



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL SUIT NO. 71 OF 2005

ALI ONAMU APIDI.....PLAINTIFF

VERSUS

ONESMUS MUTINDA.....1ST DEFENDANT

ELVIS MULUVI.....2ND DEFENDANT

JACKSON NYUMU.....3RD DEFENDANT

DOMINIC NZINE.....4TH DEFENDANT

KANG'OTI KATHUVI.....5TH DEFENDANT

STANDARD LIMITED.....6TH DEFENDANT

JUDGEMENT

1. The plaintiff brought this defamation suit against the defendants for general, exemplary, punitive and aggravated damages for defamation of character and an unconditional apology in lieu thereof, costs of the suit, and interest.

2. According to the plaint as amended on 20th April, 2006, the plaintiff's cause of action arose as follows:

On or about the 23.1.2004, the 6th Defendant printed and published an article entitled "councilors want clerk transferred" in the "Standard" of the said day in which it quoted words attributed to the 1st to the 5th Defendants to the effect inter alia that;

"...Kitui Municipal Councillors gave Local Government Minister Musikari Kombo a seven day ultimatum to transfer the town clerk, Mr Apidi Onamu or they throw him out forcibly. They also want the Ministry to send auditors to investigate the alleged abuse of council funds. The Civic leaders accused Onamu of using Local Authority Transfer Fund without consulting them. Councilors Jackson Nyumu, Mwema Nzine, Elvis Muluvi, Kangoti Kathuvi and Mutua Mutinda said Onamu was working in cahoots with the Mayor Martha Mwangangi."

3. That by a letter dated 8.11.2004 entitled **BREACH OF THE PROCUREMENT PROCEDURES AND OTHER IRREGULARITIES BY THE CLERK MR ALI ONAMU APIDI OF THE ABOVE**

COUNCIL” addressed to the Director of Kenya Anti- Corruption Commission and copied to the plaintiff, the District Commissioner Kitui, Permanent Secretaries of Ministries of Local Government and Office of the President and Minister for Local Government, the 1st to 5th defendants published statements to the effect inter alia ;

“The above clerk has breached the procurement procedures...as a result the council has not improved its services to the local citizens as it should be the case mostly with the local authorities transfer funds (LATF). As such we are requesting your office to investigate this officer with an intention of recovering the tax money so that the council can provide services to the local citizens...We feel that your office can help this council to deliver services to the locals by stopping these corrupt practices by the clerk .”

4. The plaintiff contended that the defendants in making these statements were insinuating and concluding that the plaintiff is incompetent and a corrupt officer who should not be entrusted with a public office.

5. The plaintiff further contended that the defendant’s conduct and words are evidently intended to lower the plaintiff’s reputation in the eyes of the right thinking members of the society and he had earlier filed Kisumu CMCC 70 of 2005 against the defendants which suit was struck out for lack of jurisdiction on 20.6.05.

6. In their joint defence dated 13th January, 2006 the 1st to 5th defendants denied each and every allegation. The defendants pleaded that the matters they raised were of great public interest and were not defamatory and were published as a result of great public outcry. They pleaded that the issues raised by the letter to the Kenya Anti -Corruption Authority were substantially true and were calculated to expose a scam at the Municipal Council of Kitui and the statements were a fair comment in matters of public interest and were aimed at exposing abuse of office by the plaintiff. They also emphasized that preliminary investigations revealed that the plaintiff had committed acts of impropriety and he was transferred to Isiolo to pave way for investigations and that the claims of the plaintiff are not genuine and shall be put to strict proof.

7. The 6th Defendant vide its defence dated 21st December, 2005 admitted the article under the heading “Councillors want clerk transferred” published on 23.10.2004 but denied that the same was done falsely, maliciously and that the said words consist of opinions, they were fair comment on a matter of public interest and that the plaint disclosed no cause of action and the same should be struck out.

8. The plaintiff filed a list of issues, list of witnesses, list of documents and witness statements by himself and Joseph Ochieng Oyugi. The 6th Defendant filed a list of witnesses and a statement by Paul Mutua. The 1st to 5th defendants filed an authority to plead granted to the 3rd defendant. The 1st to 5th Defendants filed a list of documents and list of witnesses and witness statements by Jackson Maithya Nyumu and Onesmus Mutinda.

