



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 303 OF 2009

DANIEL ONCHIEKU..... PLAINTIFF

VERSUS

THE STANDARD LIMITED1ST DEFENDANT

JUMA KWAYERA2ND DEFENDANT

JUDGMENT

1. Vide a plaint dated 29th May, 2009 the Plaintiff instituted the suit herein claiming damages for defamation against the Defendants. It is alleged that the Defendants published in **The Standard** newspaper of 15th March, 2009 on page 10 a libellous and defamatory publication under the heading “**Now Police dragged into cash scandal at NSSF**”. It was averred that the said newspaper has a wide circulation and that the publication caused distress to the Plaintiff and lowered his reputation before the right thinking members of the society.

2. The Defendants filed a statement of defence and denied the claim. It was denied that the publication was libellous and defamatory. In the alternative the Defendants pleaded that the publication was true and therefore fair comment in a matter of public interest.

3. During the hearing of the case the Plaintiff testified (PW1). He also adopted his witness statement as his evidence. The Plaintiff stated that he works at the National Social Security Fund (hereinafter NSSF) as a records clerk. That a colleague brought to his attention an article published in **The Standard** of Sunday the 14th March, 2009. He proceeded to purchase the said newspaper in which he found the article in question to be malicious and defamatory. That he then approached his seniors to obtain approval to make a response to the article. That the approval was not given and since he was dissatisfied he consulted his advocates in order to seek redress. That he suffered agony as the attitude of the public and workmates towards him became negative.

4. The Defendants closed their case without calling any witnesses. The parties then filed written submissions which I have considered.

5. 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 Gatley 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.”

6. The elements of defamation were outlined by the Court of Appeal in case of **Wycliffe A Swanya v Toyota East Africa Limited & another Nbi CA No. 70 of 2008** as follows:

“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.”

7. Turning back to the case at hand, it is pleaded in the plaint in paragraph No. 5 that the Defendants published a libellous and defamatory article concerning the Plaintiff headed **“Now Police dragged into cash Scandal at NSSF”**. No contents of the said article were set out in the plaint. The actual defamatory words must be set out as clearly as possible in the plaint. A case is anchored in the pleadings and throughout the case the court looks at the pleadings to decide the issues. It is necessary for the Defendants to know with certainty the case against them. Failure to set out the words complained of is fatal. This is not just a question of a technicality curable under Section 1A & 1B of the Civil Procedure Act or Article 159 of the Constitution as the plaint fails to disclose any cause of action. (See for example **Veronica Wambui v Michael Wanjohi Mathenge [2015] eKLR, Mary Njiru Mboru & another v Chelestino Ireri Murekie [2011]**)

8. During the hearing of the case the Plaintiff did not specifically point out which parts of the article in question were injurious to his character. The article which was produced as evidence consists of a full page which also includes the photograph of the then Minister for Labour and the NSSF’s head office. The article goes on to give the narrative of another suspect alleged to have stolen more than Ksh.10,000,000/= from NSSF and is said to have colluded with anti- fraud officers to escape from custody. The article then proceeds to talk of other officials implicated in the fraud and interdicted and that is where the Plaintiff is named. It seems the Plaintiff just placed the article before the court and left it to the court to discern what was offensive to him.

9. The Plaintiff was the only witness who testified herein. Bearing in mind that defamation is an injury to ones reputation, that it is about what other people think of the person who alleges to have been defamed, evidence must be adduced to show what other people, other than the Plaintiff think. There is no evidence in the case at hand to show that the Plaintiff’s reputation was disparaged in the eyes of the right thinking members of the society. The Plaintiff’s case therefore failed to prove all the ingredients of defamation.

10. The Defendant did not call witnesses. However the Defendant had no obligation to adduce any evidence. The burden of proof fell squarely on the Plaintiff. He who alleges must prove. The Evidence Act Cap 80 Laws of Kenya stipulates as follows:

Section 109 “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.”

11. With the foregoing, this court's conclusion is that the Plaintiff failed to disclose any cause of action. Secondly the failure to call any witness is also fatal to the Plaintiff's case. If the Plaintiff's case had succeeded, I would have considered the content of the publication that concerns him. That the article refers to the Plaintiff by name i.e Daniel Onchieku as one of the officers implicated in fraud following an audit carried out at NSSF. That the article further names the Plaintiff as one of the officers interdicted after being implicated in the fraud. That the article further proceeds to state that the named officers who include the Plaintiff diverted money from NSSF's bank account, impersonating bank staff, forgery and pilfering of the workers pension.

12. The Plaintiff's evidence was that he is a records clerk. Although the Plaintiff stated that he was demoted, his evidence reflects that he still held the same substantive post of a clerk. In addition, I would have also considered the wide circulation of the newspaper and the fact that such sensational stories increase readership and therefore increases profits. There was also no evidence of any apology despite a formal demand.

13. In addition to cases cited herein I have considered the following authorities:

(a) **C A M v Royal Media Services Limited [2013] eKLR** where a cabinet Minister was awarded Ksh.500,000/= as exemplary damage

(b) **Mwangi Kiunjuri v Wangethi Mwangi & 2 others [2016] eKLR** where a politician was awarded the sum of Ksh.1,000,000/= as exemplary damages.

(c) **Hon. AMB Chirau Ali Makwere (supra)** where the Plaintiff who was a former ambassador and a politician was awarded Ksh.3,000,000/= as general, exemplary and aggravated damages.

(d) **Andrew Mukite Musangi v Standard Group Limited, Nakuru HCCC No. 331 of 2009** where an advocate was awarded general damages of Ksh.3,000,000/= and Ksh.500,000/= for exemplary damages.

14. I would have awarded the Plaintiff herein a composite figure of Ksh.2,000,000/= if his case had succeeded.

15. Having arrived at the conclusion that the Plaintiff failed to prove his case on a balance of probabilities, I dismiss the Plaintiff's case. Taking into account the circumstances of this case, each party to bear own costs.

Date, signed and delivered at Nairobi this 29th day of June, 2018

B. THURANIRA JADEN

JUDGE