



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 447 OF 2013

ANN WAIRIMU NJOGUPLAINTIFF

VERSUS

RADIO AFRICA LIMITED.....DEFENDANT

JUDGMENT

The Plaintiff has moved the court by way of an amended plaint dated 17th December, 2013 seeking general, exemplary or punitive damages, an apology publicized in the same space and size and publicity as the offending article, an order for the removal of the offending article from the online edition for the Defendant's publication within such time as the court shall order and the costs of the suit.

The Plaintiff has pleaded that on or about the 3rd and/or 4th day of November, 2012, in the issue of the weekend star, the defendant carried a story of and concerning the Plaintiff under the title:

“Ann Njogu’s effort to lock media out of court flops.”

It is alleged that in the said article, the Defendant wrote the following of and concerning the Plaintiff:

“An attempt by political activist Ann Njogu to gag the media from reporting on the assault case against her yesterday failed. Njogu through her lawyer Elisha Ongoya, had asked the court to bar coverage of the proceedings where she is accused of assaulting her father.

She told the court that the media had flouted the provisions of the Children’s Act and the Constitution by revealing the identity of the teenage boy charged with her.

Njogu said due to the family ties between the teenager and herself, the media should be barred from broadcasting information about the court case.”

It was further pleaded that the said article in its natural and ordinary sense meant and was understood to mean:

- a) That Ann Njogu had made an application in court.
- b) That the purport of Ann Njogu’s application was to gag the media.
- c) The said application by Ann Njogu had been rejected by the court.
- d) That Ann Njogu is not a respecter of the media freedom

e) That Ann Njogu had something to hide regarding the proceedings in question.

It was pleaded that the story was false in fact and in substance and it tended to lower the Plaintiff's reputation in the estimation of ordinary, just and right thinking members of the society with the consequences that the Plaintiff suffered loss and damage for which she holds the Defendant responsible. That the said articles were activated by malice on the part of the Defendant. The particulars of malice are particularized in paragraph 12 of the Plaintiff.

The Defendant filed a statement of defence on 9th December, 2013 in which it stated that the Star Publications Limited is a different legal entity from Radio Africa Limited.

It was admitted that the Star Publications Limited published the article herein but denies that the same was false and malicious and avers that the article and the words published on the 3rd day of November, 2012 concerning the Plaintiff were true in substance and in fact.

Further or in the alternative, the Defendant pleaded that the words as published were and are a fair and accurate report of proceedings heard on the 2nd day of November, 2012 before the Chief Magistrate's Court, a court exercising judicial authority within Kenya and were published contemporaneously in the Star Publications Limited Newspaper with such proceedings without any malice towards the Plaintiff and are therefore, absolutely privileged. That the said court proceedings were of public concern and was of public benefit and is therefore, privileged subject to explanation and contradiction.

The Defendant has denied that the words contained in the publication bears the defamatory meaning alleged by the Plaintiff and/or capable of bearing that or any other defamatory meaning by innuendo. The particulars of malice have been denied.

The Defendant avers that the publication is not defamatory on the face of it and the Defendant did not know of circumstances by virtue of which the publication might be understood to be defamatory of the Plaintiff and, therefore, the Plaintiff's suit discloses no reasonable cause of action.

In her evidence the Plaintiff who testified as PW 1 told the court that in the year 2012 herself and her son were arraigned in court in a Criminal Case where they were maliciously and falsely charged with assaulting her father, Peter Njuguna. That they were both acquitted under section 210 of the Criminal Procedure Code.

It was her further evidence that the media took into sensationalizing the reporting of the case by carrying out biased report of the same. That it portrayed her and her son in negative light. That through her lawyer, it was brought to the attention of the court that the media had breached the Children's Act by carrying out photographs of her son. It was also brought to the attention of the court that the media coverage should be objective and also that one media house namely the Star had carried out a malicious and defamatory article alleging that she had tried to gag the media from reporting the court proceedings and that the attempt had failed.

She told the court that in her own understanding, the article insinuated that she was not a respecter of media freedom and that she had something to hide in the proceedings before the court. According to her, the article was false as she had not made such an application before the court and that it was malicious as she had not sought to gag the media in reporting the proceedings. That the application was made by her son's lawyer who was seeking to have the provisions of the Children's Act respected and upheld, which application the court affirmed and asked the media not to carry references to her son or any of his images. That the media was also cautioned to be objective in their reporting. The order referred to all the media houses namely the Nation, Standard, the People Daily and the Star.

