



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 430 OF 2010

PHILIP KISIA PLAINTIFF

VERSUS

NATION MEDIA GROUP LIMITED 1ST DEFENDANT

OLIVER MATHENGE 2ND DEFENDANT

JUDGMENT

1. The plaintiff has sued the defendant seeking damages for defamation. It is alleged that on the 20th February, 2010, the 2nd defendant falsely and maliciously wrote and the 1st defendant published on page 7 of the physical edition and on the online edition of her publication, “the Daily Nation” an article of and concerning the plaintiff titled “PRICE OF NEW BURIAL GROUND INFLATED”.

2. The article is said to have read as follows:

“The land acquired by the Nairobi City Council for its new cemetery in Mavoko was over –valued by more than Sh.250 Million, an audit by the government shows.

The controller and auditor general has thus recommended that the money be recovered from the concerned parties and officers from the Nairobi City Council and the Ministry of Local Government involved be disciplined.

This comes just days after the Kenya Anti-Corruption Commission (KACC) said that investigations had revealed that there was a conspiracy to embezzle over Sh.270 Million from the government during the tendering of the land.

The auditor general’s report blames Local Government Permanent Secretary Sammy Kirui, former Town Clerk John Gakuo, his successor Philip Kisia and former deputy Town Clerk Nelson Otido as the most culpable officers.

The report indicates that the tender for the land was awarded to MM/S Naen Rech Ltd as the sixth lowest bidder at a price of 283.2 million.

“However, the real value of the 120 acre at current market price is Sh.24 million,” says the audit report.

The local government ministry paid two cheques for the land – Sh.175 million on June 30, 2008 and Sh.108 million on January 15, 2009. It also paid Shs.5.6 million to the Kenya Revenue

Authority and Sh.2 million as professional advocate's fees.

Mr. Henry Musyoki Kilonzi, who was registered as the owner of the land, is said to have received Sh.107.5 million while the rest of the money was "disbursed to other parties."

3. It was alleged that the words were in their natural and ordinary meaning meant and were understood to mean that the auditor general undertook an investigation and published an audit report indicting the plaintiff for unprofessional conduct and behaviour; that the plaintiff engaged, connived and conspired with others to defraud the residents of Nairobi; that the plaintiff was engaged in and directly involved in a plot to defraud the government of Kenya; that the plaintiff engaged in corporate malfeasance, embezzlement and was a beneficiary of bribery; that the plaintiff engaged in corrupt practices and is a corrupt person; that the plaintiff has no respect for the dignity of the dead; that the plaintiff is and has been engaging in immoral and unethical practices and that the plaintiff is unfit and unqualified to hold the office of Town Clerk to the City Council of Nairobi.

4. It was stated that the article still remains in the 1st defendant's online edition archives as at the date the suit was filed and continues to injure the plaintiff's reputation and character on a worldwide scale while the defendants continue to profit from the advertisement on the web page on which the article appears. The plaintiff alleged that the publication has occasioned him public scandal, ridicule, odium and contempt and his reputation has been lowered in the estimation of right thinking persons in the society.

5. That the article is untrue, totally misleading and is actuated by malice for the reasons that; the publication of the article was done without seeking clarification from the plaintiff; that it was published with full knowledge that the plaintiff was not an employee, agent or otherwise associated with the City Council of Nairobi at the material time, the article was published with the full knowledge that the contents were libelous and proceeding with the publication of the libel having established that the prospect material advantage to the defendants in publishing the said words outweighed the prospect of material loss to the plaintiff.

6. The plaintiff sought general damages for defamation, aggravated and/or exemplary damages, a mandatory injunction compelling the defendants to immediately expunge the article from the archives of the online edition of the publication, a permanent injunction restraining the defendants from further publishing the said or similar libel about the plaintiff, a complete and unequivocal withdrawal, retraction and apology by way of a publication in the 1st defendant's official website www.nation.co.ke in a page and column of equal prominence, interest and costs.

7. In his testimony, the plaintiff told the court that his name was not mentioned in the report by the parliamentary Committee dated January, 2010 (P. Exhibit 4) and that he was never summoned as one of the witnesses by the said Committee. He stated that the article was an issue of concern to his family and friends as well as his late mother. He stated that the report talked about a conspiracy to defraud the government but that his name did not feature in the report. He further testified that he was not an employee of the City Council of Nairobi by the time the issue arose. He however said that he had no evidence to prove that the online publication is still in existence. He stated that his business went down due to the publication.

