



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO 20 OF 2017

FORMELY COMM 296 OF 2016

SAMWEL KIJOGI MAKUNYI.....PLAINTIFF

VERSUS

JOHN LAWRENCE ODHIAMBO.....1ST DEFENDANT

STANDARD MEDIA LIMITED.....2ND DEFENDANT

JUDGMENT

INTRODUCTION

1. In his Complaint dated 8th July 2016 and filed on 25th July 2016, the Plaintiff sought judgment against the Defendant for:-

- a) **A permanent injunction restraining the Defendant, his agents and/or servants from writing publishing any article and/or any document, physical or online/digital/electronic, malicious, libelous, scandalous and/or defaming the Plaintiff.**
- b) **General damages.**
- c) **Exemplary /aggravated damages.**
- d) **Damages in lieu of an apology.**
- e) **Costs of this suit.**
- f) **Interest on (b) (c) (d) and (e) above at courts rate from the date of judgment till payment in full.**
- g) **Any other or further relief that the Honourable court may deem just and fit to grant.**

2. The Defendants' Statement of Defence was dated 29th August 2016 and filed on 30th August 2016. They also filed a Notice of Preliminary Objection dated and filed on 15th August 2016. The Plaintiff's Reply to the Defendant's Statement of Defence was dated 6th September 2018 and filed on 8th September 2016. Their agreed Issues dated 19th September 2016 and filed on 26th September 2016.

3. The Plaintiff's Written Submissions were dated and filed on 18th June 2018. While the Defendants' Written Submissions and List of Authorities were dated 11th June 2018 and filed on 12th June 2018. The Plaintiff's Bundle of Documents dated 8th July 2016 and filed on 25th July 2018 was marked as the Plaintiff's Exhibit "1"

4. When the matter came before the court on 31st July 2018, both parties requested the court to deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

THE PLAINTIFF'S CASE

5. The Plaintiff's adopted his Witness Statement dated 8th July 2016 and filed on 25th July 2016 as his evidence-in-chief.

6. He stated that he was the Revenue Officer at Kenya Revenue Authority (KRA). He stated that between 10th June 2016 and 16th June 2016, the 1st Defendant caused to be published in the 2nd Defendant's newspaper, the Nairobiian, an article headed "**Did KRA Officers tax athletes duvet at JKIA**". He said that above the said caption, was his coloured photo image.

7. He added that the 1st Defendant also caused his coloured photo image to be placed above wordings in the said 2nd Defendant's newspaper wherein it was stated that he had opened the luggage of a passenger without his consent and in his absence where the passenger's luggage was interfered with by customs officers.

8. He further contended that the 1st Defendant published the said words and photo following an altercation they had at Jomo Kenyatta International Airport (JKIA) while he was in the course of his professional duties.

9. It was his averment that the said words, coloured image and publication were malicious, scathing and defamatory and were intended to portray him as savage, uncouth, uncivilised, unethical, unprofessional, unpatriotic, disrespectful, corrupt, lacking in integrity and unfit to hold a public office.

10. His assertion was that since his reputation, character and good image had been tainted and damaged in the eyes of right thinking members of the society, he was entitled to the reliefs he had sought against the Defendants herein.

11. He therefore urged this court to allow his suit as prayed.

THE DEFENDANTS' CASE

12. The Defendants did not call any witnesses in support of their case. They had in fact not filed any list of witnesses or witness statement(s).

13. Their Preliminary Objection was that this court lacked jurisdiction to hear the suit and could not grant the Plaintiff general damages, damages in lieu of an apology or any other relief that this court would deem just and fit to grant as he had sought in his suit on the ground that the Plaintiff did not institute proceedings as provided in the Constitution of Kenya, 2010.

