



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 518 OF 2010

BRIGADIER KENNETH OKOKI DINDI.....PLAINTIFF

VERSUS

THE STANDARD GROUP LIMITED.....DEFENDANT

JUDGMENT

The parties herein had agreed that this be a test case on the issue of liability on the understanding that judgment delivered herein would apply in all other cases filed against the defendant by the respective plaintiffs. Those other cases are HCCC Nos. 511, 512,513, 514, 516,517,519 and 527 of 2010.

Aburili J. then heard the case and determined the subject of liability by finding the defendant liable but went ahead and addressed the subject of damages payable to the plaintiff herein contrary to the approach agreed upon by the parties. An application for review was then filed and on 6th March, 2017 the judgment was reviewed by setting aside the award of damages awarded to the plaintiff. This matter was then placed before the court to address the issue of damages payable. Only the plaintiff gave evidence in addition to adopting his witness statement in the assessment of damages.

On the other hand, the defence did not call any witnesses. Upon the close of the case, both parties have filed submissions and cited several authorities. The only duty remaining on my part is to assess damages payable to the plaintiff following the libel complained of by the plaintiff against the defendant.

As I have already observed, the defendant has been found liable and there is no evidence that that finding has been appealed. In the proceedings leading to this judgment, the plaintiff established by production of evidence that the defendant continues to publish the offending articles or words concerning the plaintiff on its web site up to the date of the trial.

The plaintiff is a military officer holding the title of Brigadier and Director of Military Prosecutions. In his submission filed on his behalf by his advocate his responsibilities and position have been compared to Director of Public Prosecutions in civilian courts.

There is no dispute that his duties cut across the entire Kenya Defence Forces these being the Army, the Navy and the Air force. The offending publication appeared in the defendants Newspaper for two consecutive days. A clarification was made by the Permanent Secretary for Defence in the defendant's own paper by way of advertisement denying any malpractice attributed to the plaintiff. The defendant did nothing in the face of that clarification and one would have expected some evidence to justify that publication yet no evidence was called at the close of the plaintiff's case.

The issues to deal with the military are sensitive and any mention in the print or electronic media attract immediate attention and curiosity. I have no doubt that in the circumstances of this case, I have no doubt that the plaintiff's peers and the public at large must have consumed that report with surprise.

There is also no doubt that the defendant's Newspaper enjoys a wide circulation locally and internationally especially so, when it has an electronic website. There is no evidence whatsoever that the defendant offered any apology or acted in any way in mitigation of damages.

In the judgment of Aburili J which was reviewed the learned Judge observed as follows,

“In their ordinary meaning, the words as used in the articles connote that the plaintiff and his negotiating committee members committed a culpable criminal offence whether under the Public Procurement and Disposals Act, that of flouting the Public Procurement Laws and procedures by single sourcing the South African firm for the supply of military equipment without following the laid down procedures or under any other written law including the public officers Ethics Act or even

the Penal Code. Breaching of the public procurement law and procedures is in itself a crime as it can lead to loss of huge public funds and or resources.”

In considering damages payable to an offended party, the court has a duty to strike a balance between public policy, comparable awards for comparable cases and also consider the station of life and position of the aggrieved party. Possible consequences of the statement should also be considered. The libellous statement made by the defendant has a criminal implication. Indeed if it were to be established that the plaintiff took part in the alleged mal practice he should be subjected the court martial. The gravity of the publication can therefore not be under estimated. There is no evidence pleaded or advanced that the defendant undertook the publication in public interest.

Decided cases would point to the direction that an award of damages operates as a vindication of the plaintiff to those who may have come across the publication and also as a consolation for the wrong done. – see **Civil Appeal No. 284 of 2005 Nation Media Group Limited & Others vs. John Joseph Kamotho & Others.** Cases referred to include **Martha Karua vs. Moses Kuria (2017) e KLR** where an award of Kshs 5 Million was made in terms of general damages and **Chirau Ali Makwere vs. Nation Media Group Limited & Another (2009) e KLR** where the plaintiff was awarded Kshs. 8 Million.

It has been submitted that as a Director of Military Prosecutions the plaintiff has never been a member of parliament or a cabinet secretary or a Minister in the republic of Kenya and that both Hon Martha Karua and Chirau Alai Makwere were well known public figures in the country and outside the country and therefore the plaintiff’s reputation cannot be the same as those two listed individuals.

The court considers this a skewed reasoning. If anything, a Director of Military Prosecutions is placed in a position that should be the envy of any individual in the forces and outside. The court takes judicial notice of the current prosecutions driven by the Director of Public Prosecution in this country and the implication across the body politic and public at large.

I have considered the gravity of the publication, the lack of concern by the defendant, and all facts placed together and make an award of Kshs. 10 Million in terms of general damages for libel. The plaintiff’s counsel submitted in praying for amendment of the plaint to read, “aggravated and or exemplary damages.” This has been opposed by the defendant but in my view nothing turns on that sought amendment. I say so because, this court is inclined to award aggravated damages based on the fact that the defendant continues to publish the offending report and no apology has been offered even at the time of the hearing. In that regard I make a further award of Kshs. 2 Million aggravated damages.

In the end there shall be judgment for the plaintiff against the defendant as follows, general damages Ksh. 10 Million, aggravated damages Kshs. 2 Million and an order that the defendant shall bring down the offending publication from its website within 30 days from the date of this judgment. The plaintiff shall also have the costs of the suit and interest at court rates.

Dated, signed and delivered at Nairobi this 28th Day of June, 2018.

A. MBOGHOLI MSAGHA

JUDGE