



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 72 OF 2014

TNN PLAINTIFF

VERSUS

THE STAR PUBLICATIONS LTD DEFENDANT

JUDGMENT

The plaintiff in this case, **TNN**, filed suit by way of an amended complaint dated 30th April, 2014 against the defendant, **RADIO AFRICA LTD**, seeking general damages for violation of the plaintiff's statutory protection as child and the plaintiff's right to privacy, exemplary or punitive damages, an apology published in the same space and publicity as the offending article, an order for the removal of the offending article from the online edition of the defendant's publication within such time as the court shall order, and the costs of the suit.

The plaintiff alleges that at all material times to this suit, he was a child within the meaning of the Children's Act, 2001. That in the year 2012, proceedings were instituted at the Nakuru Law Courts in which the plaintiff, then a child, was involved. The said proceedings being *Nakuru Chief Magistrate's Criminal Case No. 1451/2012, R V Ann Wairimu Njogu & Another*, were consequently dismissed and the plaintiff and his co-accused acquitted under **section 210 of the Criminal Procedure Code** for failure of the prosecution to establish a prima facie case against them that would have warranted their placement on their defence.

The plaintiff avers that in total violation of **section 76 (5) of the Children's Act, 2001**, the defendant covered the details of the plaintiff with abundance which coverage included but was not limited to:

- a) *The child's name;*
- b) *The child's photo; and*
- c) *The names and photo of the child's parent.*

The defendant is said to have violated the law in, among others, the following issues of its publication:

- a) *August 25/26 2012, under the story: "Why Ann Njogu and I fell out – father";*
- b) *November 3/4, 2012, under the story: "Ann Njogu's effort to lock media out of court flops";*
- c) *Wednesday, February 6, 2013, under the story: "Court acquits Njogu in her father's assault case".*

The plaintiff further avers that these coverage and reports were in violation of his statutory protection and violation of his right to privacy and that the reports were carried out by the defendant in spite of orders of court prohibiting the same. As a result of the defendant's illegal acts against the plaintiff, he has suffered loss and damage.

The defendant filed defence on 9th July, 2014 and pleaded that there were no violations as alleged by the plaintiff. The defendant averred that the plaintiff's entire claim in so far as the same is based upon the articles published by the defendant on 25th and 26th August, 2012, 3rd and 4th November, 2012 and 6th February, 2013, is barred by limitation, the same not having been instituted within 12 months of the respective dates of the publication.

Further, and in the alternative, the defendant pleaded that the article and words published on 25th and 26th August, 2012, 3rd and 4th November, 2012 and 6th February, 2013, were true in substance and in fact.

That an apology was published by the defendant on 2nd July, 2013 following directions of the court in Criminal Case No. 1451/2012 for an apology to be published by the defendant to the court and the accused persons in the said case in respect of the publication of 3rd November, 2012.

Further or in the alternative, the defendant pleaded that the said articles were a fair and accurate report of the proceedings heard on 24th August, 2012, 2nd November, 2012 and 4th February, 2013 before the Chief Magistrate's court, a court exercising judicial authority within Kenya and the same was published without any malice towards the plaintiff and are therefore absolutely privileged. That the publication was of public benefit and is therefore privileged. It is further pleaded that the said articles and words referred to in the amended plaint are not defamatory on the face of it. In view of the foregoing, the defendant avers that the suit discloses no or a reasonable cause of action, is scandalous, frivolous, vexatious and is otherwise an abuse of the process of the court.

In his submissions, counsel for the plaintiff identified two issues for determination as follows:

*a) Whether the plaintiff's rights under **section 76 (5) of the Children's Act, 2001** were violated by the defendant.*

b) Whether the plaintiff is entitled to the prayers sought.

On the first issue, it was submitted that in dealing with any aspect of children's rights and interest, regard must be placed on the best interest principle of the child, the first starting point being **article 3** of the convention on the rights of the child and **section 4 of the Children's Act No. 8 of 2001** in which the court has held that the "best interests or paramountcy" principle creates a right that is independent and extends beyond the recognition of other children's rights in the constitution.

