



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO 305 OF 2015

HON MR. JUSTICE NICHOLAS OMBIJA.....PLAINTIFF

VERSUS

THE NAIROBI STAR PUBLISHERS LTD.....1ST DEFENDANT

ROSELINE ODEDE.....2ND DEFENDANT

JUDGMENT

INTRODUCTION

1. In his Plaint dated 1st September 2015 and filed on 2nd September 2015, the Plaintiff sought judgment against the Defendants jointly and severally for:-

1. Exemplary and Punitive Damages for Defamation.

2. A permanent injunction to restrain the Defendant whether by herself, her servants, agents and representatives from making whether by electronic or print media any defamatory libelous or scandalous statement, article or material of and concerning the Plaintiff.

3. Costs and interest of the suit.

4. Such further orders as this Honourable Court may deem just and expedient to grant.

2. The 1st Defendant entered appearance on 16th October 2015. Its Memorandum of Appearance was dated 14th October 2015 while its Statement of Defence was dated 30th October 2015 and filed on 5th November 2015.

3. The 2nd Defendant entered appearance on 21st October 2015. Her Memorandum of Appearance was of even date. Her Statement of Defence and List of Documents were both dated and filed on 3rd November, 2015.

4. The Plaintiff's Replies to the Statements of Defence for both Defendants were dated 11th November 2015 and filed on 12th November 2015. His Written Submissions were dated 7th January 2019 and filed on 14th January 2019.

5. The 1st Defendant's Written Submissions were dated 17th May 2019 and filed on 21st May 2019 while those of the 2nd Defendant were dated and filed on 7th July 2019.

6. Parties asked this court to deliver its decision based on the Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

THE PLAINTIFF'S CASE

7. The Plaintiff called Francis Eric Wasuna (PW 1) to support his case. They both adopted their Witness Statements dated 1st September 2015 and filed on 2nd September 2015 as their evidence-in-chief.

8. The Plaintiff's case was that the 1st Defendant published false & defamatory words that had been spoken about him by the 2nd Defendant. He pointed out that at the time of the publication, he was a Judge of the High Court having successfully challenged the decision of the Judges and Magistrates Vetting Board (hereinafter referred to as "The Board") in which the 2nd Defendant was at the material time, its Vice Chair.
9. He averred that as a result of the publication of the false and defamatory words, he suffered damage to his reputation and character.
10. He therefore urged this court to grant him the prayers he had sought in his Pleint.

THE 1ST DEFENDANT'S CASE

11. Samson Kiplagat (hereinafter referred to as "DW 1") adduced the evidence on behalf of the 1st Defendant herein. He adopted his Witness Statement dated 30th October 2015 and filed on 5th November 2018 as his evidence-in-chief.
12. The 1st Defendant's case was that the publication was true in substance, fact and form.
13. It urged this court to dismiss the Plaintiff's case with costs to it.

THE 2ND DEFENDANT'S CASE

14. The 2nd Defendant adopted her Witness Statement that was filed on 3rd November, 2015.
15. She was emphatic that she did not publish or cause to be published any words relating to the Plaintiff in the 1st Defendant's newspaper or any other newspaper. She also denied that she uttered the words complained of by the Plaintiff.
16. She therefore asked this court to dismiss the Plaintiff's suit with costs to her.

LEGAL ANALYSIS

17. The Statement of Agreed issues that was duly executed by counsel for all parties was dated and filed on 18th April 2016. The issues they wanted determined by this court were as follows:-

- 1. Whether the Defendants jointly and severally caused to be published false and malicious defamatory words of and concerning the Plaintiff's suitability to hold office of the Judge of the High Court of Kenya.**
- 2. Had the Plaintiff been injured in his reputation in the estimation of reasonable members of the public as a result of the defamatory publication by the Defendants?**
- 3. Whether the defamatory words could be construed either in their natural and ordinary meaning or by way of innuendo or by any necessary implication, in the manner and form as pleaded in the Pleint.**
- 4. Were the defamatory words complained of true in substance and in fact?**
- 5. Whether the defamatory words of and concerning the Plaintiff were published on a privileged occasion as alleged by the Defendants.**
- 6. Was the publication a fair comment?**
- 7. In publishing the defamatory words of and concerning the Plaintiff, were the Defendants actuated by malice, ill will and spite?**
- 8. Had the Plaintiff suffered loss and damage as a direct result of the defamatory publication of and concerning him?**
- 9. Whether the 2nd Defendant was shielded from personal liability for acts done or allegedly done in official course of duty.**
- 10. Was the Plaintiff entitled to the relief sought?**
- 11. Who should bear the costs of the suit?**

18. It was apparent to this court that the said issues could be condensed as follows:-

- 1. Whether or not the Defendants published or caused to be published false and defamatory words of and concerning the Plaintiff in the 1st Defendant's newspaper.**
- 2. If so, who was liable?**

3. Whether or not the Plaintiff was entitled to any quantum and if so, what was the quantum?

19. In his evidence, the Plaintiff stated that following his appointment as a Judge of the High Court of Kenya, he had worked in several stations in Kenya and had thus built a solid reputation.
20. His further testimony was that after the promulgation of the Constitution of Kenya 2010, together with other Judges and Magistrates, he appeared before the Board for vetting. In a determination pronounced by the Board on 21st December 2012, a majority of four (4) members to two (2) members concluded that he was unsuitable to continue serving as a Judge.
21. He stated that Mrs Mueledi Iseme, a member of the Board rendered a dissenting opinion concluding that he was fit to continue serving as a Judge of the High Court. Following this dissenting opinion, he filed an application for review and a Supplementary Review application on 9th January 2013 and 28th January 2013 respectively.
22. The Board considered the applications and in an unanimous decision rendered on 20th March 2013 held that the determination that was made on 20th December 2012 was a nullity and was thus set aside. It was concluded that a new panel vet him.
23. That exoneration led him to believe that he would continue serving as a Judge of the High Court with his reputation, standing and character intact having practically not have been vetted. It was his contention that as the time he filed suit, he had never been vetted afresh.
24. He told this court that on 6th September 2014, PW 2 called him and alerted him of an article in the Nairobi Star which read as follows:-

“OMBIJA DISMISSAL BASED ON PUBLIC INTEREST-BOARD

The vetting Board’s Vice chair Roseline Odede said the decision to bar Ombija from membership in the Judicial Service Commission was purely based on his action as a public officer. The JMVB found the Judge unfit to continue serving in the judiciary and we have sufficient reason for that,’ she said.”

25. It was his contention that the said words were intended to injure his character, to disparage his suitability to hold the office of a Judge of the High Court and to lower his reputation in the eyes of right thinking members of the society.
26. He was emphatic that the said words were untrue, malicious and defamatory. He itemised the particulars of malice on the part of both Defendants. He faulted the 1st Defendant for not having sought his comments before it published the said words.
27. He was apprehensive that the Defendants could continue publishing the defamatory words unless restrained by the court.
28. On being cross-examined by the 1st Defendant, he was emphatic that he was never dismissed. He admitted that he was not present at the workshop where the words were uttered. He averred that he opted not to be vetted afresh because the Board and the 2nd Defendant were going to be biased against him and that the publication was made long after the decision of the Supreme Court that he should be re-vetted.
29. When he was cross-examined by the 2nd Defendant, he stated that he was never furnished with a transcript by the 1st Defendant to show what was actually said at the workshop. He further admitted that the proceedings of the Board were public documents.
30. On being re-examined, he stated that in his Witness Statement, DW 1 had stated that the publication was a verbatim report by the 2nd Defendant.
31. In his evidence-in-chief, PW 2 told this court that on reading the newspaper article, the impression that one got was that the Plaintiff was applying to be a member of Judicial Service Commission (JSC) or that he was being removed from JSC due to his actions.
32. On being cross-examined, he stated that he was aware that the Board made a determination on merit that the Plaintiff was unfit to hold the office of a Judge of the High Court of Kenya.
33. His testimony was that despite having been the Plaintiff’s lawyer, he had reservations about his integrity which he attributed to the newspaper article. In his re-examination, he was emphatic that the person who was said to have uttered the words was the 2nd Defendant.
34. DW 1 pointed out that the Plaintiff had been found unfit to act as a Judge and that the 2nd Defendant uttered the words complained of during a workshop at Nakuru on 4th September 2014. He said that he was not aware of when the decision of the Board was made but that if he had known of the same, he would have put a rider that a decision had been made for the Plaintiff to be re-vetted.
35. It was his testimony that he never sought the Plaintiff’s and the 2nd Defendant’s comments and that although he was not present at the workshop, he believed that their Reporter captured what the 2nd Defendant said.

