



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE 405 OF 2014

AGNES ZANI.....PLAINTIFF

VERSUS

STANDARD GROUP LIMITED.....DEFENDANT

JUDGMENT

The plaintiff herein has sued the defendant claiming the following reliefs;

- a) A permanent injunction restraining the defendant by itself or its agents or otherwise however from publishing any further or similar defamatory material of or concerning the plaintiff.
- b) General damages for libel and for publishing words concerning the plaintiff without taking any sufficient steps or procedure to establish whether they were true.
- c) Exemplary damages for malicious libel for publishing words concerning the plaintiff with reckless disregard as to whether or not they were defamatory or injurious to the plaintiff.
- d) Aggravated damages arising from the defendant's refusal to offer an apology when the plaintiff demanded one and for the threatened future publication.
- e) Costs of the suit and interest on the above.

The cause of action is alleged to have arisen on the 9th day of March 2014 when the defendant wrote, printed and published an article under the banner headline;

“revealed the inside story of ODM’s men in Black at page 6 and 7 in which it made the following highly defamatory statement of and concerning the plaintiff; that is to say;

“How the men in Black were mobilized -11.30 pm the group accompanied by Zani, relocates to Ngong Hills Hotel on the same road.”

The plaintiff avers that the writing, printing and publishing of the offending words were done by the defendant in reckless disregard of whether or not they were true or without taking any or any sufficient step or precaution to establish whether they were true.

It was further alleged that the defendant was actuated by extreme malice and spite against the plaintiff in writing, printing and publishing the offending words which were not only false but were also highly defamatory of her and were intended to injure her political career, professional standing and family life.

The particulars of malice are set out in paragraph 10 of the plaint.

It was averred that the plaintiff's reputation, image, credit, integrity and status as a mother, accomplished academia, national women leader, political leader and contender for the position of secretary General of Orange Democratic party (ODM) was substantially damaged by reasons of the wide circulation of the publication within Kenya and Globally.

The plaintiff further averred that by reason of the publication, she has suffered monumental distress, mental anguish and substantial loss and damages in her various roles in the society which she seeks full and appropriate compensation from the defendant, in damages.

The defendant filed a statement of defence in which it admitted having published the article but avers that the same was published for the benefit of the public and with no malice or ill intention as against the plaintiff. It also denied that the printed words were done in reckless disregard of whether or not they were true.

It was averred that the information related to a matter of public interest which gives a fair and accurate account of events that transpired during the ODM National Elections on the 28th February, 2014 and that there was no bad blood between the plaintiff and the defendant to warrant the alleged malice.

It was contended that the plaintiff has not suffered in reputation and is still to date holding the position for nominated senator under the ODM party.

The defendant prayed for the dismissal of the plaintiff's suit with costs.

In her evidence, the plaintiff told the court that she holds a P.H.D in sociology and by then, she was a nominated senator, that she has a master's degree in sociology and a BSC in the same discipline. That for a long time she was a lecturer teaching social education and Ethics among other disciplines.

She stated that during the ODM's party Elections scheduled for 28/2/2014, she was vying for the position of secretary General. That on the material day, just when elections were about to take place, she had stepped out to have a snack when a member of the party informed her that there was chaos in the hall. She went back to the hall to see what was happening only to find boxes had been shrewn all over and there was a scene of disorder. She was disappointed and she called members of the National Election board in a meeting to try and understand what was happening after which they issued a statement on the Elections that had been disrupted. She denied having been involved in the said disruptions/chaos.

It was her evidence that on the material day, she had just come back from Lamu County where she held her last campaign and she returned to Nairobi at around mid-day where she retired in her house until the following day from where she headed to Kasarani for elections. She stated that a friend of hers called her and told her about the article. It is her contention that the publication is a blur to her identity and character now and in the future.

John Kipkurui gave evidence as PW2. He works for a public relation media company. He stated that he read the article and he believed it. That the story portrayed the plaintiff as a person who associates herself with rogue members of the society and from that day he did not belief in her any more. In cross examination he stated that the article was not true as he knew the plaintiff in her area of work and back at home.

