



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NO. 47 OF 2007

FIDELIS WAMBUA MUSEMBI.....PLAINTIFF

VERSUS

ROYAL MEDIA SERVICES LTD..... DEFENDANT

JUDGMENT

THE PLAINTIFF'S CASE

1. The plaintiff herein instituted a Plaint dated the 28th February, 2007 December, 2015 against the defendant for defamatory words broadcast in the defendants Radio Citizen programme **“Wembe wa Citizen”**; he sought General Damages for libel as well as aggravated/exemplary/punitive damages together with costs of the suit and interest.

2. The testimony of the plaintiff and his two witnesses detailed his case as follows; that he was a successful advocate of the High Court of Kenya carrying on business within Nakuru County under the name and style of Wambua Musembi & Company Advocates; that on the 26th September, 2006, 29th September, 2006 and the 3rd October, 2006 the defendant caused to be broadcast by radio an item concerning the plaintiff and used the words complained of by the plaintiff;

3. Part of the offending radio broadcast was the usage of the words;

“Wambua MusembiAdvocate.....unamkumbuka huyu Mama Ruth Gathoni Kinyua? Si umlipe pesa zake.....shame on you!.....”

4. Translated into English this would mean;

“Wambua MusembiAdvocate.....do you remember this woman Ruth Gathoni Kinyua?.....why don't you pay her money.....shame on you!.....”

5. He told the court and his witnesses corroborated this fact that it was clear from the description as set out in the broadcast that the defendant was directly referring to him; that the impugned broadcast was published and heard by many people who knew him in Nakuru County where his business was situate; that the offending broadcast had seriously injured and damaged his reputation, character and good standing in the society; and that it had also affected him negatively as he had not been able to conduct his business in Nakuru Town.

6. His evidence was that the ordinary meaning of the words in the impugned article in the eyes of right-thinking members of the public was that the plaintiff refused to remit the money to the claimant without any probable cause or justification; that these allegations that he wilfully withheld the decretal sum from the claimant were completely untrue and without foundation;

7. That other than the statement being completely untrue, the innuendo created was that he was a dishonest person who was not transparent and could misappropriate and retain his client's money/funds;

8. The plaintiff stated that he issued a demand notice in writing and posted it to the defendant demanding for amends by way of an apology, but the defendant ignored, refused and neglected to do so.

9. That the defendant's actions of printing, publishing and distribution of the words in the broadcast were defamatory and had caused him damage and prayed for General Damages, aggravated and exemplary damages in the total sum of Kshs.25,000,000/-; an amount in lieu of apology; together with costs of the suit and interest.

10. Cases referred to by the plaintiff were numerous and voluminous but the pertinent ones were; **Samuel Ndungu Mukunya vs Nation**

THE DEFENDANTS RESPONSE

11. In response the defendant called one witness a legal officer who confirmed that the program used to be aired but denied that the defendant made the alleged defamatory broadcast as claimed by the plaintiff; that there was no record of the alleged broadcast and he challenged the plaintiff to produce it to prove that it was ever made; that the burden to produce only shifts to the defendant once it was proved that it authored the libelous publication which has not been done;

12. All the allegations in the plaint were denied and the defendant was categorical that the plaintiff had not proved defamation; nor was there any proof of service of the demand letter; nor was there evidence tendered of lost business; and therefore the defendant could not be called upon to prove its defence when in the first place the plaintiff had not proved defamation;

13. Case law referred to; **Clement Muturi Kigano vs Hon. Joseph Nyagah Nbi HCCC No.509 of 2007; Phinehas Nyagah vs Gitobu Imanyara Nbi HCCC No. 697 of 2009; William Oduol vs IEBC & 2 Others [2013] eKLR.**

ISSUES FOR DETERMINATION

14. After hearing the evidence adduced and upon hearing and reading the rival oral and written submissions presented and filed herein these are the issues that this court has framed for determination;

- i. Whether the defendant made the impugned broadcast;
- ii. Whether the broadcast amounted to slander or libel;
- iii. Whether the broadcast referred to the plaintiff; whether the words were false and malicious
- iv. The suitable damages that should be awarded.

ANALYSIS

Whether the defendant made the impugned broadcast:

15. To prove his case the plaintiff in addition to his testimony called two witnesses **PW2** and **PW3** who purportedly heard the broadcast of the defendant; they testified that on 26/09/2006 they separately heard the defendant's presenters say the words complained of; their testimony on this regard remained consistent during their respective cross-examination.

16. The defendant argued that these testimonies were insufficient and it was necessary for the plaintiff to produce the radio clip of the broadcast to prove his case; it argued that this omission was fatal for two reasons; that the broadcast was not proved and that the necessary ingredient of the tort of libel in that the publication must be permanent in form was not satisfied.

17. Section 62 of the Evidence Act provides that all facts, except documents may be proved by oral evidence; the only caveat placed by section 63(i) is that such evidence must be direct which is defined at sub-section (i)(b) with reference to a fact which could be heard as is the case herein the evidence is of witnesses who say they heard it;

18. In the absence of an express provision in the Defamation Act or other relevant law requiring that in order to prove the fact of broadcast the radio clip must be produced as evidence, the above provisions of the Evidence Act stand. The testimony of the two witnesses is found to be satisfactory by this court and suffices.

19. The defendant's legal officer's testimony on the other-hand was not sufficient to displace their evidence because he stated that he was not working with the defendant at the time of the broadcast and could therefore not testify as to whether the same was made or not. In addition, his assertion that the defendant did not have in its custody the alleged broadcast was not enough to infer that the same was not made.

20. In the circumstances of this case it is proper to infer that if the same existed, and was incriminating, the defendant was not ready to produce it in court.

21. Therefore, this court is satisfied that the plaintiff discharged his burden by proving on a balance of probability that the defendant published the words complained of as the defendant's evidence did not successfully displace the plaintiff's case.

Whether the broadcast amounted to slander or libel:

22. The second assertion by the defendant also flowing from the failure of the plaintiff to produce the radio clips of the said broadcast was that the critical ingredient of the tort of libel, under which this case falls, was not satisfied because it was not established that the words were conveyed in a permanent form.

23. The tort of defamation is in two forms, slander and libel. The distinction between the two forms is in the manner in which the

information is conveyed. In libel, the publication must be made in a permanent form, whereas in slander it is in a non-permanent form. Halsbury's Laws of England, 4th edition Vol28 on libel and slander, as cited in **Clement Muturi Kigano (supra)** defines the two in the following terms:

“ If a defamatory statement is made in writing, or printing or some other permanent form, the tort of libel is committed and the law presumes damages. If the defamation is oral, or in some other transient form, it constitutes the tort of slander which his not actionable at common law without proof of actual damage, except where the statement is one of a particular character.

24. A slander for which an action will lie is a defamatory statement if made or conveyed by spoken words, sounds, looks, gestures, or some other non-permanent form, published of or concerning the plaintiff to a person other than the plaintiff, by which the plaintiff has suffered actual damage, often referred to as special damage, which he must allege and prove.

25. The Defamation Act, Cap 36 Laws of Kenya however classifies wireless broadcasting which it defines to mean;

“publication for general reception by means of radio communication within the meaning of the Kenya Posts and Telecommunications Corporation Act,” as libel and slander, the publication of words by wireless broadcasting shall be treated as publication in a permanent form”

26. It follows that the classification of a claim for defamation arising from a broadcast by radio as libel is not as a result of the nature of the publication but by virtue of the above provision. Therefore the claimant is not required to prove that the defamatory statement was made in a permanent form in order to succeed in a claim for libel.