36. The 2nd Defendant’s evidence was that she recused herself from all the proceedings in which the Plaintiff herein was being vetted. She said that she could not remember in which decision he was found unfit to hold office. She could also not recall whether any member dissented from the decision of the Board. What she could remember was that there was a decision that was delivered by the Board in which it was held that the Plaintiff should be re-vetted.

37. She was emphatic that she never uttered the words complained of and that the 1st Defendant did not give her an apology or furnish her with a transcription of what she was alleged to have stated. She denied that the 1st Defendant had discharged the burden of proof and had instead transferred the same to her. In a nutshell, she denied ever uttering the words.

38. There was no dispute that the 1st Defendant published the following words:-

“Ombija dismissal based on public interest – Board.

The Judges and Magistrates Vetting Board found the Judge unfit to continue serving in the Judiciary and we have sufficient reason for that.”

39. These words were attributed to 2nd Defendant who denied having uttered the same. The contents of the said Article were not correct as will be seen hereinbelow raising doubt in the mind of this court as to whether the 1st Defendant’s reporter captured exactly what the 2nd Defendant said during the workshop, which workshop, she did not deny having attended.

40. The Plaintiff also admitted that he was not at the said workshop and never heard the 2nd Defendant utter the words. He merely relied on the article that was authored by the 1st Defendant’s report. It was heresay evidence as he was not present at the time. The burden of proof then shifted to the 1st Defendant to provide evidence that the 2nd Defendant uttered those words.

41. Notably, the Reporter who was said to have reported the same was not called as a witness in this case. His evidence was critical because it would have shed more light on what transpired during the workshop the 2nd Defendant was said to have attended and uttered the words.

42. It is important to note that Section 107 of the Evidence Act Cap 80 (Laws of Kenya) states that:-

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

43. Section 108 of the Evidence Act stipulates that:-

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

44. Section 109 of the Evidence Act states thus:-

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

45. It was therefore clear to this court that neither the Plaintiff nor the 1st Defendant proved that the 2nd Defendant uttered the words, which it is not disputed, that they were published in the 1st Defendant’s newspaper.

46. Having found that the 1st Defendant published the words, the next issue the court was to consider was whether the words were false and defamatory.

47. The 2nd Defendant admitted in her evidence that the decision in which the Plaintiff was found to have been unfit to act as a Judge was set aside and it was directed that he would be re-vetted. Although the 2nd Defendant had contended that she could not recall in which decision he was found unfit to hold the office of a Judge, he told this court that this was delivered on 21st December 2012. It was set aside on 20th March 2013 on the ground that it was a nullity. He was emphatic that he was never vetted afresh and consequently, the words that he was unfit to hold the office of a Judge were false.

48. This court agreed with him that as at 6th September 2014, he could not be said to have been unfit to act as a Judge as he had not been vetted. The Statement was false and defamatory of him.

49. Whereas DW 1 stated that he was not aware of the decision of 20th March 2013, the onus was on the 1st Defendant to have sought his comments or verify the veracity of the statement before publishing the story so that he could respond before the said publication. Expecting the 1st Defendant to have verified if he was to be re-vetted would have been onerous on it as the Plaintiff did not tell this court that the decision of 20th March 2013 was circulated in public.

50. Having said so, it was also important to establish whether or not the words complained of were uttered with malice. Indeed, for the tort of defamation by libel to succeed, the following elements must be proved by the claimant:-

a. The libel must be published by the Defendant.

- b. The words must refer to the claimant i.e. identify him.
- c. The statement must be false and defamatory of the Plaintiff.
- d. It must be published i.e. communicated to at least one person other than the claimant.
- e. That the publication was malicious.

51. The same principles were re-stated in the case of Wyclife A swanya vs Toyota East Africa Ltd & Another [2009] eKLR that was relied upon by the 2nd Defendant, where the Court of Appeal observed that:-

“(1)That the matter which the Plaintiff complains of is defamatory in nature.