14. They therefore asked this court to dismiss the Plaintiff's case.

LEGAL ANALYSIS

15. The Agreed Statement of Issues that had been duly executed by counsel for both parties listed the following issues for determination:-

- 1. Whether the Honourable court had jurisdiction to hear defamation matters;**
- 2. Whether the words, coloured image and the publication thereof were scathing, malicious and defamatory;**
- 3. Whether the words published have the meaning set out in Paragraph 8 of the Plaint to wit that the Plaintiff was savage, uncouth, uncivilized, unethical, unprofessional, unpatriotic, disrespectful, corrupt, lacks integrity and unfit to hold a public office;**
- 4. Whether the words were true in substance and therefore justifiable; and**
- 5. Whether the Plaintiff is entitled to the reliefs sought in the Plaint.**

16. The court therefore found it prudent to deal with the same under the separate issues.

I. JURISDICTION

17. This court deemed it fit to determine the issue relating to its jurisdiction right at the outset because if it found that it had no jurisdiction to hear this case, it would have to down its tools as was held in the case of **Lillian "S" vs Caltex Oil Kenya Ltd [1989] KLR** and save precious judicial time in not addressing the remaining issues as they would have by such a finding, been rendered moot.

18. The Defendants submitted that the Plaintiff's suit had been instituted under the provisions of Civil Procedure Acts and Civil Procedure Rules, 2010 instead of being instituted under the provisions of Article 22(3) of the Constitution of Kenya and as a result, the Plaintiff could not be granted the reliefs that he had sought.

19. They placed reliance on the case of **Standard Ltd & 2 Others vs Christopher Ndarathi Murungaru [2016] eKLR** where the Court of Appeal held as follows:-

"The High Court has jurisdiction by virtue of article 22, 23 and 165 (3) (b) to enforce rights and fundamental freedoms and that article 34 (5) does not constrain, limit or affect the jurisdiction of the High Court".

20. They further submitted that Rule 4 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 Part II lays out the mode of invoking the court's jurisdiction and Rule 10 provides for the form in which the court will

be approached.

21. On his part, the Plaintiff submitted that the Defendants' Preliminary Objection in respect of the High Court's jurisdiction in the case of **Standard Limited & 2 Others vs Christopher Ndarathi Murungaru** (Supra) was dismissed by the Court of Appeal. He averred that the effect of the said decision was that the High Court had jurisdiction to entertain defamation matters.

22. This court perused the decision of the Court of Appeal and noted the clarity of that court's decision when it stated that the Defendants' assertions that Article 34 of the Constitution of Kenya had ousted or limited the jurisdiction of the High Court under Article 165 of the Constitution of Kenya had absolutely no substance but in essence, Article 165 (3) (b) of the Constitution of Kenya conferred special jurisdiction on the High Court to enforce rights and fundamental freedoms.

23. Indeed, the Court of Appeal expressly stated as follows:-

“In our view, such express jurisdiction cannot be ousted or limited by implication, as the appellants assume. In our reading of Article 34 (5) of the Constitution, which provides for the establishment of a media regulatory body, there's absolutely nothing that constraints, limits or otherwise affects the jurisdiction conferred on High Court by Articles 22, 23 and 165 (3) (b) to enforce rights and fundamental freedoms” (emphasis court).

24. In addition, this court noted the Plaintiff had sued the Defendants for defamation. This was not a constitutional issue. Rather, it was a tort, which the High Court has jurisdiction to determine. A claim for tort can only be instituted by way of a Plaintiff.

25. This court did not therefore find any merit in the Defendant's assertion that this court had no jurisdiction to hear and determine this matter or that the Plaintiff had used the wrong procedure or mode to approach the court.

26. Indeed, it was the Defendants that ought to have filed their Petition in the Constitutional Court were they to feel that their constitutional rights and freedoms had been infringed upon. Their Preliminary Objection dated and filed on 15th August 2016 had no legal basis.

II. PROOF OF THE PLAINTIFF'S CASE

27. Having found that this court had jurisdiction to determine this matter, this court turned to the issue as to whether the Plaintiff proved his case on a balance of probabilities.

28. The Plaintiff stated that the Defendants did not adduce any evidence pointing to him having been caught on video as had been contended by the 1st Defendant and published by the 2nd Defendant. He was emphatic that there was no probable explanation why the 1st Defendant picked on him and that the use of his coloured photo image only pointed to the 1st Defendant's malice.

29. He further argued that the altercation between him and the 1st Defendant related to a drone he had seized from him in accordance with the law and that was what led him (the 1st Defendant) publishing the malicious article about him.

30. He was emphatic that the words were completely false and untrue and because the Defendants did not provide any video footage as the 1st Defendant had been contended in the said publication, the Defendants had not been able to establish the defence of justification.

31. He relied on the cases of **Gideon Mose Onchwati vs Kenya Oil Co Ltd & Nation Media Group Ltd [2015] eKLR** to buttress his argument.

32. On their part, the Defendants argued that the Plaintiff did not call any other witness to testify that he or she understood the article to have referred to him.

33. He referred this court to the case of **Daniel N Ngunia vs KGGCU Ltd [2000] eKLR** where the Court of Appeal held as follows:-

“Leaving aside any questions of privilege upon which the learned judge dismissed that aspect of the appellant's claim, we note from the record that the appellant was the only person who testified in support of his claim. In those circumstances, we cannot see how a claim based on defamation could have possibly succeeded even in the absence of the defence of qualified privilege”.

34. It was their contention that the Plaintiff had testified that he was still in KRA's employ and consequently his assertion that his reputation in the eyes of the public had been tarnished and that his relationship with his employer had been antagonised had not been proven.

35. They were emphatic that the burden of proof lay with the Plaintiff to prove his assertions in line with Section 107 of the Evidence Act Cap 80 (Laws of Kenya) and that he had not discharged his burden of proof because he did not adduce evidence that the words complained of were published to a third party who believed that the same referred to and deferred the Plaintiff.

36. This court perused the Article that was published on page 4 June 10th -16th, 2016 in the Nairobiian. It was headed **“Did KRA officers tax athletes duvet at JKIA”**. It had a sub-title headed **“Rogue officers target innocent Kenyans returning from abroad”**. There was a photo the Plaintiff identified as his in which it was written about him, **“A KRA Official who, without consent, allegedly opened a package belonging to a passenger at the airport, the passenger was also not present when his luggage was interfered with”**.

37. The Article also stated in part:-

“The video, recorded by a Kenyan flying from Europe and who was the victim- shows just how low the Customs and Excise Department officials at the airport have stooped.

In the video, one of the KRA officials is seen disappearing into a room with one of the passenger’s imported items. The official empties the luggage without courtesy of informing the owner, or at least doing so in his presence. The traveler is then led to a customs office and fined Kshs 10,000/= for bringing a duvet into the country”.

38. Reading the two (2) paragraphs aforesaid and looking at the photo image of the KRA official, who the Plaintiff said it was him, a fact that was not controverted by the Defendants, it was evident that the said words and photo image referred to the Plaintiff herein.

39. The Defendants did not adduce in evidence the video footage or a witness to corroborate the Defendants case. As they rightly submitted, anyone who asserts a fact must prove. Indeed, Section 107 of the Evidence Act stipulates as follows:-

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.

40. By failing to adduce the said evidence, the Defendants did not demonstrate their defence of justification. They did not also adduce any evidence to show that the Plaintiff was dismissed from KRA’s employ due to the unethical and unprofessional practices that he had engaged himself. In fact, at the time he testified, the Plaintiff stated that he was still employed at KRA.

41. It appeared to this court that the investigations KRA carried out after a complaint by the 1st Defendant carried in a communication dated 8th June 2016 which the Defendants had listed as part of their evidence in their List of Documents dated 12th July 2017 and filed on 13th July 2017 did not lead to the Plaintiff’s dismissal from KRA.

42. His explanation of what transpired on the material date of 25th May 2016 was contained in an email dated 30th May 2016 to his supervisor Jacob Onchiri. He stated that on 25th May 2016, he asked the 1st Defendant to surrender a drone into the customs warehouse as that was a requirement by the Department of Defence and the Kenya Civil Aviation Authority. The 1st Defendant reluctantly paid the taxes due after an altercation between them. In the absence of any evidence to the contrary, this court accepted this to have been what have transpired on the material night and concluded that the 1st Defendant abused his position as a journalist to paint the Plaintiff in a negative light to right thinking members of the society.

43. Notably, there is widespread consensus than an independent witness must testify that a Plaintiff’s reputation has been dented. This was the purport of the Defendants reliance on the case of **Daniel N Ngunia vs KGGCU Ltd** (Supra) where the Court of Appeal observed that the appellant therein had not called an independent witness.

44. The understanding of this court was that calling a witness to confirm that a person has been defamed was not mandatory if the words had been circulated and could be accessed by any third party. In the mind of this court it was sufficient that a publication had damaged a plaintiff’s reputation if there was no justification of such publication having been made.

45. In the case of **Kagwiria Mutwiri Kioga & Another vs The Standard Ltd & 3 Others [2015] eKLR**, the Court of Appeal cited with approval V.W. Rogers, the Learned author of **Winfield and Jeloewiz on Tort, of 6th Edition** 2002 at pp 404-405 where it was stated as follows:-

“12.2. Defamation is a publication of a statement which reflects on a person’s reputation and tends to lower him in the estimation of right thinking members of a society generally or tends to make them shun or avoid him. For historical reasons defamation takes the form of two separate torts, libel and slander, the former being more favourable to the claimant because it is actionable *per se* and injury to reputation will be presumed...

In contrast, in cases of libel (and in some cases of slander) the claimant can recover general damages for injury to his reputation without adducing evidence that it has in fact been harmed, for the law assumes that some damage will occur in the ordinary course of things...”

46. In the case of **Musikari Kombo vs Royal Media Services Ltd [2018] eKLR**, the Court of Appeal cited with approval the holding of Lord Atkin in **Knupffer vs London Express Newspaper Ltd [1944] 1 ALL ER 495** that”-

“The only relevant rule is that in order to be actionable the defamatory words must be understood to be published of and concerning the Plaintiff”.

47. In addition, all that a plaintiff is required to demonstrate is the existence of a defamatory statement, that the defendant has published a defamatory statement and that the publication refers to the claimant

48. It was the view of this court that it was not necessary for the Plaintiff to have called a witness to corroborate his assertion that his character was tainted. This is because the Article was published in a Newspaper with wide circulation and damage to his reputation must

have occurred as right thinking members of the society would have shunned him for being a rogue person.

49. Indeed, the circumstances of this case were distinguishable from the facts in **Daniel N Ngunia vs KGGCU Ltd** (Supra) because in that case, the communication the appellant had complained about had been written to him by the respondent and not published to a third party and hence the Court of Appeal's holding that it could not see how a claim based on defamation could succeed as the appellant therein did not call a witness to support his claim was pertinent.

50. This court took the view that the independent witness would have been necessary in cases of slander and where publication had limited circulation like in a case of letters but not publications of wide circulation.

51. This court therefore agreed with the Plaintiff that as the words that were published by the 1st Defendant in the 2nd Defendant's newspaper were not justified by the Defendants, he had proven his case on a balance of probabilities that he was indeed defamed by the Defendants herein. In any event, save for filing a Statement of Defence, the Defendants did not call any witnesses. The Plaintiff's evidence therefore remained uncontroverted and/or un rebutted.

III. QUANTUM

52. Having found that the Plaintiff had proved his case as aforesaid, the next question to be determined was that of the payable quantum.

53. The Plaintiff prayed for Kshs 6,000,000/= general damages, Kshs 60,000,000/= exemplary damages and Kshs 2,000,000/= being damages in lieu of notice.