27. The defendant referred this court to two cases in which in its opinion, the courts refused to allow the claim for libel because of lack of evidence of the broadcast. In **Phineas Nyaga v Gitobu Imanyara (supra)** the defendant made defamatory statements at a press conference which were subsequently reproduced in the Star Newspaper. The Plaintiff in that case did not hear the press conference and did not call any person who heard it or the editor from the newspaper to confirm that the defendant was the author of the words.

28. Consequently the court found that the case had not been proved. The court's decision was not informed by the failure of the plaintiff to produce the clip of the broadcast but by the fact that the plaintiff had not submitted any evidence that other persons heard the press conference or that the defendant in that case had authored the defamatory statement. The newspaper extracts were not sufficient to infer that the words therein had emanated from the defendant. In this instant case however, the plaintiff called two witnesses who heard the broadcast.

29. In **Clement Muturi Kigano v Joseph Nyaga (supra)** the defendant who had been sued for libel made a press conference whose contents were also reproduced in various newspapers. In that case the plaintiff called witnesses who heard the press conference to give evidence on its contents. The court in adopting the common law definitions of libel and slander, found that the claim for libel had not been proved because the plaintiff did not produce the clips of the broadcast or newspaper extracts containing the utterances of the defendant. Notwithstanding the fact that the court believed the testimony of the plaintiff and his witnesses, it refused to allow the claim because the tort of libel had not been proved as it relied on the common law definition of libel and slander finding.

30. However, as stated above Section 8 (1) of the Defamation Act removes the distinction between libel and slander in relation to claims emanating from broadcasts. The plaintiff only needs to prove that the words were broadcast, and need not prove that the same were disseminated in a permanent form. This court is guided by the Court of Appeal's decision in **Nation Media Group Ltd & 2 Others [2010] eKLR**;

“Traditionally, in common law, the fundamental distinction was between written including printed words which were libel and spoken words which were slander. Nowadays, the general view is that the test of libel is whether the publication is in a “permanent form”, other cases being slander. See Lipumba v Mzee (2000) 1 EA LR 105 (CAT). However, many countries, Kenya being one of them, have made statutory provisions whereby broadcasting, both radio, television, and theatrical performances are libel”.

31. In that case the court held that libel had been proved on account of an admission by the defendant that it had broadcasted the words although the clips of the broadcast had not been produced as evidence. Similarly in **Livingstone Maina Ombete T/A L. M. Ombete & Company Advocates V Royal Media Services Ltd T/A Radio Citizen (2010) eKLR** the court, held that once the words were published by radio, then the publication was in permanent form and therefore actionable *per se* as libel.

32. This court is satisfied that the words broadcast by the defendant was permanent in form and are therefore found to be libelous.

Whether the broadcast referred to the plaintiff; whether the words were false and malicious;

33. The ingredients of the tort of libel are that the defendant published words that refer to the plaintiff; that the statements are published to at least one other person other than the plaintiff; that the words published are false and defamatory; and that the publication is malicious. Refer to the cases of **Samuel Ndung'u Mukunya v Nation Media Group Limited & Another (2015) eKLR**, **Daniel Musinga t/a Musinga & Co Advocates v Nation Newspaper Ltd (2005) eKLR**; **Nation Media Group td & 2 Others [2010]eKLR**.

34. On the first ingredient this court has already made a finding that the words broadcast were permanent in form and actionable '*per se*' as libel;

35. On the second and third ingredient is whether the words refer to the plaintiff and that the statements are published to at least one other person other than the plaintiff; the testimony of **PW2** and **PW3** was that on 26/09/2006 the defendant's presenters broadcast in the defendant's radio station the words complained of by the plaintiff. The defendant used the name "**Wambua Musembi....Advocate...**" in the broadcast and to both witnesses who heard it there was no other advocate by that name except the plaintiff specifically mentioned therein; and the publication was made to other persons other than the plaintiff.