(2)That the defamatory statement or utterance was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.

(3) That it was published maliciously.

52. The Plaintiff placed reliance on the case of J.P. Machira vs Wangethi Mwangi & Another Civil Appeal No 179 of 1997 where the import was that an injurious falsehood may not necessarily be an attack on the Plaintiff’s reputation but that the words must be maliciously published and malice can be inferred from a deliberate or reckless or negligent ignorance of facts.

53. The aspect of malice is one that the 1st and 2nd Defendant agreed with. The 1st Defendant relied on the case of Nation Newspapers Ltd vs Gilbert Gibendi [2002] eKLR where Hatari Waweru J held that:-

“... Actual or express malice is ill will or spite or any indirect or improper motive in the mind of the defendant at the time of the publication ...”

54. On his part, the Plaintiff submitted that the 1st Defendant’s use of the words **“Ombija dismissal based on public interest”** made a sensational charge against him and members of the public at large were misinformed by the said words.

55. He also relied on the case of Alnasir Vishran vs The Standard Ltd HCCC No 52 of 2012 where it was held that failure to accord the plaintiff an opportunity to give his side of story was a manifestation of recklessness and spite and therefore malice. Odunga J also made similar observations in the case of Phineas Nyagah vs Gitobu Imanyara [2013] eKLR.

56. He also referred this court to the passage from Halsbury’s Laws of England 4th Edition Volume 28 paragraph 1 in which it was held that:-

“In English Law, speaking generally, every person is entitled to his good name and to the esteem in which he is held by others and has a right to claim that his reputation shall not be disparaged by defamatory statements made about him to a third person or persons without lawful justification or excuse. If a defamatory statement is made in writing or printing or in some other permanent form, the tort of libel is committed and law presumes damage.”

57. As has been stated herein, the 1st Defendant was liable for the words published as it did not call the reporter who authored the same. A careful perusal of the Article did not make reference or allude to the fact that the Plaintiff was dismissed on public interest. Those appear to have been the author’s own words which this court determined to have been intended to be sensational.

58. The words attributed to the 2nd Defendant, which she denied she uttered were reported as follows:-

“The Vetting board’s Vice chair Roseline Odede said that decision to bar Ombija from the membership of the Judicial Service Commission (JSC) was purely based on his actions as a public officer. The Judges and Magistrates’ Vetting Board found the Judge unfit to continue serving in the Judiciary and we have sufficient reason for that.”

59. The said Article not only contained incorrect facts such as the assertion that the decision had barred the Plaintiff from membership for JSC but it did not state that the Plaintiff was dismissed on public interest. It appeared to have been spiteful.

60. The innuendo that could be discerned from the said publication was that the Plaintiff had failed the integrity test as a public officer. This statement must have injured his reputation by lowering him in the estimation of the right thinking members of the society.

61. Having considered the evidence that was adduced by the Plaintiff and PW 2, it was evident to this court that the Plaintiff had proved on a balance of probability that he had been defamed by the 1st Defendant which failed to call the author of the article to shed light on the source of his information as presented in by the 1st Defendant which was to a great extent not factual. To the contrary, it was by all means, to a great extent, replete with incorrect information.

62. The 1st Defendant was thus not able to rely on the defence of qualified privilege as stipulated in Section 7(1) of the Defamation Act

Cap 36 (Laws of Kenya) that states as follows:-

(1) Subject to the provisions of this section, the publication in a newspaper of any such report or other matter as is mentioned in the Schedule to this Act shall be privileged unless such publication is proved to be made with malice.”

63. The Article did not contain fair and accurate facts of and concerning the Plaintiff and could not be said to have been made under Article 33(1)(a) of the Constitution of Kenya 2010 that stipulates that:-

Every person has the right to freedom of expression, which includes—

(1)

(a) freedom to seek, receive or impart information or ideas.

64. The case of Adam vs Ward [1917] A.C. 309 at page 19, Micah Cheserem vs Immediate Media Services & 4 Others [2001] eKLR and Thuo Muchina vs Wainaina Kiganya & 2 Others [2012] eKLR that it relied upon and in which the common thread was that where there is qualified privilege, what is published must be fair and accurate and must be made on a matter of public interest could not come to its assistance.

65. While it is true that vetting of Judges was a matter of public interest, only a fair and accurate had to be made. As can be seen hereinabove, the Article was not accurate and was not fair. It smacked of malice. The title of the Article was a complete departure from the contents therein. It appeared to this court that the title was intended to draw the attention of the readers of the newspaper to the article only for them to find that what was stated therein was different.

66. Having found that the words complained of by the Plaintiff fitted what constitutes the tort of defamation, he must by all means be compensated. This court had due regard to the case of John vs MG Ltd [1966] I All ER 35 and Nation Media Ltd & 2 Others vs John Joseph Kamotho & 3 Others Civil Appeal No 284 of 2005 where the holdings were that a plaintiff who had been successful in a defamation case was entitled to damages.

67. He urged this court to award him general damages in the sum of Ksh 20,000,000/=. To support his submission, he relied on the case of Alnashir Vishram vs The Standard Ltd (Supra) where an award of Kshs 18,000,000/= was made therein.

68. He also asked this court to grant him aggravated damages in the sum of Kshs 10,000,000/= . Similar damages were awarded in the case of John vs MG Ltd (Supra) where the Court of Appeal stated that:-

“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 of failure to apologise.”

69. On its part, the 1st Defendant stated that the sums demanded by the Plaintiff were excessive. It placed reliance on Gatley on Libel & Slander 12th Edition by Joint Editors in which it was stated that:-

“The purpose of general damages is to compensate the claimant for the effects of the defamatory statement... General damages serve three functions, albeit that the emphasis placed on each will vary from case to case: to act as a consolation to the claimant for the distress he suffers from the publication of the statement; to repair the harm to this reputation (including, where relevant, his business reputation); and vindication of his reputation.”

70. Notably, the 1st Defendant did not propose any sums to be awarded to the Plaintiff in the event this court were to have it liable. It only stated that he failed to prove a case of defamation against it and termed his claim as not only having been vexatious and frivolous but also as an abuse of the court process.

71. The 2nd Defendant also submitted that the Plaintiff had not suffered any loss or damage and that he had failed to prove that she uttered the alleged defamatory words and/or published the same.

72. In his own admission, the Plaintiff stated that he did not submit himself for re-vetting as was decided by the Board. It was a choice he made voluntarily. It was not certain what the decision of the re-vetting could have been. The decision could either have been that he was fit to act as a Judge or that he was not fit to act as a Judge. It was against this background, this court determined that he would not be entitled to aggravated damages.

73. It was, however, the view of this court that as his status of being a Judge had not been fully ascertained because as at the time of the publication the decision that he had been found to have been unfit to act as a Judge had been set aside, general damages in the sum of Kshs 1,000,000/= were in the mind of this court, adequate in the circumstances of the case herein. Indeed, damages are not intended to punish a defendant. They must be sustainable in an economy and only offer consolation for wrong doing.

74. In arriving at this figure, this court had due regard to the case of Phineas Nyagah vs Gitobu Imanyara [2013] eKLR where Odunga J held that he would have awarded the plaintiff therein Kshs 3,000,000/- general damages had he succeeded.

75. The court also had due regard to the case of Ahmednasir Maalim Abdullahi vs The Star [2019] eKLR wherein it awarded the plaintiff therein general damages in the sum of Kshs 3,500,000/= for defamation.

76. It also considered the case of **James Ogundo vs Standard Group Ltd [2019] eKLR** where it also awarded the plaintiff therein general damages in the sum of Ksh 3,000,000/= for defamation.

DISPOSITION

77. For the foregoing reasons, the upshot of this court's decision was that the Plaintiff's claim against the 1st Defendant was merited. It is hereby directed that judgment be and is hereby entered in favour of the Plaintiff against the 1st Defendant for Kshs 1,000,000/= general damages plus interest thereon at court rates from the date of judgment until payment in full and costs of the suit. However, the Plaintiff's suit against the 2nd Defendant is hereby dismissed. The Plaintiff will bear the 2nd Defendant's costs of this suit.

78. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **31st** day of **October** 2019

J. KAMAU

JUDGE