54. While he relied on the cases of **Nicholas R.O Ombija vs Kenya Commercial Bank Ltd [2009] e KLR**, **Johnson Evan Gicheru vs Andrew Morton & Another [2005] e KLR** and **Gideon Mose Onchwati vs Kenya Oil Co Ltd & Another** (Supra) where the common thread was that in assessing the appropriate damages for injury to reputation, the extent of the libel was to be taken into consideration.

55. This court noted from the Plaintiff's evidence that he held a Bachelor of Commerce (Accounting option), a Masters Degree in Business Administration and he was a Certified Public Accountant- Kenya (CPA- K) and that the Article was contained in a publication for the week on 10th June 2016- 16th June 2016 that was circulated widely. However, it was the view of this court that the damages that had been sought by the Plaintiff were grossly exaggerated. On the other hand, it noted that the proposed damages in the sum of Kshs 200,000/= by the Defendants were inordinately low.

56. Indeed, it must be appreciated that no amount of damages can compensate a plaintiff for loss of reputation. The damages to be awarded are merely intended to assuage such a plaintiff due to the injury he has suffered to his reputation. These damages must also be in line with what other courts have awarded in similar circumstances. The damages that are awarded are not intended to enrich a plaintiff and impoverish a defendant.

57. Section 16A of the Defamation Act Cap 36 (Laws of Kenya) provides that:-

“In any action for libel, the court shall assess the amount of damages payable in such amount as it may deem just:

Provided that where the libel is in respect of an offence punishable by death the amount assessed shall not be less than one million shillings, and where the libel is in respect of an offence punishable by imprisonment for a term of not less than three years the amount assessed shall not be less than four hundred thousand shillings”.

58. Doing the best it could, this court came to the firm conclusion that a sum of Kshs 2,000,000/= general damages was adequate compensation for defamation. This was adequate to incorporate damages in lieu of an apology. Awarding the two (2) damages together would amount to unjust enrichment.

59. This court was also satisfied that the Plaintiff had demonstrated that he was entitled to exemplary damages. These damages are awarded to punish a defendant to deter other would be offenders from behaving in a similar manner like that defendant. It is important that a strong message be sent out to those who have the power of the pen and access to media in whatever form to be deterred from publishing malicious articles just because they disagree with others who have no such access to media platform.

60. In this regard, this court was of the view that a sum of Kshs 1,000,000/= would be adequate compensation for exemplary damages. Constitution rights come corresponding duties and limitations otherwise there would be anarchy in the name of people exercising their freedom of speech.

61. Appreciably, the Plaintiff herein did not lose his job and must have in fact been consoled by that fact. This court did not therefore find any justification in awarding him aggravated damages.

62. In arriving at the aforesaid figures, this court had due regard to the following cases:-

1. Joseph Njogu Kamunge vs Charles Muriuki Gachari [2016] eKLR

On determining the appeal therein in 2016, Mativo J refused to interfere with the award of Kshs 1,500,000/= that had been awarded by a lower court for libel.

2. Equity Bank Ltd & Another vs Robert Chesang [2016] eKLR

On determining the appeal therein in 2016, Aburili J refused to interfere with the award of Kshs 1,500,000/= that had been awarded by the lower court for libel.

3. Hon Musikari Kombo vs Royal Media Services Ltd (Supra)

On appeal, the Court of Appeal awarded Kshs 1,000,000/= for aggravated damages.

DISPOSITION

63. For the foregoing reasons, this court's decision was that the Plaintiff's suit was merited. Accordingly, this court hereby directs and orders that judgment be and is hereby entered in favour of the Plaintiff against the Defendants, jointly and severally, for:

a) **General damages** **Kshs 2,000,000/=**

b) **Exemplary damages** **Kshs 1,000,000/=**

Kshs 3,000,000/=

Plus costs and interest thereon at court rates.

64. Orders accordingly.

DATED and DELIVERED at NAIROBI this 31st day of October 2018

J. KAMAU

JUDGE