36. On the fourth ingredient; the ordinary meaning of the words broadcast was that the plaintiff an advocate of the High Court had acted for Ruth Gathoni Kinyua in a running down matter; that she was awarded damages; and the plaintiff having received the money was holding on to it without justification . The phrase '**why don't you pay.....shame on you**' implies that the plaintiff refused to release the money to the claimant without any probable cause;

37. The plaintiff testified that he did act for Ruth Gathoni Kinyua in the running down matter where judgment was entered in her favour in the sum of Kshs 180,000/=; However the motor vehicle which caused the accident had been insured by Lakestar Insurance Company Limited which was wound up and therefore unable to settle the decree. Accordingly the implication that the plaintiff had willfully withheld the decretal sum from the complainant was untrue.

38. The words published were intended to, and did in fact, portray the plaintiff in the eyes of a right thinking member of society as a dishonest person who received and retained his client's money without justification. The words published are therefore defamatory statements as per Odunga, J. in **Dorcas Florence Kombo v Royal Media Services Limited (2014) eKLR** defines a defamatory statement as;

"One which has the tendency to injure the reputation of the person to whom it refers by lowering his/her in the estimation of the right thinking members of society generally and in particular to cause him/her to be regarded with feelings of contempt, ridicule, fear, dislike and disesteem and typical examples are an attack upon the moral character of the plaintiff attributing him/her any form of disgraceful conduct such as crime, dishonesty, cruelty and so on."

39. As a result the plaintiff's reputation, character and standing as a person and a professional were gravely injured and put to ridicule in the eyes of his clients, colleagues, family, friends and the general public.

40. Malice in libel can be inferred from the language used in the publication or from the failure of the defendant to inquire into the truthfulness of the information. Reference is made to the case of **Daniel Musinga (supra)** the defendant in this instant case did not contact the plaintiff to verify the information before publishing that he had committed professional misconduct. The statements were untrue in the light of the evidence of the plaintiff that he could not remit the money as the same was never paid to him.

41. From the above this court is satisfied that the words were libelous; that the words broadcast by the defendant referred to the plaintiff; and that the words were false and were published maliciously with reckless disregard of the truth.

The suitable damages that should be awarded.

42. The plaintiff pleaded for an award of Kshs.25,000,000/- as damages computed as follows;

(a) General damagesKshs 10,000,000/-

(b) Exemplary damages..... Kshs 10,000,000/-

(c) Aggravated damages.....Kshs 5,000,000/-

43. On the part of the defendant, it was pleaded that should the plaintiff's claim be allowed, then he is entitled to an all-inclusive sum of Kshs.1,000,000/-;

44. The purpose of general damages in a claim for libel is to compensate the plaintiff for the damage to his reputation; in the case of **CAM vs Royal Media Services Limited (supra)** the court held that the court has a wide discretion when assessing damages taking into account the peculiar circumstances of the case.; it relied on the guidelines set out in **Jones v Pollard (1997) EMLR 233-234**, where the court held.

"In relation to a claim for libel the court should take into account the objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published and any repetition, subjective effect on the plaintiff's feelings not only from the ; prominence itself but from the defendant's conduct thereafter both up to and including the trial itself, Matters tending to mitigate damages for examples publication of an apology, matters tending to reduce damages, vindication of the plaintiff's reputation past and future. In situations where the author or publisher of a libel could have with due diligence verified the libelous story or in other words, where the author or publisher was reckless or negligent, these factors should be taken into account in assessing the level of damages."

45. And also in the case of **John v MGM LTD (1997) QB 586**

"In assessing damages for injury to reputation, the most important factor is the gravity of the libel, the more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of personality the more serious it is likely to be. The extent of publication is also very relevant: a libel published to millions has greater potential than a libel published to a handful of people."

46. Taking into account that the publication had been made through a medium with wide circulation and touched on the personal integrity and professional reputation of the plaintiff, the court awarded Kshs.3,000,000/- as damages to compensate the plaintiff for damage to his reputation and status.