9. When the matter came up for hearing, Pw1 was the plaintiff who testified that he sought to rely on his witness statement and the list of documents filed as 1 to 29. On cross-examination, he testified that the 1st to 5th defendants were councilors with the municipal council of Kitui and that the complaint was that the councilors were alleging that the plaintiff was engaging in dealings with the then mayor and a letter was written to the Anti- Corruption Commission and it described him as a corrupt town clerk which was all lies. He testified that he was transferred to Isiolo and the 5 defendants in their press statement wanted him to be transferred and that it was not true that he was demoted neither was he retired in public interest. On further cross-examination, he testified that he did not know if the standard exaggerated what the councilors had stated. He stated that the cause of action arose in Kitui and not Kisumu. On re-examination, he testified that the complaint ought to have been lodged through the exchequer act and the defendants did not follow the procedure in lodging the complaint against him. He told the court that he was not given reasons for the transfer to Isiolo and he had never been summoned in respect of the said complaints.

10. Pw2 was Joseph Ochieng who testified that he was an accountant at the time that the plaintiff was a clerk and sought to adopt his statement. On cross-examination, he testified that after seeing the newspaper article he did not want anything to do with the plaintiff and that he never received any report clearing the plaintiff. He told the court that he did not work at Kitui and was not aware of the operations there and that the plaintiff was not reporting to him. On further cross-examination, he testified that he never knew of the challenges faced in Kitui and that the publication was defamatory; it reported what the councilors uttered and it stated that the plaintiff was to be thrown out of Kitui. He testified that his relationship with the plaintiff whom he respected was down because of the publication. He added that he was not aware of any other allegations against the plaintiff. The plaintiff closed his case and the defence proceeded to give their evidence.

11. Dw1 was Jackson Maithya Nyumu who testified that he sought to rely on his statement as well as the documents filed. On cross-examination, he testified that he wanted the plaintiff out and eventually managed to remove him. He told the court that he had no malice at all because this was the last resort as the plaintiff was asked to convene a meeting to sort out the issues and he refused. He admitted that a report was made to the Anti-Corruption Commission. On further cross-examination, he testified that the report he made captured the issues raised and they were doing an oversight duty on behalf of the public. On re-examination, he testified that the words in the Standard emanated from what he forwarded to the minister.

12. Dw2 was Onesmus Mutua Mutinda who testified that he sought to rely on his evidence as filed and that he had requested the plaintiff to call a meeting over the issues but the plaintiff refused forcing them to write to the KACC and later the press was called so as to alert the public. On cross-examination, he testified that he could not tell if the plaintiff was summoned by KACC. On re-examination, he testified that the mayor did not represent his interests and that the plaintiff brought the suit in bad faith and targeted the defendants and left out the mayor. The 1st to 5th defendants closed their case and the 6th Defendant presented its evidence.

13. Dw3 was Paul Mutua who testified that the plaintiff held a high office and that the press statement by the 1st to 5th Defendants was captured by him and that he attempted to contact the plaintiff but there was no response. He testified that he was not malicious or reckless when he published the report and that it is not true that the plaintiff sought for an apology from him. On cross-examination, he testified that he was a resident of Kitui and that there was a public outcry over the conduct of the plaintiff in the performance of his public duties and the press statement implicated the then mayor who declined to give her side of the story. He told the court that had the plaintiff given his side of the story, he would have published it as well. On further cross-examination, he testified that the plaintiff held a high office and he could reach the plaintiff in his office but could not get him. It was his testimony that the councilors made the press statement at around noon and the report was made by other media houses. He told the court that the plaintiff approached the 6th Defendant for an apology but there was nothing to apologize about; that there was a public outcry about the plaintiff's performance as town clerk as evidenced by the letter of the Electrical Contractor. Further that he did not have the plaintiff's phone number but opted to follow after him. On re-examination, he testified that the issue that he published was of great public importance.

