



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
HIGH COURT CIVIL CASE NO. 463 OF 2003

HON. KOIGI WA WAMWERE.....PLAINTIFF

VERSUS

THE STANDARD LIMITED.....DEFENDANT

JUDGMENT

1. By a plaint dated 20th May, 2003, the Plaintiff sued the defendant for:

- c) General, exemplary and punitive damages for defamation.
- b) Costs of the suit
- c) Any other relief that the honourable court may deem fit and just to grant.

2. The Plaintiff, Hon Koigi Wa Wamwere was at the material time a Member of Parliament for Subukia Constituency and previously a visiting scholar at Columbia University Law School and had lived with his family in Norway for many years as a political exile.

3. The Defendant, the Standard Limited, is a limited liability company incorporated in Kenya and dealing in the business of publication of articles, reports, news analysis and commentaries among other functions involving the dissemination of information in the East African Region but which publications can be accessed worldwide through subscription and via the internet.

4. The Plaintiff's claim against the Defendant is based on the Tort of defamation. It is averred that the Defendant through its publication, the Sunday Standard of 4th May, 2003 defamed the Plaintiff.

5. The Defendant denied the Plaintiff's claim through the statement of defence dated 19th June, 2003. The defendant also denied service of notice to sue and stated that the Plaintiff had consequently waived its right of reply as provided for under Section 7A of the Defamation Act Cap 36 Laws of Kenya.

6. The Plaintiff's case started with the evidence of PW1, Stephen Waititu Kimani, a court clerk who delivered the demand letter to the Defendant. The delivery book was produced as an exhibit. The evidence of this witness was not challenged by way of cross examination.

7. The Plaintiff testified (PW2). He referred the court to the article in question. The article's heading states:

“Koigi risks Norway jail term”. The Plaintiff expressed shock at this heading which he stated had insinuations of criminal behaviour on his part yet he was not aware that the Norway police were looking for him with a view of prosecuting him.

8. The Plaintiff pointed out the parts of the article which made claims that he was receiving a disability allowance in the sum equivalent to Ksh.45,000/= per month from the Norwegian Government when he was not an invalid and had been elected as a member of parliament in Kenya; that the Plaintiff was fined 3,000 Kroner (Ksh.30,000/=) in Norway for reckless driving; that the Plaintiff received a grant from the Norwegian Government to undertake a two year research project in the United States of America when he had no competence to do so and was instead holding political rallies and campaigns in Kenya and that when the Plaintiff became a Member of Parliament he requested for a grant from the Norwegian Government for 6.5 million Kroner for four projects three of which were in his constituency but which request was turned down.

9. The Plaintiff contended that the aforesaid allegations were not true. He further stated that the author of the article in question did not contact him for his side of the story prior to the publication. That he communicated with the Defendant through his advocates asking for a retraction of the story as it was not true but the Defendant did nothing. A demand letter was then written to the Defendant.

10. According to the Plaintiff, the article in question was defamatory, lowered his esteem, reputation and portrayed him as a conman, a fraudster and a criminal yet he was not under any investigation by the Norwegian police. The Plaintiff further stated that his friends who had read the article in question telephoned him asking about the matter. Among the said friends is Kariuki Kiboi (PW3).

11. In his evidence PW3 expressed his surprise at the allegations in the article. PW3 further stated that the allegations made in the article were not good and he telephoned his friend the Plaintiff and asked him to explain the allegations.

12. The Defendant closed its case without calling any witnesses. The parties opted to file written submissions. I have considered the said submission and the authorities cited.

13. The elements of defamation were stated by the Court of Appeal in case of **Wycliffe A Swanya v Toyota East Africa Limited & another Nbi CA No. 70 of 2008** as follows:

“It is common ground that in a suit founded on defamation the plaintiff must prove:-

(i) That the matter of which the plaintiff complains is defamatory in character.

(ii) That the defamatory statement or utterances was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.

(iii) That it was published maliciously.

(iv) In slander subject to certain exceptions that the plaintiff has suffered special damages.”

14. The freedom of expression of the media as guaranteed under Article 33 of the Constitution of Kenya in the bill of right is not absolute. There are limitations set out in Article 34 of the Constitution. The Constitution balances the rights of freedom of expression with the rights and reputation of others. I am persuaded by the case of **Cheserem (Supra)** where it was stated;

“Before I conclude I will try to correct three things. First, the right of a journalist to freedom of speech and expression as guaranteed by the Constitution of Kenya is not absolute and it is not correct for the Respondents to say that, that right cannot be taken from the press. I have already discussed the limitation of the freedom of expression elsewhere. Secondly, it is not sufficient and I think it is dangerous and not good for a journalist to disseminate information

based solely on good faith. He should base the information on factual truth if he expects the law to protect him. Thirdly, it is not correct to say as the Respondents say that; “Where public interest conflicts with private interest, the public interest shall prevail.” This is public interest (versus) private interest in defamation actions and the end result is not always the same. The result can be in favour of the public interest or in favour of the private interest. If there is a substantial risk of grave injustice and the private interest in preventing the publication the Applicant seeks to prevent outweighs the public interest, then the court will declare that private interest prevails over public interest, and from my discussion in this chamber summons dated the 13th March 2000, that is exactly the way I am ending this ruling.”

15. It is not in dispute that the Plaintiff was a Member of Parliament for Subukia Constituency at the material time. The article in question is not denied. The article concerned the Plaintiff. The issue is whether the article is defamatory.

16. The Plaintiff's evidence is that by the date of the publication of the article, he had stopped receiving the disability allowance. The Plaintiff further testified that he had been receiving the disability allowance following a doctor's recommendation after he had been involved in an accident. The Plaintiff further stated that he was not under any police investigation in Norway and that he had visited Norway during the time in question without being arrested. He produced his passport as an exhibit. On the other hand the claim in the article is that the Plaintiff continued receiving the disability allowance even after being elected as a Member of Parliament in Kenya. The Plaintiff's evidence does not state exactly when he stopped receiving the disability allowance visa-viz the date he became an elected Member of Parliament. Although there are some factual comments in this part of the article, the comments therein have distorted and sensationalized the same. There is no evidence of any investigations of the Plaintiff by the Norwegian Government of any criminal activity.

17. On whether the Plaintiff was convicted and fined for reckless driving the Plaintiff's evidence that there was no trial and that therefore he was not found guilty for the offence of reckless driving was not controverted by any other evidence. The Defendant did not adduce any evidence. The Defendant's bundle of documents which was filed in court was not produced as an exhibit.

18. The request for the equivalent of Ksh.650 million grant is not denied by the Plaintiff. The Plaintiff's issue with the reference to the same in the article in question is that he was portrayed as a politician without a national outlook who was only interested in developing his constituency. According to the Plaintiff, he ought to have been commended for having made the request and not vilified. However, looking at the context within which the issue of the grant is reported, I would agree with the Plaintiff that there is negative portrayal of the Plaintiff.

19. On whether the Plaintiff was competent enough to undertake a research project at Columbia University in the United States of America, the Plaintiff produced as an exhibit the letters of invitation by the said university to serve at the Human Rights Institution at the University's Law School. The Plaintiff's evidence is that he is a graduate of Cornell University in the United States of America which is of equal status as Colombia University. The Plaintiff produced a certificate of eligibility for exchange visitor programme from the United States of America Information Agency as an exhibit. According to the Plaintiff, he served for two years at the Columbia University Law School and thereafter published a book entitled: **“Towards Genocide in Kenya: The curse of negative ethnicity”**. The book was produced as an exhibit. This evidence remains unchallenged by way of cross-examination and is unconverted by any other evidence. It is clear that the Plaintiff was qualified to undertake the research project which he stated was in his area of expertise as a human rights scholar.

20. From the foregoing analysis the Plaintiff's evidence, I am satisfied on a balance of probabilities that the article in question is defamatory. It is not denied that the article was published. The article refers to the Plaintiff. The evidence of PW3 establishes that the Plaintiff's reputation was even being questioned by his friends because of the article in question. Malice can be inferred as the article contained information that was mostly not factual. The Defendant did not verify the facts. According to the

Plaintiff's evidence, the author of the article did not talk to him before the publication was made. Words like "**Koigi risks Norway jail term**" were alarming. Whether the Plaintiff had been fined for reckless driving is something that could have been verified. The same applies to whether the Plaintiff had the competence to undertake the research project. Although this court has observed above that there are some aspects of the publication that were partly true, taken as a whole, the article has a defamatory sting.

21. The Plaintiff prayed for general damages and exemplary and punitive damages. In the circumstances of the case, the Plaintiff is entitled to general damages to compensate him for harm caused in his reputation and the distress and humiliation caused by the defamatory publication (See for example **Kipyator Nicholas Biwott vs. Clays Ltd & 3 others Nbi HCCC No.1067 of 1999**).

22. On exemplary and punitive damages, it is noted that Plaintiff was not accorded the right of reply. The plaintiff's uncontroverted evidence is that he was not contacted to give his views, yet the author of the article contacted the Norwegian Embassy for their comments. When the demand notice was sent to the Defendant, there was no apology or retraction of the article. Thus the Defendant did nothing to mitigate the circumstances. It is also noted that the article in question appeared prominently at the back page. The Defendant's newspaper is also widely circulated. The Defendant must have also made a profit from the sale of the newspaper. It is noted that the Plaintiff's uncontroverted evidence is that he is a well known public figure and politician and that due to the said publication he suffered socially, politically and financially.

23. Although in their submissions the Defendant's side submitted that the words in question were justified, the defence of justification was not pleaded in the Defendant's statement of defence. The statement of defence denied the allegations made in the plaint and denied that the article was malicious and defamatory. In any event, the Defendant did not call any evidence in support of the statement of defence.

24. With the foregoing, I am satisfied that the Plaintiff has proved his case. On the assessment of damages, the Plaintiff's counsel submitted for the sum of 45,000,000/= all inclusive. The Defendant submitted for the dismissal of the case. My view is that an all inclusive figure of Ksh.5,000,000/= is reasonable as both compensation to vindicate the injury to the Plaintiff's reputation and as exemplary and punitive damages.

25. With the foregoing, Judgment is entered for the Plaintiff against the Defendant for the sum of Ksh.5,000,000/= plus costs.

Date, signed and delivered at Nairobi this 26th day of July, 2017

B. THURANIRA JADEN

JUDGE