8. Obadia Otieno Abuga (PW2) confirmed that the plaintiff was not the Town Clerk by the time the procurement was done but that Mr. Gakuo was. He stated that the article tainted the plaintiff's reputation since he was not in office at the time of the alleged scam.

9. In their statement of defence, the defendants denied the plaintiff's claim. In particular, it was denied that the publication was actuated by malice and that the words were capable of bearing the meanings as pleaded by the plaintiff. That in so far as the words in their natural meaning or otherwise, the same consists of expression of opinion and were fair comments and fair information upon the facts which are matters of public interest and were so published under a sense of public duty. The defendants further denied having received a demand and or notice of intention to sue. They averred that they have neither made an apology nor tendered any or any offer of amends due to the matters aforesaid.

10. I have considered the pleadings, the evidence on record and the submissions by the learned counsels. The tort of defamation has been well described in *Whitfield on Tort* 8th Edn as the publication of a statement which tends to lower a person in the estimation of right thinking members of society generally, or which tends to make them shun or avoid that person. In the Halsbury's Laws of England, a defamatory statement is defined thus:

“A defamatory statement is a statement which tends to lower a person in the estimation of right thinking members of the society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey an imputation on him disparaging or injurious to him in his office, calling, trade or business.”

11. The essentials of a defamation case were discussed in the case of *WYCLIFFE A SWANYA V TOYOTA EAST AFRICA LIMITED & ANOTHER*, (2009) eKLR as follows:

“For purposes of deciding a case of defamation, the court is called upon to consider the essentials of the tort generally and to see whether these essentials have been established or proved. It is common ground that in a suit founded on defamation the plaintiff must prove:

- 1. That the matter of which the plaintiff complains is defamatory in character.***
- 2. That the defamatory statement or utterance was published by the defendants.***
- 3. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.***
- 4. That it was published maliciously.”***

12. It therefore follows that the statement must have been published of and concerning the plaintiff as it was held in the case of *KNUPFFER V LONDON EXPRESS NEWSPAPER LTD*, (1944) 1 ALL ER 495 that words are not actionable as defamatory unless they are published of and concerning the plaintiff. The words must also have been published by the defendant. These are facts that have not been contested and I will not belabor on them.

13. On whether the article was defamatory or not, the plaintiff has submitted that the article was defamatory in that the contents were not true. I have carefully read the contents of the article complained of and it reads in part:

“The Auditor General’s report blames Local Government Permanent Secretary, Samuel Kirui, former Town Clerk John Gakuo, his successor Philip Kisia and former Deputy Town Clerk Nelson Otido as the most culpable officers.”

The plaintiff in his evidence testified that he was not the Town Clerk at the material time and he was not even working for the City Council of Nairobi then. It was his further evidence that the report by the Departmental Committee on Local Authorities dated January, 2010 did not mention his name as having been involved in the cemetery land scam. I have perused through the said article which was produced as exhibit 4 and also the report by the Kenya Anti Corruption Commission dated 8th March, 2010 and I have noted that indeed the plaintiff's name has not been mentioned in the two reports as having been involved in the scam.

14. Though the defendants have claimed that the article was printed as a matter of expression of opinion, and that they were matters of fair comment and fair information upon facts which are matters of public interest, the circumstances of this case cannot afford them the defences of justification, privilege or fair comment for the reason that they ought to have established whether the article was true or false where it related to the plaintiff herein. There is no doubt that the matters raised in the article were of great public interest, but that did not give the defendants a right to publish falsehoods about the plaintiff.

