



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 421 OF 2003

ROSEMARY KIMINGI PLAINTIFF

V E R S U S

JOHN BUNDOTICH.....1ST DEFENDANT

THE STANDARD LIMITED..... 2ND DEFENDANT

JUDGEMENT

1) By the amended plaint dated 5th June 2009, Rosemary Kimingi, the plaintiff herein, sought for damages for defamation against John Bundotich and Standard Group Ltd, the 1st and 2nd defendants herein. The defendants entered appearance and duly filed a defence to deny the plaintiff's claim. When the suit came up for hearing, the plaintiff (PW1) and two independent witnesses namely Henrietta Ng'endo (PW2) and Dr. Zephaniah Kamau (PW3) testified in support of the plaintiff's case. The defendants on the other hand, did not summon witnesses to testify in support of their defence.

2) Rosemary Njeri Kimingi (PW1), told this court that she graduated with an LLB degree from the University of Nairobi in 1985 after which she was employed as a magistrate in 1986 upon completing Kenya School of Law. At the time of her testimony, she had served as a magistrate for over 25 years.

3) PW1 told this court that on 9.5.2002, the defendants printed and published concerning her the article titled "**CJ REVIEWS RAPE VERDICT**"

Chunga yesterday ordered a review of a non-custodial sentence imposed on a paedophile convicted of defiling a four-year-old. Chunga placed the file taken from the Makadara Criminal Court before the High Court Criminal Division to determine whether or not it calls for the intervention of the superior court. The C-J's action comes in the wake of unprecedented criticism levelled against the Makadara court which last week imposed a light sentence on a rapist found guilty of defiling a child. Makadara Principal Magistrate, Rosemary Kimingi came under severe criticism for imposing a three-year probation sentence on Reuben Bichanga whom she found guilty last Thursday of defiling the minor in a city estate last Decemberthe paedophile was put on probation for three years because the Principal Magistrate said she was satisfied Bichanga would comply with the probation officer's demands.

4) PW1 further stated that on 10th May 2002 the defendants published another article concerning her titled "**RAPE BETRAYAL, INSENSITIVITY IN THE NAME OF COURT DISCRETION**"

I read with utter indignation the story about the pervert, by the name Reuben Bichanga, who defiled a four-year-old girl at Nairobi's Makongeni Estate last December. He not only robbed her of her virginity but also infected her with gonorrhoea. That was grievous enough for members of the public to lynch the convict. But as sense would prevail, the complainant laid the matter before the honourable courts of justice to take its course. For over four months the matter was presided over by the Makadara Principal Magistrate, Ms Rosemary Kimingi. In her wisdom, the court convicted the accused. The paedophile walked out with a three-year probation. Outrage is an understatement. With such insensitivity and downright betrayal, where should people run to for justice to be seen to have taken place.

Consider the following:

- *Are we not familiar with how defenceless four-year-olds are under the predatory maniacs like Bichanga?*
- *Shouldn't Ms Kimingi do the only honourable thing and resign, rather than continue being paid by the same public whose trust she has betrayed, which public will have confidence in her court any more? Having lost her moral credibility, she ought to either resign or her services terminated in public interest.*

· How safe is Bichange now that the public sees him as a confirmed rapist who is capable of attacking and defiling four-year-olds and have the probation officers and magistrates sympathise with his libido and the insatiable lust.