14. The 6th defendant closed its case and parties were directed to file written submissions. Learned counsel for the plaintiff framed 4 issues for determination, *to wit*; Whether the Defendants did utter the statement alleged in the plaint; whether the 6th Defendant did publish the statement in a reckless manner; whether the defendants failed to offer an apology and quantum. On the issue of publication, counsel submitted that the 6th defendant published the alleged statement and that he gave evidence that he did so without seeking the opinion of the plaintiff. On the issue of reckless publication, learned counsel submitted that the 6th Defendant printed the statement recklessly and offered no apology when asked to do so by the plaintiff; further that there is no evidence on record or an investigative report from a competent government agency supporting the allegations by the 1st to 5th Defendants. On the issue of duty of care, counsel submitted that the 1st to 5th defendants owed the plaintiff a duty of care because they should have followed the procedures provided when filing a complaint and Section 130 of the Local Governments Act Cap 265 as read with Part 2 of the 3rd Schedule to the Act provides that the town

treasurer of the Municipal Council is the only one who is statutorily responsible for matters of finance and accounts over the local authority and not the town clerk whose statutory role is provided under Section 129 of the said Act. Counsel cited the case of **Patrick Nyoike v People Limited (2013) eKLR** where the court held that the defendant breached its duty to verify the information before publication. Counsel submitted that councilors are incompetent to deal with matters pertaining to tenders for the procurement of goods and services; the same could only be reviewed by the Public Procurement Complaints committee. On the issue of quantum, counsel cited the case of **Francis Xavier Ole Kaparo v Standard Limited & 3 Others (2010) eKLR** where the court held that where a plaintiff's reputation and dignity are injured, he is entitled to general, exemplary and aggravated damages. Reliance was placed on Section 16A of the Defamation Act that obliges the court to assess an amount of damages as it may deem fit. In that regard, counsel submitted that the plaintiff was never prosecuted or investigated, was transferred on normal routine and vindicated of accusations levelled against him and no apology was offered. He relied on the case of **Francis Xavier Ole Kaparo v Standard Limited & 3 Others (2010) eKLR** where Kshs 7,000,000/- was awarded as well as the case of **Patrick Nyoike v People Limited (2013) eKLR** where Kshs 4,000,000/- was awarded as general damages and Kshs 1,000,000/- as aggravated damages.

15. Learned Counsel for the 6th Defendant submitted that there were 3 issues for determination, viz; whether the plaintiff has discharged its burden of proof; whether the publication was defamatory and whether the plaintiff is entitled to the prayers sought. On the first issue, counsel submitted that the plaintiff did not prove his case and that he ought to have proven reputational damage and as a public officer, the article did not elicit his demotion and instead he continues to serve as a public officer in senior capacity in the Nandi County Government. Counsel relied on the case of **Wycliffe Swanya v Toyota East Africa Ltd & Another (2009) eKLR** that observed that all the elements of the tort of defamation must be proved to the required standard. Counsel quoted **Gatley on Libel and Slander, 8th Edition at page 15 paragraph 31**: *“The gist of the tort of libel and slander is the publication of a matter (usually words) conveying a defamatory imputation. A defamatory imputation is one to a man's discredit, or which 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. The standard of opinion is that of right thinking people generally...”*

16. Counsel opined that the plaintiff did not discharge his burden to the required standard. On the 2nd issue, counsel submitted that in order to make a finding that the 6th Defendant's publication was false, it must satisfy itself that there was no press conference by the 1st to 5th Defendants; the 1st to 5th Defendants did not give the minister an ultimatum to transfer the plaintiff; the 1st to 5th Defendants did not threaten to forcibly remove the plaintiff; the 1st to 5th Defendants did not make allegations against the plaintiff; the 6th Defendant published that which the 1st to 5th defendants did not say. According to counsel, the statements published were true and not defamatory. Counsel relied on the case of **Joseph Njogu Kamunge v Charles Muriuki Gachari (2016) eKLR** and added that freedom of speech and of the media is of paramount importance. Counsel submitted that the plaintiff had failed to plead the claim of defamation as required by Order 2 Rule 7(1) of the Civil Procedure Rules and also has not proven reputational loss. Counsel submitted that the plaintiff is not entitled to the prayers sought and distinguished the case of **Patrick Nyoike v People Limited (2013) eKLR** where the plaintiff was a permanent secretary and the defendant did not file a defence. Further in the case of **Francis Xavier Ole Kaparo v Standard Limited & 3 Others (2010) eKLR** where the defendant admitted liability and the plaintiff was a speaker of the National Assembly. In this case the plaintiff being a clerk, damages of Kshs 500,000/- is sufficient as was found in the case of **Margaret Wambui Mwangi v Lucy Njoki Nyaga & Another (2012) eKLR**. Counsel added that the plaintiff is not entitled to aggravated damages for he has not proven the same and prayed the suit be dismissed as was the finding in **Miguna Miguna v Standard Group Limited (2016) eKLR**.