Evans Umidha testified as PW3. It was his evidence that he is an active member of ODM party as a member of Youth Committe. He was aware of the ODM party Elections scheduled for 28/2/2013 and that the plaintiff was vying for the post of secretary General. That on the said date, there were disruptions and the Elections could not go on as scheduled. It was his evidence that the article made him look at the plaintiff differently and started seeing her as a person who is not peaceful and who cannot engage in Democratic Polls. He testified that after the said disruptions, the plaintiff could not be appointed as a secretary General because it was widely believed that she had something to do with the disruption of

Elections while her opponent was not blamed. The article affected her reputation and she only got nominated after she convinced the party that she was not involved and that she had already filed a suit.

The court has carefully considered the pleadings filed herein, the evidence on record and the submissions by the counsels for the respective parties. Having set out the positions by the parties. I now proceed to set out the issues for determination which in my opinion are;

1. Whether the article was published by the defendant.
2. Whether it refers to the plaintiff.
3. Whether the article was false and malicious.
4. Whether it was defamatory of the plaintiff.

Defamation as a tort does not fit one definition it depends on the circumstances of the case. In the 7th Edition of Salmond on the Law of Tort, defamation is defined as follows;

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

In the case of **Ondonkara versus Astels (1970) 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.”

The elements of the tort of defamation are well set out in the case of **J Kudwoli Versus 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 the plaintiff.
3. That it was defamatory in character.
4. That it was published maliciously.
5. That in slander, subject to certain exceptions, the plaintiff has suffered special damage.

The same principles are repeated in the case of **Wycliffe A Swanya Versus Toyota East Africa Limited and Francis Massai Nairobi C.A 70/2008**.

Applying these principles to the case herein it is not in dispute that the Article was published by the defendant and a small caption of it refers to the plaintiff.

Was the article false and malicious?

The plaintiff has referred to the case of **Phineas Nyagah Versus Gitobu Imanyara** to the effect 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.”

It is alleged that the defendant acted negligently and out of malice as they did not inquire into the truthfulness of the publication.

On the part of the defendant it was alleged that the Article was true and there was no malice on their part. That the plaintiff has been unable to show that the defendant acted with malice in having the articles published. It was further submitted that there was no bad blood between the plaintiff and the defendant to persuade the court that the publication was done maliciously to injure the plaintiff's reputation. The defendant further averred that from the evidence of the plaintiff and the witnesses who testified in support of her case, it emerged that the defendant was a friendly newspapers to the ODM and by extension, the plaintiff, who is an official to the plaintiff and that subsequent publications have portrayed the plaintiff in positive light.

It was further submitted that the plaintiff's assertion that the article was motivated by malice is untrue because the article was merely contemporaneous with the events taking place and was made in good faith. That the Article was serving the greater good of public interest and cause and was true in fact.

With regard to malice, the case of **Musikari Kombo Versus Royal Media services HCCC no 89/2011** may be helpful where it was stated as follows:

“Qualified privilege can be rebutted by proof of express malice, and malice in this connection may mean either lack of belief in the truth of the statement or use of the privileged occasion for an improper purpose. Lack of belief in the truth of the statement is generally conclusive as to malice, except in cases where a person is under a duty to pass on defamatory reports by some other person. Mere carelessness, however, or even honest belief produced by irrational prejudices, does not amount to malice. But an honest belief will not protect the defendant if he uses the privileged occasion for some other purpose other than that for which the privilege is accorded by the law; if his dominant motive is spite or if he acts for some private advantage he will be liable. Existence of malice can be evinced by language; if the language used is utterly beyond or disproportionate to the facts; however, it does not follow that merely because the words are excessive malice won't be inferred. It can also appear from the relations between the parties before or after publication or from the conduct of the defendant in the course of proceedings themselves, as, for example insisting on the defence of justification while nevertheless making no attempt to prove it. However mere pleading of justification is not itself evidence of malice even though the plea ultimately fails. It may be deduced from the mode of publication where the dissemination of the statement is wide than necessary. When a defamatory communication is made by several persons on an occasion of qualified privilege, only those against whom express malice is actually proved are liable.”