According to her, the first misrepresentation in the article is that the Defendant reported that she had made an attempt to gag the media, secondly, that she had asked the court to bar the coverage of the proceedings in court and thirdly, that she had brought before the court, the matter of the Children's court by the media revealing the identity of her son and the fourth misrepresentation being that the court had

not granted the order while indeed, it had affirmed the provisions of the Children's Act.

She stated that the article brought upon her person massive public ridicule and it also damaged her reputation and that her friends and colleagues not only shunned but avoided her. That the article generated a lot of negative publicity in the social media about her person and her reputation was massively attacked.

In cross-examination, she stated that she did not make an application to gag the media. She admitted that an application was made by her lawyer on behalf of her son and that her lawyer was holding brief for the lawyer who was on record for her son. The said application was made on the 24th August, 2012 by her lawyer Mr. Elisha Onguya who held brief for Judy Thongori who was on record for the Plaintiff's son, who was the 2nd accused in the criminal case.

That even on 2nd November, 2012 her lawyer still held brief for her son's lawyer. She admitted that according to the proceedings in the criminal matter, the application was made by the defence which induced herself and her son and that the record did not indicate on whose behalf the application was made.

The defence called one witness namely Irene Wairimu Wamaru. In her evidence, she admitted having published the article on the 3rd/4th November, 2012. She told the court that she was in court when the alleged facts took place. She stated that the application to gag the media was made by Advocate Elisha Ongoya who was acting for the Plaintiff herein and also held brief for Judy Thongori for the 2nd accused who is the Plaintiff's son. That when he made the application he did not specify on whose behalf he was making the application. That she was in court when the ruling on the application to gag the media was made but the court stated that the order should not apply to the Plaintiff who is an adult but it was only in respect to the child [2nd accused]. According to her, the request to gag the media by the Plaintiff herein flopped. That after the court order, the Star Newspaper did not mention the minor in their subsequent reporting. She stated that the court admonished her and she was told to apologize but she did not defy the court order after that.

In cross-examination, she stated that there was a code of conduct that regulates the media and it requires her to verify the correctness of the information before the same can be published but she reiterated that she was in court on 2nd November, 2012 all through the proceedings.

In his submissions, counsel for the Plaintiff submitted that in a case of defamation parties are guided by the requirements laid down in the case of **CFC STANBIC BANK LTD V CONSUMER FEDERATION OF KENYA (COFEK) & 2 OTHERS, (2014) eKLR** which set out the elements of defamation.

He also cited the case of **WYCLIFFE A SWANYA V TOYOTA EAST AFRICA LIMITED & ANOTHER, (2009) eKLR** which espoused the same principles.

On whether the article referred to the Plaintiff, it was submitted that the article refers to her by the name.

On reputation, it was submitted that when a person's reputation has been besmirched by unfounded allegations, the same can be damaged forever especially if there is no opportunity to vindicate the same. The case of **NATION MEDIA GROUP LIMITED & 2 OTHERS V JOHN JOSEPH KAMOTHO & 3 OTHERS, (2010) eKLR** was relied on in support of that contention. He also relied on the case of **KNUPFLER V LONDON EXPRESS NEWSPAPER LIMITED, (1944) AC 116, (1944) 1 ALL ER 495.**

It was also submitted that the Defendant did not in any manner show the steps she took to confirm whether indeed the application was made on behalf of the Plaintiff or the minor. That she did not state that she perused the court file or talked to the Plaintiff to confirm the correct position.

Submitting on the Defendant's defence that the article was true in substance and that it was a fair and accurate comment, the court was told that it is the Defendant's responsibility to indicate clearly what portions of his work are facts and which are comments so far a reader can be able to distinguish between

the two. That on the face of the article, the reader cannot discern whether the same was a comment but it is outright that it is a report of events that transpired in court on 2nd November, 2012 and as such the defence of fair comment cannot and should not be allowed to stand. That, in any event, it was the duty of the Defendant to prove the allegations of facts to be true and it's not sufficient for the Defendant to plead that she bona fide believed them to be true.

On whether the article was malicious, the plaintiff's counsel cited the case of **PHINEAS NYAGA V GITOBU IMANYARA, (2013) eKLR** in which the learned Judge held that evidence of malice may be found either in the publication itself, if the language used is utterly beyond or disproportionate to the facts, or can be inferred from the relations between the parties. The case of **DANIEL MUSINGA V NATION NEWSPAPERS LTD, HCCC. No. 102 of 2000** and that of **J.P. MACHIRA V WANGETHI MWANGI & NATION NEWSPAPERS** were also relied on.

It was submitted that the fact that DW1 was in court when the application was made, she knew that it was made on behalf of the 2nd accused and was indeed allowed contrary to what the Star Newspaper reported. That DW1 did not make any attempt whatsoever to seek clarification from the plaintiff's advocates or even peruse the court file on the contents of the said article.

On the part of the defendant, it was submitted that both the plaintiff and the 2nd accused in the criminal Case No. 1451/2012 sought to gag the media and that the request by the 2nd accused was allowed whilst that of the plaintiff herein was declined and therefore, the article could not have been false, malicious or defamatory of the plaintiff. That the defences of justification, absolute privilege and fair comment should succeed. On the defence of justification, it was submitted that evidence in support of the same was given by DW1 which testimony was not dislodged in cross-examination and that the plaintiff failed to provide falsity in the impugned publication. To support this contention, the case of **KAGWIRIA MUTWIRI KIOGA & ANOTHER V THE STANDARD LTD & 3 OTHERS, [2015] eKLR** was cited where the Court of Appeal held that falsity was not proved by the plaintiff.

On the defence of absolute privilege, it was submitted that the article related to a fair and accurate report of what transpired in court on the 2nd November, 2012. The defendant relied on ***Section 6 of the Defamation Act*** which provides for absolute privilege for judicial proceeding heard in a court exercising judicial authority within Kenya.

On the defence of fair comment on a matter of public interest, it was submitted that the plaintiff herself testified that she is a public figure and that the criminal proceedings in Nakuru impacted negatively on her civil society career. That in the absence of falsity and malice in the impugned publication, the defence of fair comment is well taken and the same should succeed.

It was also submitted that evidence of loss of reputation cannot be given by the plaintiff but by a third party. The case of **PHINEAS NYAGAH V GITOBU IMANYARA, (2013) eKLR** was cited in support of this contention and also the case of **MIGUNA V STANDARD GROUP LTD & 4 OTHERS, (2016) eKLR**.

The court has considered the evidence on record and the submissions by the learned Counsels. Having set out the positions by the respective parties, I now proceed to set out the issues for determination which in my humble opinion are as hereunder:

- 1. Whether the words in the impugned article are defamatory of the plaintiff.*
- 2. Whether the article published in the star newspaper on 3rd/4th November 2012 concerning the plaintiff was false and malicious.*
- 3. Whether the article and the words refer to the plaintiff*
- 4. Whether the plaintiff is entitled to general damages for libel and if so how much?*

5. *Who should meet the costs of the suit?*

I now proceed to consider the issues set out hereinabove.

The tort of defamation does not fit one definition but it depends on the circumstances of each case for instance in the 7th Edition of Salmond on the Law of Torts, Defamation is defined as follows:

“The wrong of defamation consist in the publication of a false and defamatory statement concerning another person without lawful justification.”

In the case of **ONDONKARA V ASTLES, (1970) EA. 374** a defamatory statement was described as follows:

“..... a statement is defamatory of a person of whom it is published if it is calculated to lower him in the estimation of ordinary, just and reasonable men”.

Another authority often cited as definitive on defamation is that of **THOMAS V CBC, (1981) 4WWR 289** as follows:

“The gist of the torts of libel and slander is the publication of matter (usually words) conveying a defamatory imputation. A defamatory imputation is one to a man’s discredit or which 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. The standard of opinion is that of right-thinking persons generally. To be defamatory, an imputation need not have actual effect on a person’s reputation; the law looks only to its tendency. A true imputation may still be defamatory although its truth may be a defence to an action brought on it; conversely untruth alone does not render an imputation defamatory.”

The common law of defamation protects every person from harm to their reputation by false and derogatory remarks about their person known as defamation. The same protection is also anchored in the constitution under **article 33(1) (a) as read with clause 3** thereof both of which provides:

“33(1) (a) Every person has a right to freedom of expression, which include freedom to seek, receive or impart information or idea.

Clause 3 provides:

“in exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.”