17. Learned counsel for the 1st to 5th Defendants submitted that the plaintiff did not discharge his burden of proof and in any event the issues raised in the impugned publication and letters were done in public interest. Learned counsel added that the plaintiff has not demonstrated any innuendos that are required by Order 2 Rule 7(1) of the Civil Procedure Rules and concluded that the claim for defamation fails and had

the plaintiff succeeded he would have been entitled to nominal damages of Kshs 100,000/- .

18. Some of the facts in this case are undisputed. It is undisputed that the letter dated 14.4.2004 to the Kenya Anti-Corruption Commission was written. It is also undisputed that the Article entitled “**Councilors want the Clerk transferred**” was published in the Standard Newspaper dated 23.10.2004. The contents of all these publications are also not in dispute. What is in issue after hearing the cases of both the plaintiff and the defendants is whether or not the defendants published and/ or caused these publications and if so whether they are defamatory of the plaintiff and if they are defamatory should the plaintiff be granted the remedies in the plaint?

19. Before I deal with the issues, I must state that in all civil cases the plaintiff must prove his/her case on a balance of probabilities. Therefore the burden of proof lies on the plaintiff to prove all the elements of the tort of defamation.

Issue 1: Whether the defendant published/caused the publication of defamatory statements against the plaintiff?

20. As indicated above, the publication was undisputed. Learned counsel for the 1st to 5th defendant submitted that when dealing with defamation cases what is important are the innuendos attributed to the words complained of which must be set out verbatim in the plaint as per Order 2 Rule 7(1) of the Civil Procedure Rules. Learned counsel for the 6th Defendant submitted that a claim for defamation had not been pleaded as required by Order 2 Rule 7(1) of the Civil Procedure Rules and therefore the plaintiff was not entitled to damages. I have considered the submissions of the parties. This Court holds the opinion that “*Every man or woman is entitled to have his or her reputation preserved and inviolate.*” It is trite law that only issues which have been pleaded must form issues and that a court has no power to decide issues not pleaded See **Nairobi City Council v Thabiti Enterprises Ltd [1995-98] 2 EA 23.**

21. A man’s or woman’s reputation is his or her property. Depending upon perception of that man or woman, reputation is more valuable to him or her than any other property. Reputation is the state of being held in high esteem and honor or the general estimation that the public has for a person. Reputation depends on opinion, and opinion is the main basis of communication of thoughts and information amongst humans. In simpler words, reputation is nothing but enjoyment of good opinion on the part of others. So, the right to have reputation involves right to have reputation inviolate or intact.

22. Defamation is the act of harming the reputation of another by making a statement to a third person. The tort of defamation consists in the publication of a false and defamatory statement concerning another person without lawful justification. Black's Law Dictionary 9th Ed. pages 479 and 480. Further, Black’s Law Dictionary 8th Edition at page 805 innuendo is defined to mean an oblique remark or indirect suggestion usually of derogatory nature. Simply put innuendo is one which is not directly contained in the words complained of but which would be understood by those reading it based on special knowledge.

23. For defamation, the plaintiff must prove the following elements:

a) The defendant made a statement about the plaintiff to another.

b) The statement was injurious to the plaintiff’s reputation in the eyes of the right thinking members of society.

c) The statement was false.

d) If the plaintiff is a public figure, or was involved in some newsworthy event or some other event that engaged the public interest, then the defendant must have made the false statement intentionally or with reckless disregard of the plaintiff’s rights.

e) There are no applicable privileges or defences.