That the importance of the best interest principle cannot be gainsaid, particularly when as here, one is dealing with children exposed to the criminal justice system. That an important fact in realizing the reformative gains of child justice is for child offenders to be afforded an appropriate opportunity to be reinstated into the society. To illustrate the above point, counsel for the plaintiff quoted a statement by David Ritcheson referring to effect of negative publicity of information about him after he was charged as a juvenile offender thus:

"It was just really bad to hold your head up even to walk outside with everyone almost in the world knowing what happened ... I shouldn't care about what people think or say. It's just the fact that everyone knows am the kid."

It was submitted that according to *[Lisa et al]* when the names of the child offender and other identifying information appear in the media, it can exacerbate trauma, complicate recovery, discourage future disclosure and inhibit co-operation with authorities for the children involved. That while media publicity is likely to have a negative effect on all victims, children have the capacity for feelings of shame and

embarrassment and that they can feel shame just by guessing or assuming that others are evaluating them negatively and that they are more likely to develop shame in the wake of traumatic experiences because their views of themselves are still forming.

It was further submitted that, the effects of negative publicity may be particularly hard on them as children because their self concept is so dependent upon others and in this case, particularly peers. To this, the stigma of abuse or victimization could lead to avoidance and rejection by child peers which in turn is associated with relationship loneliness, impaired school performance and the greater likelihood of future social problems that can persist into adulthood.

That the convention on the rights of child which Kenya ratified provides under **article 39** for the protection of children's rights to privacy including during all stages of the criminal justice system. That in appreciating that children are individual right bearers rather than mere extensions of their parents. Counsel for the plaintiff cited the constitutional court of South Africa in the case of **S V M** [Centre for Child Law as Amicus Curiae], where by a majority, the court endorsed the said position.

In the above case, the court clearly stated, individually and collectively that all children have the right to express themselves as independent social beings to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood.

It was further submitted that the rationale for protecting the privacy of children through publication is in recognizing that they are immature and they need to be protected from the harmful effects of negative publications so that their choices of rehabilitation are maximized. That when an individual is publicly exposed to criminal investigations and prosecution, it is almost invariable that doubt will be thrown upon the good opinion his or her peers may have of him or her and when it comes to minors the damage that the negative publicity causes is more severe than when it's an adult because children are not fully equipped with the mechanisms and machinery to deal with the effects.

That according to a survey conducted by McBride, 2004 and Steele, 2002, the media personalities and community are clearly aware of the potential harm on minors in disclosing their identity especially when reporting on crime. This forms part of the ethical codes and guidelines to increase journalists sensitivity in cases involving publicity of child offenders in the code of conduct for the practice of journalism in Kenya by the Media Council of Kenya and though most readers of newspapers may not know the child offenders but only those persons that the child has constant interaction with on a daily basis and who the child is most worried about them finding out. Those persons include but not limited to family associates, neighbours, classmates at school and school personnel and it's these very persons that will be able to identify them when the information is publicized. In addition, to these people the other determining factor is the office or stature of the parent which determines the number of persons who could easily identify the child from the publication and in the case herein, the plaintiff's mother being a renowned human rights activist, the publicity is bound to attract much interest from the general public because she is a public figure.

The plaintiff submitted that it was the responsibility of the defendant to ensure they adhere to the principles of **section 76 (5) of the Children's Act** and that the publicity that the mother is bound to get is not visited upon the minor. That the defendant failed to consider the effects of the publication upon the minor by only considering the publicity that the case is bound to get based on the position held by the plaintiff's mother, that even without direct evidence of its negative effect, media organization and public policy in general recognize and accept the potential for negative impact on victims from media exposure as it is reflected in the laws and practices protecting juvenile offenders through negative media personality.

On whether the plaintiff is entitled to the prayers sought, it was submitted that the plaintiff has exhibited before the court that indeed his statutory protection has been violated by the defendant and as such, based on national and global platform, the law presumes that the plaintiff has indeed suffered harm by the said

actions. That the article as published caused the plaintiff ridicule and to be shunned and avoided by his peers and colleagues in school and at home.

That a statutory course of action for violation of rights is actionable without proof of damage as it recognizes that the effects of violations are often non financial in consequence or may result in distress, humiliation and insult that fall short of provable damage and as such it would allow the court to award a wide range of remedies to redress the violation such as an order requiring the defendant to apologize to the plaintiff.

Submitting on **article 33 of the Constitution** the court was told that though the article guarantees freedom of expression, there is a duty of care on dignity and reputation of others.

On the part of the defendant, it was submitted that the plaintiff's claim does not disclose any reasonable cause of action in that the plaintiff's cause of action lie in libel and that the same has been disguised as a violation of a child's right. The court was told that the penalty for contravention of the provisions of **section 76 (5)** is set out in **section 76 (6)** and that to remedy the violation complained of in the subject publication, the trial court delivered a ruling on 4th February, 2013 directing the defendant to render an apology to the court, the plaintiff and her mother within 17 days. That the defendant and other media houses were warned to adhere to and observe court orders in future. That the trial court had the option of recommending the prosecution of the defendant but it did not do so in view of the explanation given by the defendant and instead it ordered the publication of an apology as a satisfactory remedy to the violation.

The court was further told that as a result of the above directive, the defendant published the apology on 2nd July, 2013 and in compliance with the directive of the trial court in the manner it did sufficiently addressed the contravention of the plaintiff's rights in respect of proceedings in Criminal Case No. 1451/2012 and that any injury that may have been suffered by the plaintiff is one in respect of which there is no civil remedy. That the *maxim damnun sine injuria* applies in this case, with the result that the plaintiff's claim for violation of his rights as a minor discloses no reasonable course of action. To support this contention, counsel for the defendant relied on the case of **JAMES OLE KIYAPI V DOL, (2016) eKLR** where the Court of Appeal reiterated that one cannot be held culpable for the loss of another in the absence of any wrong doing. In addition to the case of **Ole Kiyapi, [supra]**, the defendant also cited the case of **PETER WAMBUGU V JUSTUS WERU AND 2 OTHERS, (2001) eKLR** which supports the same principle of law as stated above. That in the absence of a conviction in terms of **section 76 (6) of the Children's Act**, there can be no reasonable cause of action for the claimed violation of the plaintiff's rights as a child.

Submitting on limitation, the court was told that despite the amendment of the plaint on 30th April, 2014 in respect of the claim for general damages, the plaintiff's claim in totality is still one in libel. That the libelous articles having been published on 25th and 26th August, 2012, 3rd and 4th November, 2012 and on 6th February, 2013, and the suit herein having been filed on 31st March, 2014, after the application of all the three articles, twelve months had expired and therefore, the claim in libel is time barred. He quoted the provisions of **section 4 (2) of the Limitations of Actions Act Cap 22 of the Laws of Kenya** which provide that an action for libel may not be brought after the end of twelve months from the date of the publication. In support of this contention the defendant cited the cases of **DR LUCAS NDUNGU V ROYAL MEDIA SERVICES LTD & ANOR, (2014) eKLR** where the court dismissed a claim filed out of time and the case of **NZOIA SUGAR CO LTD V COLLINS FUNGUTUTI, CA NO. 7/1988 KLR 399** in which the court observed:

"A judge cannot lawfully award damages for defendants in an action brought 12 months after the course of action arose. ..."

On the defences of justification and absolute privilege, it was submitted that the words published in the articles were true in substance and in fact. That there was no claim by the plaintiff of any falsity in the publication and in the circumstances, there cannot be any defamatory imputation against the plaintiff in so

far as the publications are concerned. The case of **KAGWIRIA MUTWIRI & ANOR V STANDARD LTD & 3 ORS, (2015) eKLR** was relied on to support that contention.