- 5) The plaintiff (PW1) told this court that she was shocked and devastated when she read the contents of the defendants' publications which were given the highest possible circulation. PW1 further said that her friends who read the publications called her and others talked in hush tones.
- 6) PW1 stated that at the time of the publication she was a principal magistrate and that she presided over the hearing of the case involving the victim named in the publication.
- 7) PW1 produced the charge sheet as an exhibit in evidence which indicated that she heard a case where the main charge was defilement with the alternative charge being indecent assault.
- 8) PW1 also produced the proceedings as an exhibit in evidence in which she found the accused guilty on the alternative charge of indecent assault and not defilement.
- 9) PW1 disputed the assertion in the publication that the accused was found guilty of defiling a child to be false. PW1 pointed out that the offence of indecent assault at the time of the trial attracted a maximum sentence of 5 years imprisonment while that of defilement attracted a maximum sentence of 14 years imprisonment with hard labour.
- 10) The plaintiff further stated that the defendants failed to clarify the veracity of the information from her before publishing the injurious information.
- 11) PW1 pointed out that had the defendants sought for clarification from her or from the court file they could have confirmed that she had the discretion to impose a probationary sentence and that the sentence was not mandatory. The plaintiff also stated that she considered the probation report before sentencing and was persuaded by the recommendations of the probation officer.
- 12) The plaintiff stated that the publication gave the impression that other improper reasons influenced her decision on sentence other than the probation report. She said that her friends reacted with shock and disbelief and started questioning her integrity and character as a judicial officer.
- 13) She further stated that the reports influenced the public to believe that she meted out a sentence which sympathised with criminals. PW1 stated that as a result of the publication the Chief Justice called for the file for his perusal.
- 14) She further stated that the publication portrayed her as a corrupt magistrate. She also said that she came to learn later that she was under investigation by the Criminal Investigation Department. PW1 stated that the story negatively affected her and she ended up developing ulcers. PW1 pointed out that the story did not reflect the truth and that she was injured in her character in the eyes of the public.
- 15) She said that after the publication of the story, she was not able to walk with her head high and was thoroughly embarrassed. She stated that her daughter asked her why her name was always in the newspapers and that she developed a negative opinion about her as a magistrate and that the children from the neighbourhood started questioning her integrity.
- 16) PW1 was of the opinion that the defendants published the statements with ulterior motives and that the publications created the impression that she was compromised to make the decision to convict the accused for the alternative charge of indecent assault.
- 17) PW1 further stated that the defendants published the offending statements for financial gain. The plaintiff also stated that the first publication depicted her as dishonest judicial officer while the second publication portrayed her as being insensitive hence unfit to serve in the judiciary.
- 18) The plaintiff averred that right thinking members of the public who read the publication viewed her as a judicial officer who lacked morals and integrity.
- 19) The second witness who took the witness stand, is Henrietta Ngendo Mburu (PW2), told this court that when the plaintiff, who is her mother read the publications she became ill and went to sleep. PW2 stated that the publications may have aggravated the ulcers the plaintiff had suffered for sometime. PW2 said that at the time of the publication she was aged 13 years.
- 20) The plaintiff's third witness is Dr. Zephaniah Kamau (PW3), a medical doctor who told this court that he was the one who examined the victim whose case was heard and determined by the plaintiff. PW3 produced a copy of the medical report which showed that there was no evidence of defilement of the victim.
- 21) At the close of evidence, the parties were invited to file and exchange written submissions.

Having considered the evidence tendered and the rival submissions, the following issues arose for the determination of this court:

- i. Whether the publications made by the defendants were defamatory of the plaintiff.**
- ii. Whether the plaintiff is entitled to damages and if yes, how much?**

iii. Who should bear the costs of this suit?

22) On the first issue as to whether the defendants' publications were defamatory of the plaintiff, I think it is important at this stage to give a brief definition of what is regarded as defamatory. In Halsbury's Laws of England, 4th Edition Vol. 28 Para. 10 defamatory is defined as follows: **"A defamatory statement is a statement which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or convey an imputation on him disparaging or injurious to him in his office, profession calling, trade or business."**

23) The defendants admitted making the publications in their defence dated 11.8.2003. The first article published on 9.5.2002 stated inter alia:

"The C.J's action comes in the wave of unprecedented criticism levelled against the Makadara Court which last week imposed a light sentence on a rapist found of defiling a child

Makadara Principal Magistrate, Rosemary Kimingi, came under severe criticism for imposing a three-year probation sentence on Reuben Bichange whom she found guilty last Thursday of defiling the minor in a city estate last December."