The elements of the tort of defamation are well laid out in the case of **J. KUDWOLI V EUREKA EDUCATIONAL AND TEACHING CONSULTANTS & 2 OTHERS, HCCC NO. 126/1990** which are:

- 1. The matter of which the Plaintiff complains was published by the Defendant.*
- 2. The publication concerned or referred to the Plaintiff.*
- 3. That it was defamatory in character.*
- 4. That it was published maliciously and;*
- 5. That in slander, subject to certain exceptions, that the Plaintiff has suffered special damage.*

The same principles were repeated in the case of **WYCLIFFE A. SWANYA V TOYOTA EAST AFRICA LIMITED AND FRANCIS MAASAI, NRB CA NO. 70/2008.**

The essence of a defamatory statement is its tendency to injure the reputation of another person. It is however, upon the Plaintiff to show or establish how he was exposed to public hatred, contempt or ridicule or that the words had caused him to be shunned or avoided by certain people. See Gatley on Libel and Slander (8th Edition Par. 31). The Plaintiff has to prove the actual words complained of and it is not sufficient to show, the Defendant made a defamatory statement.

Applying the above principles to our case, it is not in dispute that the Defendant published the article complained of. In fact the same has been admitted in their defence. It is also not in dispute that the article refers to the Plaintiff as it can clearly be seen in the headline thus:

“Ann Njogu’s effort to lock media out of court flops.”

That takes me to the next issue; was the article defamatory of the Plaintiff?

In the Black’s Law Dictionary 8th Edition, the word defamation is defined as follows:

“Tending to harm the person’s reputation by subjecting that person to public contempt, disgrace or ridicule or by adversely affecting the person’s business.”

The Plaintiff contends that she was defamed by the Star Newspaper in the article the subject matter of this suit.

This court has perused the contents of the article *vis-à-vis* the court record in the criminal case Number 1451/2012 (*R V Ann Wairimu Njogu & Njau Njogu*). The record shows that on the 2nd day of November, 2012 Mr. Ongoya Advocate appearing for the first accused and holding brief for Thongori for the 2nd Accused, made an application in court under the provisions of **Section 76(5) of the Children’s Act** alleging that the 2nd Accused rights have been breached. At the tail end of the application he stated and I quote:

“I apply the media not to be allowed to cover proceedings. We pray for a gagging order.”

In its ruling, the court stated that the application was made by the defence and that the order shall not extend to any reports of the proceedings of the adults involved in the case.

In the article, the star reported that an attempt was made by the Plaintiff herein to gag the media from reporting on the assault case and that the said attempt had failed. The article further reported that, the Plaintiff through her lawyer Elisha Ongoya had asked the court to bar coverage of the proceedings where she is accused of assaulting her father. That she told the court that the media had flouted the provisions of the Children’s Act and the constitution by revealing the identity of the teenage boy charged with her. Njogu said due to the family ties between the teenager and her, the media should be barred from broadcasting information about the court case.

Though the Plaintiff contends that the article was defamatory, there is no evidence by and independent witness to support that fact. In the case of **PHINEAS NYAGAH V GITOBU IMANYARA, (2013) eKLR** the court stated thus:

“... The defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers by lowering him in the estimation of the right thinking members of society generally and in particular cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike and disesteem and typical examples are an attack upon the moral character of the Plaintiff attributing to him any form of disgraceful conduct such as crime, dishonesty, cruelty and so on. Publication is the communication of the words to at least one other person other than the person defamed. Publication to the Plaintiff alone is not enough because defamation is an injury of one’s reputation and reputation is what other people think of a man and not his own opinion of himself. The evidence we have on record is by the Plaintiff and what

she thought about herself and her reputation and not what a reasonable person thought about her. In the premises, I find that she did not prove that she was defamed.

Was the article malicious and false?

For the Plaintiff to succeed in a claim for defamation, he has to prove malice. On the other hand, malice can be inferred and for it to be inferred, the language of the published article ought to have altered the facts and their meaning and there ought to be animosity between her and the Defendants. However, it is trite that malice can be inferred from the circumstances. See the case of ***Phineas Nyaga (supra)***.

The failure to inquire in the facts is a fact from which inference of malice may be properly drawn.

According to the Plaintiff, the evidence of malice is borne from the fact that DW 1 was present in court when the application was made and she ought to have known that the application was made on behalf of the 2nd accused. That she did not make any attempt to seek clarification from the Plaintiff or her advocates or even peruse the court file on the contents and purport of the article before publishing the same.

