



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 24 OF 2017

ALAN HERD.....PLAINTIFF

VERSUS

1. THE STANDARD GROUP LIMITED

2. NZAU MUSAU

3. DANIEL WESANGULA.....DEFENDANTS

J U D G M E N T

Outline of pleadings

1. The suit between the parties was ignited by an article admittedly published by the defendants in the Sunday newspaper called the **Sunday Standard** and headed **DRUGS: US Targets Key Raila And Uhuru Allies.**

2. An excerpt in that article and said to concern the plaintiff read:-

“Alan Herd: “Humphrey Kariuki’s business partner. He is the de facto manager of the Kijipwa Airstrip and the Mombasa Flying Club where he manages a flight-training program. We believe that Herd allows narcotics traffickers to use the Kijipwa Airstrip to smuggle narcotics into Mombasa”.

3. To the plaintiff the words were utterly false and meant and could only mean, in their ordinary and natural context, that the plaintiff had committed a crime related to narcotics, was engaged in an illicit drug trade as a drug kingpin engaged in smuggling and importation/exportation of narcotic drugs and a fulcrum around which the entire narcotic trade in Kenya rotates.

4. The plaintiff contended that the publication was false and bereft of truth in that he has in no manner engaged in drug trade, has never been a partner of Humphrey Kariuki in any business and that Kijipwa airstrip belong to a corporate called LaFarge Group Ltd to which he had never been a de facto manager.

5. To the plaintiff the publication was driven and propelled by, malice malevolence and spite against him in that the defendants never bothered to contact him and verify the information and the sensation was calculated to drive the newspaper sales for the defendants’ own economic and financial benefits. The particulars of malice were set out as well as what was considered the natural and ordinary meaning of the words. It was then charged and asserted that the words would not have been published by any fair and honest person, however prejudiced, exaggerative, imaginative and obstinate because nobody could have genuine belief in the truth thereof.

6. The publication was thus openly, to any ordinary, good and just citizen, defamatory of the plaintiff and thus actionable for tarnishing and diminishing the plaintiffs esteem with which he is held in Kenya and in the international place and has thus occasioned to the plaintiff damage in the eyes of right thinking Kenyans and thus entitle him to damages.

7. the plaintiff pleaded that a demand was made for an apology and public retraction and a notice to sue in default given but the defendants declined to offer any such apology as would be appropriate thus necessitating the suit in which the plaintiff seeks a permanent injunction restraining the defendant from publication and circulation of words to the same effect, general as well as aggravated and exemplary damages together with costs of the suit.

8. Together with the plaint was filed a witness statement by the same plaintiff and a list of two documents being the publication complained about and the demand for apology and retraction.

8. For the defendants, a joint statement of defence was filed on the 11/4/2017 in which the fact of publication was admitted but it was denied as having been sensational or that they were falsely or maliciously printed or caused to be printed. It was then pleaded that there are no ordinary and natural meaning to the words which bear of impute any intention to injure the plaintiff's reputation. All the particulars given at paragraphs 11, 12 and 15 were all denied together with any embarrassment to the plaintiff. Even demand for apology and retraction was denied to have been made with an assertion that the plaintiff disclosed no cause of action and deserved dismissal with costs.

9. In support of the defence the 2nd and 3rd defendants filed witness statements in which the published information was asserted to have been a repetition of what was already in public domain and that the report was merely an analysis of a report headed "**Interim Report on Drug Trafficking Investigation Report**" made on 1/2/2011 and presented to the Commissioner of Police by a team of 11 officers which had been given a mandate to investigate Drug trafficking in major Kenyan town. It was then asserted that the report itself made reference on what had become to be commonly known as the "**Renneberger dossier**".

Evidence by parties

10. At trial both sides called one witness each even though the defendants had filed two witness statements and indicated at trial that they would call both.

11. The plaintiff evidence in chief was by adopting the witness statement dated 1/3/2017 wholly. He then added that he knew the a Mr Humphrey Kariuki, said in the report to be his friend, but added that he never worked with him. The witness said that after the publication, his wife who was the Chair of East African Women League wanted to leave the country because the story had affected her life and standing. He termed the allegations as false because he had never been charged in any court for any offence.

12. On cross examination, the witness referred to paragraph 8 of the plaintiff in which the accusation of him allowing the airstrip to be used to smuggle drugs into Mombasa. He however confirmed that the word Kingpin was never used in the article and that him being a fulcrum to the drug trade depended on interpretation by the reader. He further denied being possession of the knowledge of the right to reply nor that after the publication there was increased sale of the defendants' newspaper.

13. For the defendants, only the 3rd defendant gave evidence by adopting his witness statement dated 27/9/2017 and was thereafter cross examined. The gist and crux of that statement, as said before, was that the publication was nothing new to the public domain but a mere analysis of a report earlier on handed over to the Commissioner of Police.

14. When cross-examined he admitted being a co-author of the article then confirmed that he had not exhibited the report he asserted he was analyzing. He conceded having not called any of the persons named in the report before publication. The witness then contended that he was just to process the report but conceded that the portion making reference to the plaintiff does not advert to any previous reports as the source.

Submissions by the parties

15. After the respective cases were closed, the parties took time to file and exchange written submissions. The plaintiff's submissions are dated 2/7/2018 and file on 6/7/2018 while those by the defendant are dated 1/8/2018 and filed on 23/8/2018.

16. In the submissions, the plaintiff takes the view and position that the statement of defence filed does not isolate any of the statutory defenses under the Defamation Act. The decision in *Alnasir Vishram vs Standard Limited [2016] eKLR* was cited where the court quoted a phrase from **Halbury's Laws of England** for the position of the law that an invasion of the right to reputation invites general damages and the plaintiff is not required to prove his reputation provided that he proves the statement to be defamatory and not excused by a defense known to law. Emphasis was then laid on the offending words it being pointed out the words tended to paint the plaintiff as a person tainted with drug trafficking and trade. Resort was then made to the definition of defamation given by the authors of **Gatley on Libel and Slander, 10th Edition and Halsbury's Laws of England, 28th Edition, paragraph 10**, where a defamatory word is defined as that which tend to lower a person's esteem in the estimation of member of the society generally or causes him to be shunned or avoided or exposes him to hatred, contempt and ridicule or has the effect of injuring him in his office, profession, calling, trade or business. It was submitted that a reading of the offending article leaves no doubt that the same refers to the plaintiff by name and profession and thus defamatory *ipso facto*. It was pointed out that the publication in permanent form made the words complained about qualify as libelous and that the publication was very wide regard being had of the newspaper's very wide coverage including the infinite internet.

17. On the defence filed, the plaintiff submitted that the same was vague and evasive and left the plaintiff to guess what defence was being pleaded. **Daily Nation vs Mukundi [1975] E.A 311** was cited to court for the holding that when a publisher accepts an item for publication, it has the right and a duty to see whether such an item contains seditious or libelous matters and if it fails in that duty, it allows publishes at its own risk.

18. The evidence by the defendant's witness that he made no attempt to get the plaintiff comments prior to publication as a way to ensure accuracy was pointed out to invite an inference of malice the part of the defendant with the decision in *Phineas Nyaga vs Gitobu Imanyara [2013] eKLR* being cited. Reliance was then placed on the provisions Section 3(2) of the Media Council Act which sets up and impose obligations upon persons exercising their right to freedom of expression.

19. On damages, counsel submitted that the plaintiff was entitled to be awarded both general as well as aggravated/exemplary damages for the defamation. The purpose of general damage was submitted to be intended to vindicate the plaintiff to the public and the sum payable are intended to compensate for the damage to his reputation and distress, hurt and humiliation occasioned by the publication. The decisions in *John Patrick Machira vs Wangethi Mwangi & Another [2001] KL-R* and *John vs NMG [1996] 2 ALL ER 38* were cited to court to underscore the purposes to be advanced by an award of damages.

20. On factors to be considered in assessment of damages the plaintiff isolated the nature of the allegations made, the extent of publication and the reaction of the defendant whether it has accepted to retract and offer an apology. The decision in **Kipyator Nicholas Kiprono Biwott vs Clay Limited NBI HCC No. 1067 of 1999** was cited for the consideration the court takes into account in assessment of damages. Based on such consideration, counsel submitted that the circumstances of the case justified the plaintiff being awarded a sum of Kshs.25, 000/= in general damages.

21. For exemplary or aggravated damages, it was submitted that the object of such awards is to inflict a punishment upon the defendant for ignoble motives or where the defendant knew that the publication would be libelous and tortious or just being reckless and unconcerned whether the same be true or tortious. It was then submitted that the evidence here lead to the inference that malice was a propelling factor for the publication hence aggravated damages were due and awardable and a sum of Kshs.8,000,000/= was proposed.

22. The plaintiff takes the view and submits that aggravated damages are awardable over and above and separated from general and exemplary damages and that while exemplary damages looks at the conduct of the defendant while aggravated damages seek to address the exceptional damage/harm done to the plaintiff.

23. For the defendant, the submission dated 1/8/2018 and filed on 23/8/2018, takes the position that there was never discharged the burden upon the plaintiff to prove his case on a balance of probabilities and that the words complained about could not be assigned the meaning accorded to them by the plaintiff at paragraph 11. Several decisions were then cited to court on what amounts to defamation and what gradients a plaintiff has to prove and the standard of proof thereof it being stressed that the plaintiff having been the only witness in the matter the effect of the words in the estimation of members of the public had not been proved. Reliance was placed on **Gatley On Libel And Slander, 8th Edition Para 31, section 3(4), evidence Act, Daniel N Ngunia vs KGGCULimited, Nbi Hcca No. 281 of 1998, George Mukuru Muchai vs The Standard ltd, Nbi Hccc No. 2537 of 1997 and Harriso Andala Ashikube vs The Standard Ltd** for such submissions.

24. On the propriety of the pleadings, the defendant made submissions to the effect that where there be an innuendo attributed to the words complained about, other than in their ordinary meaning the particulars of such must be given and that in this matter the plaintiff wholly failed to give particulars as mandated. Such failure was submitted to be fatal and make the mention of the innuendo inconsequential. To prop up that position the decision in **Otieno Vs Nation Newspapers Ltd (2002)2KLR** was cited.

25. With particular reference to the 2nd and 3rd defendants, submissions were offered to the effect that there was no evidence to connect them with the wrong pleaded having been merely described as employees of the 1st defendant. It was thus asserted that there was no proof or averment that the two had the publishing capabilities and therefore that the ingredient of the tort had not been established. On those submissions on liability the defendant submitted that the claim against it had not been proved and prayed that the suit be dismissed on that account.

26. On damages, the defendant submitted and relied on the decision in **Gicheru Vs Morton and Another (2005)2KLR** for the enunciation that a victim of defamation does not get damages for his damaged reputation but because he was publicly defamed. On that note the defendant submitted that the proposal of Kshs 25 million was without rational guidelines but rather grounded on the now discredited decision in **Kipyator Nicholas Biwott vs.....** heavy reliance was then put in the decision of **The standard -vs- Alnashir Visram CACA No. 89 Of 2017** (Unreported) in which the award of 18 million shillings was adjudged as improper as being too high and reduced to Kenya shillings 12 million. **Kenya Tea Development Agency Limited Vs Benson Ondimu** (unreported) was then cited on factor that guide a trial court in assessment of damages to include; the objective feature of the libel, gravity, province, circulation, repetition, the subjective effect upon the plaintiff, mitigating acts and circumstances and the need to vindicate the plaintiff's reputation in the past and future.

27. Based on such principles, the defendant submitted that the matter published was of considerable public interest on which the defendant had a social duty to write and comment on. That there was no malice, ill-will, spite or improper motive established against the defendant it being stressed that the law as established in **Nation Newspapers Ltd Vs Gibendi (29002)2KLR** is that actual malice ought to be proved as much as the actual damage to reputation. Resort was then made to section 7A, Defamation Act to dictate that an aggrieved person is entitled to the right of reply by having the report corrected free of charge and that failure to exercise the right entitles the court to reduce the award found payable.

28. on prayer for permanent injunction, the defendant termed same speculative since no basis had been laid while aggravated and exemplary damages was said to be only available in exceptional circumstances including where the libel is deliberate and propelled by need for profit. The sum for damages proposed by the plaintiff was viewed as wholly baseless and the defendant proposed a sum of Kshs 200, 000 as sufficient.

Analysis and determination

29. Having perused the pleadings, the evidence and submission by the parties, this court takes the view that the following issues present themselves for determination by the court.

- Whether the published words were libelous of the plaintiff?
- Whether as consequence thereof the plaintiff has suffered damage and loss?
- What is the quantum of the damages if suffered?
- What orders should be made as to costs?

25. A publication is said to be defamatory when it tends to lower the Subject's esteem in the eyes of right-thinking or reasonable members of the society. A plaintiff thus ought ordinarily to demonstrate that as a consequence of the words complained about he has been damaged in his esteem, estimation and standing in the eyes of members of the society. However, where the libel attributes as against the plaintiff an offence punishable by imprisonment, then the tort is said to be actionable *per se* and the plaintiff is not obligated to prove any loss in the nature of lowered esteem and standing in the society. A pre-requisite of defamation is that the published words must be false.

26. Those are the principles to be applied to the facts of this case to help the court determine whether or not the publication complained about was indeed defamatory.

27. The words attributed to the defendant by the plaintiff and acknowledged by the defendant read:-

“WHY UHURU AND RAILA ALLIES ARE NOT SLEEPING EASY”

Alan Herd:

Humphrey Kariuki's Business Partner. He is the *de-facto* Manager of the Kijipe Airstrip and the Mombasa Flying Club where he manages a flight training programme. We believe that Herd allows narcotics traffickers to use the Kijipwa Airstrip to smuggle narcotics into Mombasa”.

28. The plain meaning of those words is that the plaintiff is at the least an abettor or accessory to the smuggling of narcotics into Mombasa through the Airstrip he manages. It is now well settled that under both penal code and Narcotics and Psychotropic Substances Act, it is an indictable offence to engage in what the defendant alleged to have been engaged in by the plaintiff. In such event the libel is said to be actionable *per se* and without proof of lowered or injury to reputation or actual loss or damage. A defendant can, in such events and circumstances, only escape liability if it advances a known defence in law. The author of *Halsbury's Law's of England, 4th Edition, Vol 28 paragraph 1*, captures the law in this regard when he writes:-

“Thus a plaintiff in a libel action is not required to prove his reputation, nor to prove that he has suffered any actual loss or damage. The plaintiff is not obligated to testify, although it is customary for him to do so, but having proved the statement to be defamatory of him and not excused by any available defence, he is always entitled to at least nominal damages”.

29. Here, the plaintiff's evidence denying being involved in the alleged criminal activities was never shaken in cross-examination just as no evidence in rebuttal was led. That evidence thus stands unchallenged and it thus follows that the plaintiff's assertion that the published words were false stands. Being so false and there being no evidence that the defendant made any efforts to verify the truth with the plaintiff, the defendant must be taken to have been malicious or just reckless in its publication without regard whether the publication would be injurious to the plaintiff. I do find that the words could only mean and did mean to anybody reading them that the plaintiff was a felon engaged in the organized crime of drug trafficking.

30. Accordingly, I do find that the publication was libelous and defamatory of the plaintiff for which I find the defendant wholly liable.

31. On damages, the purpose and object of awarding damages in tort is to compensate the wronged party. The approach is therefore to strive towards arriving at a figure which takes into account any aggravating factors so that instead of truncating such damages into separate and distinctive heads like general, aggravated and exemplary damages an award is made that encompasses the goals of all.

32. In the *Standard Limited vs Alnashir Visram [2018] eKLR* the Court of

Appeal did set the appropriate approach in this regard in the following words:-

“We think, in fact, that damages, being essentially compensatory in nature, the proper approach (alas rarely followed from the authorities!), is to arrive at a sum which takes into account any aggravating factors so that damages are awarded in appropriate cases, on aggravated footing” as opposed to stating a sum for general damages and then settling on additional sum as aggravated damages. Considering that compensatory damages are at large, such truncated approach is of doubtful propriety, the generality of its practice notwithstanding”

33. With such building directions in mind, and having considered the submissions offered by both sides on the sum awardable as damages and the authorities thus cited, while aware that such damages are at large, I do award to the plaintiff a global sum of Kshs.5,000,000/= being general damages for libel.

34. I also award to the plaintiff the costs of the suit together with interests of damages and such costs when taxed or agreed.

Dated and delivered at Mombasa this 20th day of September 2019.

P.J.O. OTIENO

JUDGE