



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 87 OF 2011

HON. MUSIKARI KOMBO.....PLAINTIFF/APPLICANT

- V E R S U S -

KENYA BROADCASTING CORPORATION.....DEFENDANT

JUDGEMENT

1. Hon. Musikari Kombo, the plaintiff herein, filed this action by way of the plaint dated 14th March 2011 in which he sought for general damages for libel against The Kenya Broadcasting Corporation, the defendant herein. The defendant filed a defence to deny the plaintiff's claim.

2. The plaintiff personally testified in support of his case as PW1. He also summoned Dorcas Florence Kombo (PW2) to testify in support of his case. The defendant indicated from the beginning that it was not going to tender any evidence nor summon witnesses to testify. When PW1 took the witness stand he indicated to this court that he was adopting his witness and further witness statements as his evidence. He pointed out that what triggered him to file this suit is the article published on the defendant's website known as <http://www.kbc.co.ke/news.aspx?id=69170>. By the aforesaid article, the defendant notified world of the following braking news:

“And at the Anti-corruption court the wife of former local government minister Musikari Kombo, Elizabeth Kaloki Kombo was charged with three counts of fraud.

Kombo was alleged to have fraudulently acquired public property and issuing a false document to a school principal.

It was alleged that she irregularly obtained over 8 million shillings on diverse dates between April 12 and May 2009 being a senior director of Education in Coast Province.

She pleaded not guilty to the charges and was released on a cash bail of 100,000 shillings and a surety of a similar amount.”

3. PW1 was of the opinion that the words were not only false and malicious but were calculated to disparage his character and were meant in their ordinary meaning to mean that the plaintiff is married to Elizabeth Kaloki Kombo. That the plaintiff is an unfaithful husband and dishonest family man and is involved in a conspiracy to defraud the public of money. The plaintiff further regarded the statement as if it were meant to say that the plaintiff engages in corruption and corrupt practices. It is also alluded that the statement meant to depict the plaintiff as a person who cannot be trusted to hold public office. The plaintiff (PW1) produced in evidence as an exhibit the charge sheet in respect of Anti-Corruption court case no. 32 of 2011 (R =vs= Elizabeth Kaloki) to show that the name “Kombo” was not part of the particulars of the charge sheet. The plaintiff further stated that the acts published were said to have been

committed between April 2009 and May 2009. PW1 said by then, he was a politician and a former minister of Local Government and naturally referred to as honourable Musikari Kombo. It was also the evidence of PW1 that the Anti-corruption court is a special court aimed at trying persons charged with corruption related charges and that 'Kombo' is a name referring to him generally. It is the evidence of PW1 that he is a leader of distinction who has held various senior positions. He obtained those appointments because of his reputation for integrity and honesty and command confidence of his constituents and of the president in winning parliamentary and ministerial positions. PW1 produced a marriage certificate showing that he is married to Dorcas Florence Kombo (PW2). Evidence were presented showing that PW2 does not work in any government ministry neither is she engaged in any programmes regarding H.I.V and AIDS. PW1 produced documents in evidence showing that as at the time of the trial, the offending article to date still run on the defendant's website. At the time of broadcast PW1 said that he was engaged in a crusade against corruption and that outside parliament, he sat on the Board of Directors of the Global Organization of Parliamentarian & Against Corruption (GOPAC). PW1 stated that he was preparing to attend an important GOPAC global conference in Mexico as Kenya's representative that this broadcast was aired. He said that the article indicated that he was married to one Elizabeth Kaloki hence damaging his personal character as a dishonest family man. PW1 and PW2 told this court that despite making demands for an apology from the defendant none was made.

4. It is the plaintiff's submission that the defendant having published untruths about the plaintiff and without bothering to cross-check whether or not it was factual is in itself a manifest of malice. The plaintiff who was not in court nor on trial on the material date was not contacted to verify the story. I have considered the evidence tendered and I am satisfied that the person described in the broadcast is the plaintiff. There was no credible evidence to show that the plaintiff was married to Elizabeth Kaloki Kombo but there was clear evidence that PW1 was married to Dorcas Florence Kombo (PW2).

5. The defendant in its written submissions admitted that the article was latently false. The defendant however argued that the same did not make direct reference to the plaintiff. The defendant was of the view that though the article erroneously mentioned the plaintiff, the issues raised by the plaintiff are grossly exaggerated. It is said that the article was published with no intent of malice. It is also claimed by the defendant that the article did not cause any injury to the plaintiff's reputation.

6. After a careful consideration of the evidence and the rival written submissions I have come to the conclusion that the plaintiff's character and reputation was greatly injured by the false article. This court would have had a different view of the publication if the same was immediately removed from the defendant's website. The defendant has not deemed it fit to have the same removed nor tender an apology to the plaintiff. In my view, the failure to tender an apology and the failure to delete the same from its website is proof of malice on the defendant's part. The defendant admits that the article contains false information concerning the plaintiff but still maintains and runs the website with the offending article. That in itself is a manifest of malice on the part of the defence.

7. Having come to the conclusion that the defendant is liable for libel as against the plaintiff, the next issue to determine is assessment of damages.

8. The plaintiff beseeched this court to make an award of ksh.20,000,000/= for damages as a fair and just. The plaintiff further asked this court to issue an order directing the defendant to publish an apology or in lieu of an apology pay ksh.2,000,000/=. The plaintiff cited the following cases:

i. Daniel Musinga =vs= Nation Media Group, C.A no. 120 of 2008 where the Court of Appeal awarded ksh.4,000,000/=.

ii. Machira =vs= Mwangi & Another H.C.C.C. no. 835 of 2007, in which this court made an award of ksh.5,000,000/=.

iii. Hon. Christopher Obure =vs= tom Oscar Alwaka & 3 others H.C.C.C. no. 956 of 2003 where this court made an award of kshs.15,000,000/= general damages and ksh.2,000,000/= as exemplary damages.

9. The defendant on the other hand proposed to this court to give the plaintiff a nominal award.

The defendant relied on two cases.

i. Phineas Nyagah =vs= Gitobu Imanyara (2013) eKLR in which this court awarded ksh.3,000,000/-.

ii. Chirau Ali Mwakwere =vs= Royal Media Services Ltd (2005) eKLR in which this court awarded ksh.1,000,000/=.

10. The defendant contested that the figures suggested by the plaintiff are manifestly excessive.

11. I have carefully taken into account the comparable awards. The publication in this suit touched on both personal and professional reputation of the plaintiff. The plaint shows that the plaintiff merely asked for general damages. There was no prayer for exemplary damages nor a demand for an apology, therefore this court declines to grant the same.

12. The relevant awards are those relating to politicians like Ali Mwakwere and Christopher Obure.

13. In 2005, Ali Mwakwere was awarded ksh.1,000,000/= each for general, exemplary and aggravated damages making it a total of ksh.3,000,000/=. On appeal, Hon Chirau Ali Mwakwere had the award on general damages enhanced by 2 million making kshs.3,000,000/= on 18.10.2013.

14. I have already stated that in 2005, Hon. Christopher Obure was awarded ksh.17,000,000/=.

15. Taking into account the circumstances of this case and past decisions, I think an award of ksh.7,000,000/= is a reasonable award for general damages which is granted. The plaintiff is awarded costs of the suit.

Dated, Signed and Delivered in open court this 27th day of January, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Respondents