To counter malice, the Defendant has relied on the defences of justification, absolute privilege and fair comment on a matter of public interest, the Plaintiff having testified that she is a public figure.

The Defendant has also submitted that the article is true in substance and in fact in that:

- 1. The Plaintiff and her son (2nd accused were charged in criminal case No. 1451/2012).*
- 2. That on 2nd November, 2012, the advocate for the Plaintiff applied for an order restraining the Star together with the Nation and the Standard Newspapers from covering the proceedings.*
- 3. The court granted orders restraining the said Newspapers from publishing any news that would led to revelation of the 2nd Accused's (her son) name, home, place or residence, school, parents, relatives and photos.*
- 4. The court declined to restrain the media from covering proceedings in the said case so far as the same related to the Plaintiff herein.*

The court has perused the article and the provisions of ***section 4 of the Defamation Act*** which provides:

“In any action for libel or slander in respect of words containing two or more distinct charges against the Plaintiff, a defense of justification shall not fail, by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the reputation of the Plaintiff having regard to the truth of the remaining charges”

On the defence of fair comment and qualified privilege Gately on Libel and Slander 10th Edition has this to say:

“... Some leeway for exaggeration and error is given by the defences of fair comment and qualified privilege. However, for the purposes of justification, if the defendant proves that “the main charge or gist of the libel” is true, he need not justify statements or comments which do not add to the sting of the charge or introduce any matter by itself actionable.”

Still on the defence of justification, an extract from Carter-ruck on libel and slander 5th Edition at page 54 is helpful where the writer stated thus:

“In order to succeed upon a plea of justification, the onus lies upon the Defendant to prove that the whole of the defamatory matter complained of, that is to say, the words themselves, and any

reasonable inference to be drawn from them are substantially true. On the other hand, for the defence to be successful, it is not necessary that every “t” should be crossed and every “I” dotted; it is sufficient if the substance of the libelious statement is justified. As much must be justified as meets the sting of the charge and if anything contained in the charge which does not add to its sting that need not be justified.”

Looking at the article complained of, I am of the considered view that the same is substantially true. In the application made in court on 2nd November, 2012, at the tail end, the record shows that she applied for the media not to be allowed to cover proceedings and concluded by saying: “we pray for a gagging order”.

It is not specifically stated that the application was made on behalf of the 2nd accused.

A perusal of the court ruling also shows that, the application was made by the defence and the order made did not extend to the reports of the proceedings of the adults involved in the case.

In the circumstances, this court cannot infer malice on the part of the Defendant.

Having made the above observations and findings, I find and hold that the Plaintiff did not prove her case on a balance of probability. But in the event I am found to be wrong in the finding that I have made, the law obliges me to assess damages that I would have awarded the Plaintiff had I entered a verdict in his favour.

I have considered the submissions by the learned counsels on quantum of damages. In awarding damages this court draws considerable support in the guidelines in the case of ***JONES V POLLAND, (1997) EMLR 233-243*** where a checklist of compensable factors in libel actions are enumerated as follows:

- 1. The objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published, and any repetition.*
- 2. The subjective effect on the plaintiff’s feelings not only from the prominence itself but from the defendant’s conduct thereafter both up to and including the trial itself.*
- 3. Matters tending to mitigate damages, such as the publication of an apology.*
- 4. Matters tending to reduce damages.*
- 5. Vindication of the plaintiff’s reputation past and future.*

The Plaintiff has relied on the case of ***P. MACHIRA V WANGETHI MWANGI & ANOTHER, HCCC NO. 1709 /1996*** where an award of KShs.8 million was made for general damages and KShs.2 million as aggravated damages and that of ***DANIEL MUSINGA V NATION NEWSPAPERS LIMITED, HCCC NO. 102 OF 2000*** where an award of KShs.10 million was made.

The Defendant did not address the court on the quantum of damages. In my view, the amount quoted by the Plaintiff is too much on the higher side.

Considering the circumstances of this case, and the Plaintiff’s station in life, I would have awarded a sum of KShs.2 million if the Plaintiff had succeeded but as I had indicated earlier, the case is hereby dismissed with costs to the defendant.

Dated, signed and delivered at Nairobi this 20th day of April, 2017.

.....

L NJUGUNA

JUDGE

In the presence of:

..... *for the Plaintiff*

..... *for the Defendant*