15. In his evidence, the plaintiff testified that the defendant did not give him a right of reply and neither did they contact him for verification. In the case of **DAILY NATION V MUKUNDI & ANOR, (1975) EA 311**, the Court of Appeal for East Africa held that the defendant publisher had a duty to see whether the items contained seditious or libelous matters and that failure to do so earned a long risk on the defendant. On the defence of qualified privilege the Court of Appeal in the case of **MWANGI KIUNJURI V WANGETHI MWANGI & 2 ORS, [2016] eKLR** had this to say:

“The House of Lords in Reynolds V Times Newspapers Ltd, [2001] 2 Ac 127 created qualified privilege for publications to the general public on matters of public concern. This privilege is founded on duty and interest; its very existence requires that the defendant has adhered to standards of responsible journalism and this involves matters like the nature of steps taken to verify the information and whether comment was sought from the plaintiff. The mere fact that the defendant honestly believes in the truth of what he says, does not of itself provide a basis for the privilege [See Blackshaw V Lord, (1984) 1QB 1CA at 27. It is trite that if Reynolds’ privilege is part of a defendant’s case, he must demonstrate that he complied with the standards of responsible journalism.

In the Australia case of Lange V Australian Broadcasting Corporation, (1997) 189 CLR 520, it was held that for the privilege to apply “reasonable conduct” by the publisher must be proved and reasonable conduct includes steps to verify the information and the opportunity for response by the claimant.”

16. As to whether there was malice, it is trite that malice can be inferred. In the persuasive case of **PHINEAS NYAGAH V GITOBU IMANNYARA, [2013] eKLR**, Odunga, J, held that:

“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 ... malice may also be inferred from the relations between the parties... The failure to inquire in the facts is a fact from which inference of malice may properly be drawn.”

There is no evidence adduced to the effect that there was bad blood between the plaintiff and the defendants herein. But can this court infer malice? From the case of ***Phineah Nyaga*** quoted above, it is possible for a court to infer malice. First, the report by Kenya Anti Corruption Commission and the one by the departmental committee on local authorities are public documents which could easily be accessible to the defendants for verification and even if they were not, the defendants ought to have contacted the plaintiff for clarification of facts before publishing the article. In the said circumstances, and for failure to inquire into the facts, I arrive at the inference of malice on the part of the defendants.

17. Turning to quantum of damages, the rationale behind awarding of damages in defamation actions was discussed by the Court of Appeal in the case **JOHNSON EVANS GICHERU V ANDREW MORTON & ANOR, [2005] eKLR** in which the court held:

“in actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of restitution integrum has necessarily in even the most highly subjective element, such actions involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, but in case the libel driven underground emerges from its looking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a bystander of the plaintiff’s loss of the charges.”

18. The plaintiff’s advocates wrote a demand letter to the defendants that required them to apologize and retract the publication. The defendants did not respond to the letter or make good the plaintiff’s claim. Having failed to retract or apologize the plaintiff is not only entitled to general damages for defamation but to exemplary damages as well. In the case of **JOHN V MG LTD, [1996] 1 ALL ER 35** the court held:

“The successful plaintiff in a defamation action is entitled to recover the general compensatory damages such sum as will compensate him for the wrong he has suffered. That must compensate him for damages to his reputation, vindicate his name and take into account the distress, hurt, humiliation which the defamatory publication caused...”

Exemplary damages on the other hand goes beyond compensation and are meant to ‘punish’ the defendant. Aggravated damages will be ordered against a defendant who acts out of improper motives where it is attracted by malice, insistence on a flurry of defence of justification or failure to apologize.

19. In awarding damages this court draws considerable support in the guidelines set out in the case of ***JONES V POLLARD, [1997] EMLR 233-243*** where a checklist in libel actions were 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 of the plaintiff’s feelings not only from the prominence itself but from the defendant’s conduct thereafter but upto 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.*

20. The plaintiff has asked the court to award a sum of KShs.8 million and has relied on the cases of ***DANIEL MUSINGA T/A MUSINGA & CO ADVOCATES*** where a sum of KShs.10 million was awarded. They have also relied on the case of ***Johnson Evan Gicheru, [supra]***, where a sum of KShs.6 million was awarded and that of ***KALYA & ANOR V STANDARD LTD, [2002] 2KLR*** where a sum of KShs.9 million and KShs.2 million was awarded for general and aggravated damages respectively.

21. I have considered the rival submissions on quantum of damages. All considered an award of KShs.5 million is made on account of general damages and a further sum of KSh.1 million for aggravated damages. In view of the age of the matter and the circumstances under which the article was published, this court decline to grant the other prayers sought in the plaint. Costs of the suit are awarded to the plaintiff.

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

.....

L. NJUGUNA

JUDGE