I have considered the evidence of the plaintiff and that of her witnesses. No evidence was put forth to prove malice on the part of the defendant. I am persuaded by the submissions of the defendant that there was no malice proved on its part by the plaintiff yet the law places a duty on the plaintiff to prove malice on a balance of probability.

Was the publication defamatory?

The plaintiff alleges that the Article was defamatory of her and that the words have highly prejudiced her. That the same has resulted to the plaintiff suffering monumental distress, mental agony and substantial loss and damage in her various roles. She averred that every person has the right to freedom of expression but in exercise of that right, every person is under obligation to respect the rights and reputation of others.

On the part of the defendant it was submitted that the Article was not defamatory in that even after the publication, the plaintiff was appointed as the Deputy Secretary General of the party despite the assertion that she had been defamed. That by the time the case was heard the plaintiff had been promoted from Deputy Secretary General to the Secretary General. It was also submitted that none of the other persons appearing in the publication has sued the defendants for defamation, the picture in issue depicts violence, the plaintiff is a public figure and that she was present at Kasarani and knew that there were disruptions as

reported

Section 4 of the Defamation Act provides as follows;

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

In the famous work of **Carter- Ruck on Libel and slander 5th edition at page 94** the writer noted the following;

“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 be contained in the charge which does not add to its sting, that need not be justified.”

The same position is advanced in **Gatley on Libel and Slander 10th Edition** where the writer states as follows;

“..... 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 maincharge 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.....”

This court is alive to the fact that the defendant did not call any evidence, but even going by the evidence on record, it is clear that the plaintiff and her witnesses admitted that there was chaos at Kasarani during the ODM party Elections which were disrupted by the **“men in black.”** They have also admitted that the matter was of public interest and that a task force was formed to look into the matter which buttresses the fact that, it is a matter, that the party was concerned about.

I have looked at the Article which is almost two pages and it can clearly be seen that there was chaos.

The bigger portion of the article does not mention the plaintiff save for a small portion which mentions her among other prominent party officials including the party leader Raila Odinga. In my view, the words captured in the article are substantially true and quoting **Carter- Ruck (Supra)** it is not necessary that every **“t”** should be crossed and every **“I”** dotted.

From the evidence on record, the plaintiff did not prove any damage to her reputation. If the evidence on record is anything to go by, she was promoted in the party hierarchy from deputy Secretary General to the Secretary General and her star has continued to rise in the ODM party.

Though the constitution guarantees right to one’s reputation, article 33 also guarantees the freedom of the media and in a civilized society, it is important that the two have to be balanced. In the case herein, I find that the article was substantially true and the defendant was reporting on a matter of public interest in which the plaintiff herself has admitted.

I find that she did not prove malice and defamation and therefore the case cannot stand. It is hereby dismissed with costs.

But the Law obliges me to assess damages that I would have awarded had the plaintiff succeeded. I have considered the submissions by the parties with regard to the quantum of damages. In awarding damages, the court draws considerable support in the guidelines in the case of **Jones versus Polland (1997) EMLR**

233- 243 where a checklist of compensable factors 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 to 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 apology.*
4. *Matters tending to reduce damages.*
5. *Vindication of the Plaintiff's reputation past and future.*

I have noted the plaintiff's station in life. I have also noted that the caption was small and not conspicuous. The parties did not suggest any figure to assist the court in assessing the general and exemplary damages. In my considered view of sum of ksh 1.5 million would have been reasonable in the circumstances of this case but as pointed out, the plaintiff did not prove the case against the defendant.

Dated, Signed and Delivered at Nairobi this **13th** Day of **October, 2017**.

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L. NJUGUNA

JUDGE

In the Presence of

..... for the PLAINTIFF

..... for the DEFENDANT