24) The defendants further admitted publishing another statement on 10.5.2002 as follows:

"I read with utter indignation the story about the pervert, by the name Reuben Bichange shouldn't Ms. Kimingi do the only honourable thing and resign, rather than continue being paid by the same public whose trust she has betrayed. Which public will have confidence in her court anymore? Having lost her moral credibility she ought to either resign or her services terminated in public interest and have the probation officers and magistrates sympathise with his, libido and the insatiable lust"

25) It is the submission of the plaintiff that the publications were made on the basis of wrong, false and incorrect facts of the case the plaintiff presided over and determined in her court. It is the submission of the defendants that the first article published on 9.5.2002 was merely reporting the reactions of the public to the verdict the plaintiff had delivered imposing a light sentence.

26) The defendants further stated that the article was purely written in the interest of the public. It was also pointed out by the defendants that the article of 10.5.2002 was merely a commentary of what had transpired by the writer who does not allege that those were the facts.

27) The defendants further denied that the publication calculated to injure the plaintiff's reputation and profession but the publications were comments on facts which were objectively reported.

28) It is clear in my mind that had the defendants taken time to keenly peruse the court proceedings in respect of the case the plaintiff presided over, they would have discovered that the plaintiff had considered the evidence presented by the prosecution in support of the charge of defilement facing the accused and found the charge of defilement was not proved. They would also have found that the plaintiff had found the accused guilty of the alternative charge of indecent assault.

29) The assertion by the defendants that the plaintiff imposed a light sentence on a rapist found guilty of defiling a child was therefore false. The defendants did not bother to seek for clarification from the plaintiff or in alternative they should have perused the court file to establish the correct facts before proceeding to publish facts which have now turned out to be false and extremely injurious to the plaintiff.

30) The defendants have implored upon this court to find that there was no evidence of malice on the part of the defendants in making the publications.

31) The plaintiff on the other hand have beseeched this court to infer that the defendants were malicious in making the publication. Both the plaintiff and the defendants cited the case of **Phinehas Nyagah =vs= Gitobu Imanyara (2013) eKLR** where Justice Odunga stated *inter alia*:

"Thirdly, the words must be malicious. Malice here does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice.

Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice but the law does not weigh in a fair balance and it does not follow merely because the words are excessive, there is therefore malice.

Malice may also be inferred from the relations between the parties before or after publication or in the conduct of the defendant in the course of the proceedings. Malice can be founded in the publication itself if the language used is utterly beyond the facts. The failure to inquire into the facts is a fact from which inference of malice may properly be drawn. Any evidence, which shows that the defendant knows the statement was false or did not care whether it be true or false will be evidence of malice.

32) I have carefully considered the language used in the publication and it is clear to me that the publications were done as though the facts relied upon were true. The plaintiff has been able to show that the accused person was not convicted for defilement but was instead convicted on the alternative charge of indecent assault. The two charges are totally different.

33) In the end, I am convinced that the plaintiff's reputation as a judicial officer was seriously damaged by the two publications. It is

sufficient to state here that the publications created an impression in the eyes of the right thinking members of the public that the plaintiff condones rapists and paedophiles.

34) It is also apparent from what the defendants referred to as commentaries that as a result of the publications that the plaintiff may have been regarded as an incompetent judicial officer who does not deserve to anymore sit on a judgment seat.

35) In sum, I find the publications to have defamed the plaintiff in many respects.

36) Having come to the conclusion that the plaintiff was injured by the publications, I now turn to determine the question of quantum. The plaintiff has submitted that she is entitled to claim for *inter alia*:

a) *General damages*

b) *Aggravated and exemplary damages*

c) *An apology in the widest possible circulation similar to the publications complained of.*

d) *Costs of the suit plus interest at court rates.*

37) It is the submission of the plaintiff that she is entitled to general, aggravated and exemplary damages for defamation. The plaintiff proposed a sum of ksh.15 million for general damages and cited the following cases:

First, is the case of **Machira vs= Mwangi & Another (2001)eKLR** in which this court awarded the plaintiff a sum of ksh.8 million as general damages plus ksh.2 million for aggravated damages.

The second case is that of **Samuel Ndung'u Mukunya vs= Nation Media Group Ltd & Another (2015) eKLR** in which this court made an award of ksh.15 million in favour of the plaintiff as general damages and 3,500,000/= as aggravated damages.

38) The defendants have argued that there exists mitigating factors which should be considered to influence the outcome of the assessment of damages. This court was beseeched to consider the fact that the publications were geared towards the protection of the girl child and the sexual offences which were rampant in Kenya at the time.

39) This court was also told that there was an element of public interest and the fact that there was no malice which manifested itself in the whole saga. The defendants further pointed out that the plaintiff had not taken advantage of the right of reply which would have been helpful to mitigate damage.

40) The defendants proposed a global sum of ksh.2,500,000/= for general damages.

41) This was further asked not to grant both exemplary and aggravated damages because there was no evidence presented to show that the defendant had direct financial gain as a result of the publication and therefore the case is not fit for an award of exemplary or aggravated damages.

42) In beseeching this court to award the plaintiff ksh.2,500,000/=, the defendants cited two cases. First is that of **Martha Karua vs= Moses Kuria (2017) eKLR** where this court awarded a sum of ksh.5 million as general damages. The second case is that of **Gicheru vs= Morton (2005) 2KLR** where this court awarded ksh.2 million as general damages and ksh.250,000/= as aggravated damages which amounts were later enhanced by the Court of Appeal to ksh.6,000,000/=.

43) There is no doubt that in assessing damages in cases of defamation involving professionals like the plaintiff, the courts over time have given various guidelines. In the English case of **John vs= M.G.N (1997) QB 586**, it was stated *inter alia* as follows:

“In assessing the appropriate 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 attributed of his personality, the more serious it is likely to be. The extent of publication is also very relevant a libel published to millions has a greater potential to cause damage than a libel published to lawful people.”

44) In the instant case, the defendants published the offensive publications in a newspaper which has the second highest circulation in Kenya. It is a widely read newspaper. The aforesaid publications were obviously calculated to disparage, discredit and injure the plaintiff’s credit, reputation were meant and to bring her to public scandal and odium.

45) The evidence of PW2 clearly show that the plaintiff was seriously affected by the publications to the extent that she was forced to retreat to her house to avoid the public. At the time of the publications the plaintiff had been a judicial officer for over 16 years and there were indications that she was highly regarded.

46) After considering comparable awards submitted by both parties, I am convinced that the plaintiff is entitled to be awarded general damages. I award the plaintiff a sum of ksh.10,000,000/= for general damages.

47) I have already stated that the plaintiff too sought to be paid aggravated and exemplary damages over and above general damages. This

court was beseeched to award on this head a sum of ksh.3 million. In the case of **John =vs= MGN (1997) QB 586** it was held *interalia* that “..... **Exemplary damages on the other hand had gone beyond compensation and are meant to “punish” the defendant. 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 apologise.”**

48) In this instant case, this court found by inference that the defendants acted maliciously. It is also clear from the pleadings and proceedings that the defendants have not deemed it fit to offer an apology despite the fact that evidence was presented showing that the factual basis of the publication was false.

49) In the circumstances the plaintiff is entitled to a claim for aggravated and exemplary damages. I award the plaintiff a sum of ksh.1,500,000/= representing both exemplary and aggravated damages.

50) The other order the plaintiff has sought is for an apology. The defendants did not submit on this prayer. The plaintiff pointed out that the defendants have failed to carry out an apology and to retract their story which continue to be read over the internet. I am convinced that the defendants should be ordered to publish an apology in the widest coverage possible circulation similar to the publications complained of within 30 days and in default of apology, the defendants should pay ksh.2,000,000/=.

51) The plaintiff to have costs of the suit. The awards to attract interest at court rates from the date of judgement until full payment.

52) In the end, judgement is entered in favour of the plaintiff and against the defendants as follows:

i. General damages for defamation ksh.10,000,000/=

ii. Aggravated and exemplary damages ksh.1,500,000/=

iii. Costs of the suit is awarded to the plaintiff.

iv. Interest at court rates on (i) and (ii) above from the date of judgement until full payment.

v. The defendants are hereby directed to publish an apology in the widest coverage possible circulation similar to publication complained of within 30 days in default the defendants to pay ksh.2 million in lieu of apology.

Dated, Signed and Delivered in open court this 19th day of October, 2018.

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant