



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 225 OF 2006

WANJA GICHURA WAMBUGU

t/a WAMBUGU & COMPANY ADVOCATES.....PLAINTIFF

- V E R S U S -

NATION MEDIA GROUP.....DEFENDANT

JUDGEMENT

1) Duncan Manuel Murigi was on 18.12.1998, involved in a grisly Road accident and as a consequence he suffered severe injuries. He lost all his upper and lower limbs, having been crushed by a train while he was walking within Thika Railway Goods shed. He filed an action before this court seeking for damages against Kenya Railways through his father, Ngori Mwasa vide Nairobi H.C.C.C no. 2442 of 1999. He was represented in the aforesaid suit by Wanja Gichura Wambugu T/A Wambugu & Co. Advocates. The aforesaid suit gave rise to the judgment delivered on 22nd May 2003 whereof Duncan Murigi was awarded in the sum of kshs.5,229,946/=. The parties later reviewed the judgment by agreement to ksh.18,542,756/=. The aforesaid award later became a subject of protracted proceedings before this court namely: Nairobi H.c Misc. Appli. No. 1148 of 2003 in which Duncan Murigi sought for *inter alia* an order of mandamus to compel Kenya Railways Corporation, the judgment debtor in Nairobi H.C.C.C no. 2442 of 1999 to settle the decretal sum. The case before this court is a case of libel by Wanja Gichura Wambugu t/a W. G. Wambugu & Co. Advocates, who took out these proceedings for defamation against Nation Media Group Ltd, the defendant herein, in respect of two successive publications made by the defendant firstly its Daily Nation newspaper on 12th July 2005 and secondly, through its radio station known as "Easy Fm". On 2nd September 2006. At the trial of this case, the plaintiff testified to prove her case. The defendant did not summon witnesses to adduce evidence but instead confined itself to cross-examination of the plaintiff. The plaintiff gave oral evidence and further filed and produced various documents which were admitted as exhibits in evidence.

2) The plaintiff in the present case set out in paragraphs 7 and 8 the publications the defendant is alleged to have published and circulated. The aforesaid publications are reproduced as follows:

"Agonising wait for 18m court award"

Seven years after a goods train ran over Duncan Murigi, crushing all his limbs to a pulp the family is still awaiting a ksh.18 million compensation claim awarded by the High Court in 2003".....

A lawyer who represented Duncan's family could neither confirm or deny if his firm had received the kshs.7million due to his client, saying that there was an application still pending in

court

“With or without the prosthetic limbs, leading a normal life is challenging for him.

Duncan needs a regular change of prosthetic as he grows because he keeps outgrowing both the lower and upper limbs depending on his body weight. This is why his father is so desperate.

That is why I have made special appeal to the lawyer that my son needs a special wheelchair to help him move around on his own and a special toilet. Not the pit latrine he struggles to use back home in Mtuu,” Mr. Mwasia said.

These, he says could be obtained if the compensation money were paid up to the family in full.”

“Ngovi: Kuongea ukweli malawyers wametusumbua sana kwanza mimi karibu hata nigongwe na gari hapa, naenda kwa mtu ananiambia nitoke nje niende nikafanye appointment ya kuingia kwake.

Speaker: Ni wao wako na pesa zako?

Ngovi: Na ukifikiria huyo mtu mimi ndiye nimemwandika

kazi niko kwake secretary ananiambia nitoke nikafanye appointment.

Speaker: Mr. Ngovi will be giving us details on what happened

with the court case when they sued for compensation. We’ve got a very distressing story oh my God. Mr. Ngovi are in the studio, habari zenu?

Ngovi & Dan: Mzuri.

Speaker: In 1998 unfortunately Duncan had an accident with

one of the train belonging to the Kenya Railways and consequently his arms were cut off, his legs were cut off. He’s 17 years old and his parents have to pay for his upkeep and everything. So they sued what happened, who did you sue, who was your lawyer.

Ngovi: G. Wambugu, G. W. Wambugu ndiye tulikuwa na yeye

kutoka 1999 mpaka mwezi wa November mwaka ulioisha.

Speaker: Mlishinda hii case lini?....

Nimeona uko na barua kutoka Kenya Railways wamesema ati wamelipaa wakili milioni saba (7 million)

Ngovi: Wamelipa.

Speaker: 7.3 million pesa iko wapi?

Ngovi: hatujui, hatujui ziko na nani, hata saa hii Wambugu akiwa haujui tataishi nani kwa vile sisi tunajuanga wambugu kwa vile hata hii cheque ilipeyanwa milioni saba (7m) ilitoka kwa wambugu kwa hivyo hizi zingine hatujui ziko wapi. Na Wahome akatwambia Duncan amewekewa mia saba nitakuwa mimi kwanza nitakuwa nikikula faida. Akaniambia na hanipei barua lakini kuna baura hapa alikuwa amwandina mia saba nimekewe tano sijawai ona ikiwekwa dani hata wa leo na saa hi mwaka unaenda kuisha na koti bado case hajaisha.”

3) It is the averment of the plaintiff that the aforementioned publications are defamatory to her.

4) The defendant admits the publication of the words but denies that the publications are defamatory and instead sought for the suit to be dismissed.

5) When the suit came up for hearing, the plaintiff testified before closing her case. The defendant opted to close its case without summoning witnesses in support of its defence. At the close of evidence this court invited learned counsels to file and exchange written submissions. They were also invited to appear and make oral highlights. I have considered the evidence presented by the plaintiff and the rival written and oral submissions.

6) The defendant has largely admitted making the two publications.

The first is in the print media and the second one is by electronic media. There are therefore two issues which should be determined in this judgment. The first issue is whether or not the aforesaid publications were defamatory of the plaintiff.

Secondly if the answer to the first issue is in the affirmative, then what is the quantum of damages.

7) The plaintiff has urged this court to find the publication to be defamatory of the plaintiff and proceed to award her damages. The defendant has argued that the publications did not in any way defame the plaintiff.

8) In her testimony Wanja Gichura Wambugu (PW1) told this court that the publication of 12th July 2005 was false. She stated that by the aforesaid date she had successfully concluded the compensatory suit securing her client a favourable judgment of kshs.18 million for the injuries he sustained. She also stated that by then there was an agreement she had executed with the client that ksh.3,919,910/= representing 20% of the award would be paid to her as fees. PW1 further pointed out that by then Kenya Railways Corporation had only paid ksh.5,136,367/70 and since Duncan Murigi was still a minor she held the judgment sum in trust and in compliance with the court order. She further pointed out that she was prompted to take out execution proceedings against the judgement debtor with a view of recovering the balance of the decretal sum. PW1 stated that by then she disbursed to M/s Luis Wahome & Co. Advocates, a firm of advocates instructed to take over the matter from her, a sum of ksh.1,498,000/= in compliance with a court order. The plaintiff also stated that at the time of handing over the matter to the firm of M.s Luis Wahome & Co. The client had not settled in full her fees as per the agreement.

9) According to the plaintiff the defendant's publications were false, untrue, defamatory of her. It is the submission of the plaintiff that the publications in their ordinary meaning was that the plaintiff in her professional capacity as an advocate, caused agony to her helpless client who was in dire need of help. It is also the submission of the plaintiff that the publications in their ordinary meaning were understood to mean that the plaintiff was the cause of or contributed to the agonizing wait for the payment of ksh.18 million court award to her client and that the plaintiff had obtained the said sum of money for and on behalf of her crippled clients and failed to release the same to the client thus causing him further agony and pain. It is also submitted by the plaintiff that the publication created a perception that the plaintiff had committed serious criminal offences of fraud by converting property or funds of a client held in trust to her own personal use. It also depicts her as having betrayed the trust bestowed upon her. In short, the plaintiff argued that the two publications imputes that the plaintiff is a criminal, a thief and a fraudster. PW1 claimed that her character and reputation were seriously defamed.

10) The defendant is of the submission that the publications contained no defamatory words. It is argued that the words are not capable of bearing any of the defamatory meanings set out in the plaint or any defamatory meanings at all. It is also said that the publication being a publication on important matters of justice was made in the public interest which were substantially true.

11) I have carefully considered the rival arguments as to whether or not the publications are defamatory. It is not in dispute that the publication of 12th July 2005, the name of the plaintiff is not stated. In my

humble estimation, I find the publication of 12th July 2005 not defamatory of the plaintiff. The statement does not in any way tend to lower the reputation of the plaintiff in the estimation of right thinking members of society. I have already stated that the publication does not name nor refer to the plaintiff at all. The plaintiff did not deem it fit to plead in her plaint, innuendo meaning, so that this court could ascribe to those words any other meaning than the ordinary and natural meaning. A reading of the article reminds the reader that the victim of the accident is still awaiting for compensation awarded by the High Court. The plaintiff in her evidence confirms that as per that time her client had not been paid by the judgment debtor in full. In some respect, the statement has some truth in it. I agree with the submissions of the defendant that the publication taken in their proper context, a reasonable reader could not have understood the words complained of to mean that the plaintiff had failed to account for the funds received as compensation to the client for the injuries he suffered. It did not impute theft or any criminal offence on the part of the plaintiff. It would appear the article narrates the fate of a boy involved in a grisly train accident and whose quest for compensation has become a nightmare due to the long wait to access compensation. I am satisfied that the first publication of 12th July 2005 was done in good faith by the defendant.

12) On the second publication of 2nd September 2005, the plaintiff Avers that the defendant broadcast in its Easy FM radio defamatory material against her. The plaintiff pointed out that the broadcast was understood to mean that the plaintiff recovered a sum of ksh.7.3 million for her client as compensation but failed to account for the said funds. In this broadcast, the name of the plaintiff is mentioned. With respect, I am convinced that the second publication which is by broadcast imputes that the plaintiff, an advocate and trustee of her client, converted the compensation award held in trust to her own personal use which in itself is a criminal offence under Section 327 of the Penal Code attracting a prison term of 7 years. I am convinced that the broadcast seriously defamed the plaintiff's character and reputation.

13) Having found the defendant liable for defamation for the broadcast due on 2/9/2005, let me now address my mind to the question touching on quantum. The plaintiff has sought for the following reliefs in the amended plaint.

i. General damages

ii. Aggravated and exemplary damages

iii. Permanent injunction.

iv. Costs.

14) The plaintiff proposed to be paid ksh. 8 million as general damages and ksh.4 million for exemplary damages. The defendant proposed that the plaintiff should be paid ksh.400,000/= for general damages. The defendant urged this court not to award exemplary damages because there was no evidence of malice on the part of the defendant. I have considered the authorities submitted by both sides. I have also taken into account the factors to be considered in the assessment of damages. The plaintiff here has been in private practice for over 20 years as an advocate of the High Court. She also had a stint in the State Law Office therefore she is widely known. In **Eric Gor Sungu vs= George Oraro C.A no. 226 of 2011** the court awarded ksh.5 million for general damages.

In the case of **Wangethi Mwangi & Another vs= J.P. Machira eKLR** the court awarded ksh. 8 million as general damages.

There is relative mildness in the case of the plaintiff herein as

opposed to the above cases. I think an award of kshs.3,000,000/= is sufficient for general damages.

15) On exemplary damages, it is on record that the plaintiff immediately called the defendant and pointed out that the publications were extremely injurious and should therefore be retracted. A demand letter was even served but the defendant did not deem it fit to retract the injurious publication. Exemplary damages

can only be awarded if the plaintiff proves that the defendant knew that it was committing a tort or was reckless. It can also be awarded where the court is of the opinion that the award will serve as a punishment to the defendant. In the present case I am convinced there was no malice proved against the defendant. The defendant was merely careless. It did not cross-check the correctness of the facts before publishing. I decline to make an award on aggravated/ exemplary damages.

16) The plaintiff also urged this court to issue an order of permanent injunction. The basis for the prayer is that other media houses have subsequently repeated or republished the statement because no injunctive order was issued earlier. The matter this court is dealing with relates to publication and a broadcast done once. There is no evidence that the defendant repeated those publications. I am not convinced there is need to grant the order.

17) In the end I enter judgment in favour of the plaintiff and as against the defendant as proposed hereinabove. Consequently the plaintiff is awarded ksh.3,000,000/= as general damages for defamation with costs.

Dated, Signed and Delivered in open court this 25th day of May, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant