



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 425 OF 2015

PATRICK MUYAH.....PLAINTIFF

VERSUS

REGINALD OKUMU.....DEFENDANT

JUDGMENT

1. Through the plaint dated 8th December, 2015 the Plaintiff sued the Defendant for damages for libel. The Plaintiff's contention is that the Defendant wrote an email dated 14th August 2015 addressed to one Ben Ekumbo and also wrote an email on 19th August 2015 to swimming coaches and parents with the following defamatory words:

- “a. a group of unapologetic imposters looking for relevance.**
- b. are now masquerading as KSF Nairobi branch**
- c. Failed to account for NASA funds**
- d. their lack of integrity, arrogance and unbecoming conduct**
- e. Blame their career stagnation and personal failures on external factors**
- f. Are responsible for running down and or stagnating once vibrant and performing schools, clubs and swimmers**
- g. Have long history of mistreating swimmers, coaches and parents just like they are doing now**
- h. were responsible for killing swimming in Rift Valley**
- i. greedy, selfish and ungrateful**
- j. impersonating and obtaining money by false pretense”**

2. It was pleaded that the aforesaid words were understood to mean that:

- “ a. The Plaintiff is unprincipled**
- b. The Plaintiff is unprofessional**
- c. The Plaintiff is corrupt**
- d. The Plaintiff is responsible for the collapse of various institutions and or facilities such as schools, clubs and swimmers**
- e. The Plaintiff is morally bankrupt**

f. The Plaintiff is an extrovert”

3. The Plaintiff averred that the said publications were false, reckless and disparaged his good name before the right thinking members of the society and thereby caused him distress, embarrassment and pecuniary loss.
4. The claim was denied vide the statement of defence dated 8th February, 2016. It is denied that the words or statements either in their ordinary meaning or by innuendo bore the meaning attributed to them by the Plaintiff and did not occasion any loss to the Plaintiff and were made as a matter of public duty and in public interest.
5. The Plaintiff testified herein (PW1) and also adopted his witness statement as his evidence. The Plaintiff described himself as a swimming coaches trainer and at the material time the Vice Chairman of Kenya Swimming Federation (KSF) and also the Chairman of the said Federation’s Nairobi Branch. He described the Defendant as the then Chairman of the Nairobi Swimming Association (NASA). The Plaintiff gave the historical background leading to the formation of the KSF Nairobi which in essence meant that together with NASA, there were now two swimming branches in Nairobi both which fell under the National umbrella body, KSF.
6. The Plaintiff’s further evidence is that the Defendant defamed him in an email dated 14th August, 2015 written by the Defendant as the Chairman, NASA, addressed to the Chairman, KSF and copied to others with the subject being **“illegal group calling itself KSF Nairobi branch”**. The Plaintiff produced a copy of the said email as an exhibit and testified that the said email referred to him by name as one of the leaders of the illegal group. The Plaintiff pointed out parts of the email that referred to the group members as having lost the NASA elections, writing threatening letters, calling them a terror group and a gang of outlaws who needed something useful to do. That the letter also called them masqueraders who were interested in power and money thereby alluding to lack of integrity.
7. The Plaintiff referred the court to another email dated 19th August, 2015 written by the Defendant to the Chairman NASA Executive Committee and addressed coaches and parents and copied to the Chairman, KFS. The Plaintiff stated that the said emails in paragraph No. 2 of page 1 refer to him by name. He further stated that on page 3 paragraph 2 of the said email, the Defendant refers to KSF Nairobi branch as a group of unapologetic impersonators looking for relevance who failed to account for NASA funds and turned NASA and KSF into pariahs, lacked integrity, were arrogant and people of unbecoming conduct who blamed their career stagnation and personal failures on external factors and have also created divisions within the swimming fraternity which has been run down and stagnated, lacking in performance, sabotaging the Defendant, being backstabbers and waging proxy wars and extortion schemes .
8. The Plaintiff referred to the last page of the said email and complained of the group being referred to as abusive and engaging in money making schemes, impersonation and obtaining money by false pretenses.
9. The Plaintiff further testified that none of the words complained of were true and that the said words painted him as a dishonest person. That as a result, his swimming consultations reduced and his income reduced. That he became socially ostracized which has had detrimental effects on his aspirations to ascend to higher leadership positions in KSF and beyond. He prayed for general damages, punitive and aggravated or exemplary damages plus costs.
10. The Defendant in his evidence stated that he is the chairman of NASA and also a registered and practicing Valuer and Estate Agent and Chairman of Superior Homes Kenya, a real Estate Development Company. The Defendant adopted his witness statement as his evidence and produced his bundle of the documents filed herein as his exhibits. The Defendant testified that following concerns raised by members, he wrote the letter by way of email dated 14th August, 2015 to seek clarification from the Chairman, KSF in regard to the running of the swimming activities in Nairobi.
11. That he mentioned the Plaintiff’s name because he Plaintiff had been mentioned as one of the people claiming to run swimming activities in Nairobi. He further stated that the Plaintiff was mentioned in a historical background and to bring out the relationship between KSF and NASA.
12. The Defendant further testified that the utterances complained of referred to a group, not to the Plaintiff. He stated that the Plaintiff and one Isaac Musembi who is also mentioned in the emails were not NASA 2015 election losers and therefore cannot be said to have been referred to in that respect in the emails. The Defendant described his relationship with the Plaintiff as cordial and stated that he worked well with the Plaintiff in the training workshops and in different committees of KSF.
13. At the close of the case, the parties opted to file written submissions. I have considered the evidence on record and the submissions filed. The parties also filed a statement of agreed issues which I have considered.
14. Defamation is defined in **Winfield in J.A. Jolowicz and T. Ellis Lewis – Winfield on Tort 8th Edition**, thus:

“Defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of the society generally, or which tends to make them shun or avoid that person.”

A defamatory statement, according to Gately on Libel and Slander 8th Edition by Phillips Lewis paragraph 4 page 5 discredits a man or 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.”
15. The Court of Appeal in the case of **Wycliffe A Swanya v Toyota East Africa Limited & another Nairobi CA No. 70 of 2008** set out the elements of defamation thus:

“It is common ground that in a suit founded on defamation the plaintiff must prove:-

(i) That the matter of which the plaintiff complains is defamatory in character.

(ii) 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.

(iii) That it was published maliciously.

(iv) In slander subject to certain exceptions that the plaintiff has suffered special damages.”

16. It is not in dispute that the words complained of were published by the Defendant. The issue is therefore whether the said words referred to the Plaintiff and were defamatory and capable of bearing the meaning attributed to the same by the Plaintiff.

17. I have carefully considered both the Plaintiff's and the Defendant's evidence and read the emails complained of. The subject of the email dated 14th August, 2015 is an illegal group calling itself KSF Nairobi Branch. Patrick Muyah the Plaintiff is named in the said email as one of the group's officials. The email then proceeds to make all the publications complained of herein by the Plaintiff. The email then points out in paragraph 3 of page 1 **“these two plus their gang of outlaws....”** and suggests that the two, Patrick and Isaac be given some work to keep them busy. The letter severally identifies **“these two”** (Patrick and Isaac) and there is no doubt that anybody reading the email was able to identify the Plaintiff.

18. In the email of 19th August, 2015, KSF Nairobi branch is referred to as made of people who are referred to as masqueraders, lacked integrity, backstabbers, extortionists, etc. Any of the coaches and parents in the swimming fraternity who knew the officials referred to in the email as the new swimming association in Nairobi would be able to identify the Plaintiff as one of the officials of the association maligned therein.

19. On page 2 paragraph 3 of the email dated 19th August, 2015, the Plaintiff is identified by name as one of the Executive Committee members sitting in both NASA and KSF as Vice Chairman in both organizations. The relationship between NASA and KSF is described as strange with the executives opposing in NASA the decisions made at KSF. Clearly the Plaintiff is identifiable herein as being a member of both outfits.

20. Having evaluated both the Plaintiff's and the Defendant's evidence and the words complained of, I am satisfied that the publications were made by the Defendant and referred to the Plaintiff. Malice can be inferred from the disproportionate language used. I find that the publications complained of were libelous. That is the way a reasonable man to whom the publication was made would understand the same. (See **Miguna Miguna v The Standard Group Ltd & 4 others [2017] eKLR**).

21. A Plaintiff is entitled to general damages to compensate him for the harm caused to his reputation and the distress and humiliation caused by the defamatory publication (See for example **Ken Odondi & 2 others v James Okoth Omburah T/a Omburah & Co. advocates [2013] eKLR; Standard Ltd v G. N. Kagia T/a Kagia & Co. Advocates [2010] eKLR**).

22. On aggravated damages, the Court of Appeal in the **Miguna Miguna (Supra)** expressed itself as follows while referring to the case of **John v MG Limited [1997] QB 586**

“The 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.”

23. Exemplary damages go beyond compensation. They are meant to punish the wrongdoer and act as a deterrent from similar conduct in future (See for example **Ken Odondi (supra)** and **Standard Ltd (Supra)**).

24. The Plaintiff's submitted for an award of Ksh.3,000,000/= compensatory damages and Ksh.3,500,000/= as exemplary or aggravated damages. On the other hand the Defendant submitted for a minimal award of damages without any award of aggravated or punitive damages. No figures were proposed.

25. I have also considered comparable awards in the following authorities:

a) Benedict Ombiro v Board of Governors Kenya Utalii College & another [2018] eKLR where an award of Ksh.200,000/= was made where publication was limited to a few persons.

b) Anna Wairimu Njogu v Radio Africa Ltd [2017] eKLR where Ksh.2,000,000/= general damages were assessed for a publication in a newspaper

(See also **Johnson Gicheru v Andrew Morton [2005] eKLR** and **Jones v Pollard 1997 EMLR 233-243**).

26. The Plaintiff is entitled to aggravated and exemplary damages. The Defendant did not retract the defamatory emails nor tendered any apology. The Defendant repeated the publication and continued to deny the Plaintiff's claim up to the end.

27. This court's view is that an award of general damages of Ksh.1,000,000/= is reasonable in the circumstances of this case. I award

Ksh.200,000/= as exemplary and aggravated damages. Consequently, judgment is hereby entered for the Plaintiff against the Defendant for a total sum of Ksh.1,200,000/= plus costs.

Date, signed and delivered at Nairobi this 24th day of Oct., 2019

B. THURANIRA JADEN

JUDGE