See Black's Law Dictionary 8th Edition

24. In Black's Law Dictionary 8th Edition a defamatory statement means one that tends to injure the reputation of a person referred to in it. The statement is likely to lower that person in the estimation of reasonable people and in particular to cause that person to be regarded with feelings of hatred, contempt, ridicule, fear or dislike. According to **Lord Atkin in Sim v Stretch (1936) 2 All E.R 1237** “*a defamatory statement is one which injures the reputation of another by exposing him to hatred, contempt, or ridicule or which tends to lower him in the esteem of right thinking members of society.*”

25. In the case of **Adoko Nekyon v Tanganyika Standard Ltd, H.C.C.S No. 393 of 1964**, Sir Udo Udoma C.J. as he then was, held:-

“In order to determine whether the article is defamatory and is capable of bearing any of the meanings ascribed to it by the Plaintiff, it is necessary that the article be considered as a whole. It is not sufficient to pick out a phrase here and a sentence there and to conclude from such phrases and sentences that the article is defamatory.”

26. In this case, the plaintiff pleaded that the publication complained of portrayed the plaintiff as an incompetent and corrupt officer who should not be entrusted with a public office. This court is not satisfied on a balance of probabilities that the statements complained of are defamatory because the plaintiff being a clerk does not have a sensitive reputation but has a job which naturally would be harmed by any sort of allegation that he is incompetent. However the evidence on record has established that he is still a public officer. The defendants have not denied the publication and from the evidence on record, it was clear that the press interview showed the opinions that not only the defendants had but those of the general public towards the plaintiff and the plaintiff was even transferred as per the intimations of the defendants and the general public. In his evidence to this court the defendants have proved why they believed these statements to be true and in my opinion this amounts to proof of a defence on the part of the defendants. The 6th defendant published the article that the Councilors wanted the plaintiff transferred and he was indeed transferred and hence the article was correct. The plaintiff as a person is entitled to his reputation and has the right to keep the same inviolate. There is no demonstration that the defendants were reckless with their words about the plaintiff. The plaintiff has not shown to court that any right thinking member of society would lower his or her estimation of him upon hearing or reading the words of the defendants. The plaintiff's witness did not work or reside in Kitui like the plaintiff so as to show that the plaintiff's reputation took a hit over the press reports. Further none of the plaintiff's colleagues or staff or even close friends within Kitui came forward to corroborate his assertions. The plaintiff's only witness who travelled all the way from Nyanza did not impress as a truthful witness and in any case he was far away from Kitui. There was no evidence that his failure to get in touch with him affected him in any way.

27. I therefore find that though defendants made the publication of the statements complained of, these statements were not defamatory of the plaintiff. The 1st to 5th defendants were councillors representing the public and were at the time protecting the public interest. The plaintiff being a public officer was expected to develop a thick skin to withstand complaints from the public from time to time as he was a servant and accountable for decisions and actions to the public.

Issue 2: Whether the plaintiff is entitled to the reliefs sought in the plaint?

28. In the plaint the plaintiff made many prayers to this Court.

a) **General damages:** The successful party in a defamation suit is entitled to recover general damages such as will compensate him/her for the wrong he/she has suffered. In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel, and extent of publication. Damages are aimed at vindicating the plaintiff's reputation and status especially where no apology or retraction is offered. The claim is denied in light of my finding above.

b) **Punitive damages:** Since the plaintiff insisted that the defendants were malicious and reckless and false and the defendant having established that the allegations against the plaintiff to be true, I find this was not reckless and there is no reason to punish the defendants. I find the claim for punitive damages lacks basis and the same goes for exemplary, and aggravated damages.

c) **Costs of the suit:** The plaintiff's claim having failed, he is not entitled to costs of the application. The defendants shall get the taxed costs of this suit.

29. Had the plaintiff's case succeeded, I find an award of Kshs 3000,000/ as general damages would have been adequate compensation for the damaged reputation. (See the case of **Patrick Nyoike vs People Limited [2013] eKLR**).

30. The upshot is that the plaintiff has failed to prove his case on a balance of probabilities. The same is dismissed with costs to the defendants.

It is so ordered.

Dated and delivered at **Machakos** this **26th** day of **September 2019**.

D. K. Kemei

Judge