It was further submitted that the words in the articles were a fair and accurate report of proceedings in Criminal Case No. 1451/2012 and what transpired in respect thereof on 24th August, 2012, 2nd November, 2012 and 4th February, 2013. That the plaintiff did not allege or prove any inaccuracies or malice in the three publications. That the defence of absolute privilege was taken and evidence in respect thereof tendered, reliance was had on ***section 6 of the Defamation Act*** and the case of **HON GEORGE KARIUKI V NAIROBI STAR PUBLICATION LTD & ANOR, HCCC NO 470/2010 [UR]** in which a claim in libel in respect of a publication concerning court proceedings was dismissed and the defence of absolute privilege upheld.

The court was also told that another aspect that removes the three publications from the scope of liability be it in respect to the claim of violation of a child's right or libel, is the absence of malice on the part of the defendant. That malice is a key ingredient for liability to warrant the award of general, exemplary or punitive damages. The case of **PHINEAS NYAGA V HON GITOBU IMANYARA, 2013, eKLR** was relied on. That there was no malice on the part of the defendant and it was evident that there was no way whatsoever a reasonable person would have identified plaintiff as a minor and as soon as this became known, an apology was given to the plaintiff and his mother.

The court has duly considered the evidence on record and the submissions by the learned counsels. Parties herein filed separate list of issues but in my view, the following are issues for determination:

1. *Whether the plaintiff was at all material times to this suit a minor;*
2. *Whether the plaintiff's claim and remedies fall within civil law or criminal law;*
3. *Whether the plaintiff's claim raises a reasonable course of action against the defendant;*
4. *Whether by publishing the material in the articles in question the defendant violated the provisions of the Children's Act;*
5. *Whether the plaintiff is entitled to the remedies sought; and*
6. *Who should bear the costs of the suit.*

The first issue is fairly straightforward. In the plaintiff's list of documents is annexed a copy of the birth certificate for TNN, the plaintiff herein. The same clearly shows that he was born on 23rd July, 1995. Though a copy of the charge sheet in Criminal Case No. 1451/2012 [*R v Ann Wairimu Njogu & Njau Njogu*] is not exhibited, the record shows that the matter was first in court on 30th April, 2012 but the two accused persons were absent and it's not until 12th July, 2012 when they pleaded to the charge. Going by that date, as the date they were arraigned in court, the plaintiff by then had not attained the age of 18 years and therefore still a minor in accordance with the Laws of Kenya that define a minor as a person under the age of 18 years.

As to whether the plaintiff's claim fall within the civil or criminal law, it is clear that under the provision of ***section 76 (5) of the Children's Act***, a person who contravenes that provision commits a criminal offence and becomes liable to a fine not exceeding one hundred thousand shillings or imprisonment for a term not exceeding three months or to both.

Though the defendant has argued that, to remedy the violation complained of in the subject publications, the trial court directed the defendant to render an apology to the court and to the plaintiff and to that extent the trial court's order on publication of an apology was a satisfactory remedy on the violation, this court begs to differ with that line of argument. This is because the criminal process of determining whether an accused person is guilty or not was not followed and therefore, the learned magistrate's order

could not have amounted to a conviction for the offence under **section 76 (5) of the Children's Act**. The defendant cannot therefore successfully argue that the apology was a satisfactory remedy under **section 76 (5)**. After all the said section provides for the remedies if one is found guilty of contravening the aforesaid section.

Having said that, this court forms the view that the cause of action for the plaintiff herein lies in both civil and criminal law and he is at liberty to pursue both or either of them. If he opts for the criminal process, the burden of proof is beyond reasonable doubt while under the civil law, the burden is slightly lower and it's on a balance of probability.

The other issue is whether by publishing the article, the defendant violated the provisions of the **Children's Act section 76 (5)**. I have carefully perused the said section. It is not in dispute that the plaintiff herein was charged with a criminal offence. It is also not in dispute that at the material time, he was a minor. The defendant has not denied that it published in the Star Newspaper the said proceedings. The plaintiff's photo appears in one of the articles. The only issue they have raised is that they did not know the age of the plaintiff at the material time.

As to whether the plaintiff's claim raises a reasonable cause of action, the defendant has submitted that the plaintiff's claim as pleaded lie in libel and that the same has been disguised as a violation of a child's right and using that reasoning, they have further submitted that the claim in defamation is statute time barred under **section 4 (2) of the Limitations of Actions Act Cap 22 Laws of Kenya**. In support of his contention, the defendants have relied on the case of **DR LUCAS NDUNGU V ROYAL MEDIA SERVICES LTD & ANOR, [2014] eKLR**, where the court dismissed a claim filed out of time. In this regard it is noted that the plaintiff amended the plaint on 30th April, 2014. I have perused the record and I did not see an amended defence on record. In the amended plaint, the plaintiff has sought general damages for the violation of the plaintiff's statutory protection as a child and the right to privacy which was replaced with damages for defamation. This therefore means that the cause of action was substituted and the cause of action in defamation was completely abandoned. In the circumstances, the defendant's submissions on limitation of action based on defamation and any other submissions relating to that cause of action is superfluous. I therefore find and hold that the plaintiff has a reasonable cause of action based on violation of his rights under the Children's Act and consequently that entitles him to damages for the said breach.

On damages, the plaintiff testified that he received public ridicule from his friends and teachers who asked him how he could be charged with assaulting his grandfather to an extent that his friends' parents refer to him as bad company. That he lost confidence in himself to an extent that he went through depression as he was shunned by his friends. His parents took him for counseling which helped him to come out of the depression and to boost his image.

It was also his evidence that as a result of the publication he could not study here in Kenya and had to travel abroad where he obtained his degree. That after the case his academic performance went down and so were extra curricular activities that he was involved in. This evidence was corroborated by his mother who testified as PW 2.

The plaintiff produced a psychological counseling report marked as exhibit 7 prepared by Jelieth Karuri (Mrs) detailing the treatment and psycho-social support that was accorded to him. In the report, she states that the plaintiff herein underwent trauma and depression from his experience with the court case and the publicity that followed. She stated that she took him through several sessions of counseling, therapy and psycho-social support to get him to regain his confidence, belief in self and get out of the depressing thoughts and self hatred, self doubt and resentment. She has remarked that though he has made progress, he does not appear to have succeeded fully in shaking off the negative effects from the adverse experience.

This court has considered the contents of the report aforesaid and has noted the remarks therein. No doubt, the plaintiff herein was affected by the publication. As rightly submitted by the plaintiff this case is peculiar and not many of its kind have been filed in our courts.

But even as this court appreciates that the plaintiff was affected by the publication, the court hastens to add that the effect the publication had was exaggerated by the plaintiff. I am not persuaded by the evidence that he had to study abroad because he could not socialize here in Kenya. Secondly, looking at the article as published, the contents therein are true. The plaintiff did not allege at any point in time that the contents are not true. Am aware that the court is not dealing with a defamatory suit, but it is important for this court to make that observation. In fact the article did not portray the plaintiff in negative light and he admitted as much in cross examination. The only problem is the publicity the article created which had an effect on the plaintiff and which in my opinion was minimal. From the evidence adduced by the plaintiff a lot of damage that he may have suffered was as a result of the criminal case and not much from the publication.

The court has seriously considered the defence mounted by the defendant in this claim and it has emerged from the evidence and also from the record that the plaintiff had a big body at the material time and was weighing 75 kgs. He was 17 years of age and approaching the age of the majority and with his physique as noted in the photograph, am persuaded by the defendant's contention that one could have been mistaken into believing that the plaintiff was 18 years and above. Infact when the same was raised in court, Mr Musyoka advocate who was watching brief for the complianant has been recorded as having stated:

“There is a possibility that the media may not have known the age of the 2nd offender.”

The court has also noted that the defendant publicized an apology after the issue was raised in court. Considering the evidence and the circumstances of this case, I find that the plaintiff is only entitled to nominal damages for the negative effect the publication could have had on him. In my view, a sum of KShs.100,000/- will suffice. The plaintiff will also get the costs of the suit.

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

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L. NJUGUNA

JUDGE

In the presence of:

..... **for the Plaintiff**

..... **for the Defendant**