47. The court further held that exemplary damages are intended to be punitive and deterrent in nature. The court took into account that the defendant did not attempt to justify the publication before publishing the statements whose truthfulness it did not try to ascertain. In awarding aggravated damages the court considered that the defendant did not apologise for the publication or retract it. It awarded a sum of Kshs.1,500,000/- for under each head. It upheld the High Court's award of general damages of Kshs.3,000,000/-;

46. The fact of failure to apologise and retract the defamatory statements was also considered by the court in **Nation Media Group Ltd and 2 Others v John Joseph Kamotho and 3 others [2010] eKLR** – the court held that the sums awarded should be fairly compensatory in light of the nature of the injury to reputation; and that a restrained hand in the award of damages is desirable since the court must maintain a stable mien. It upheld the High Court's award of Kshs.3,000,000/- for general, exemplary and aggravated damages and its finding that the court had applied proper principles including the number of people to whom the communication was made and the failure of the defendant to apologise or retract the statement.

47. In **Ken Odondi & 2 Others v James Okoth Omburah t/a Okoth Omburah and Company Advocates (2013) eKLR** the plaintiff was awarded Kshs.4,000,000/- for general damages and Kshs.500,000/- for exemplary damages. The court took into account the fact that following the publication of the defamatory statement, the plaintiff had lost a client and also an intended partnership failed to materialize.

48. In **Julius Njire Wachira and another t/a Muraya Wachira and Company Advocates vs Royal Media Services (2008) eKLR** the plaintiff was awarded Kshs.4,000,000/- as compensation for injury to his reputation and Kshs.1,000,000/- for aggravated damages.

49. Guided by the above authorities this court notes that the defendant in this case repeatedly broadcast the offending words which were not only injurious to the personal integrity of the plaintiff but also touched on his professional reputation; the words inferred that he is an advocate who refuses to pay clients their monies after representing them. He testified that he was greatly affected by the implication and received phone calls from his colleagues in regard to the same. His volume of work subsequently declined.

50. The broadcast was repeated on 29/09/2006 and 3/10/2006 and this court has taken into account that the broadcast was heard as far as Nakuru and Machakos and must have reached a wide audience as the defendant has a wide coverage. Therefore a sum of Kshs.3,000,000/- is found to be sufficient compensation for the injury to his reputation;

51. On the claims for aggravated and exemplary damages, the defendant in this case did not call the plaintiff to verify the information that was given to it by the claimant before publishing the same. The malice of the defendant is evident from this fact and also from the words that were used in the broadcast.

52. Even though the plaintiff did not have evidence that the letter he wrote the defendant (**PExh.1**) demanding an apology and retraction of the statements was received; he nevertheless followed it up with a phone call to the defendant's offices and spoke to a Mr. Mburu who declined to assist him in the matter; the defendant also failed to offer any justification in this case for its actions; accordingly an award to the plaintiff of Kshs.1,000,000/= for aggravated damages and exemplary damages should suffice.

FINDINGS

53. Therefore, from the foregoing this court makes the following findings;

- i. That on the 26/09/2006 the defendant's presenters broadcast in the defendant's radio station the words complained of by the plaintiff;
- ii. The words broadcast by the defendant referred to the plaintiff;
- iii. The broadcast/publication was libelous, false and was published maliciously with reckless disregard to the truth.
- iv. The suitable amount for general damages for injury to his reputation is the sum of Kshs.3,000,000/-;
- v. An award to the plaintiff of Kshs.1,000,000/= for aggravated damages and exemplary damages should suffice.

DETERMINATION

54. Judgment is entered in favour of the plaintiff against the defendant in the total sum of Kshs.4,000,000/- together with costs and interest at court rates.

Orders Accordingly.

Dated, Signed and Delivered at Nyeri this 22nd day of February, 2018

HON.A.MSHILA

JUDGE