



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 5 OF 2016

MARY M' MUKINDIA.....PLAINTIFF

VERSUS

NATIONAL MEDIA GROUP LIMITED.....1ST DEFENDANT

DAVID HERBLING.....2ND DEFENDANT

JUDGMENT

In an amended plaint amended on the 8th day of July 2016, the plaintiff sued the defendants for recovery of general and exemplary damages, a permanent injunction restraining the defendants from publishing material on the same or similar libel about the plaintiff, an order compelling the defendant to publish an apology and the costs of the suit.

The said orders are sought following some articles alleged to have been published on diverse dates as follows;

“On Sunday, December 20, 2015 “Karua” fights back as British paper names her in shs. 7 million BAT Bribery storm.”

Daily Nation of 22nd December 2015 under the heading

“Karua’s 2 million was a donation for polls Drive.”

On 31st December, 2015 the Business Daily wrote another article headed.

“Swiss” contractor Disowns BAT in Bribery for KRA Tender Expose”

On the 6th January 2016 there was yet another article titled

“KRA passes the buck to Rotich on fate of bribery tainted director”

And on the 13th day of January, 2016, the Business Daily published an article under the heading

“Rotich seeks word from the president, on the fate of M’ Mukindia at KRA”

It was pleaded that, in December 2015, the plaintiff received an email from a journalist, a Mr. David Connett, purportedly employed by the Independent Newspaper which is published in the united Kingdom

in which Mr. Connett informed the plaintiff that he is writing an article regarding payment of monies paid by BAT Kenya to presidential candidate in 2012 and had wanted the plaintiff to explain the role she played in M/s Martha Karua's campaign team and in particular whether she had received a bribe on behalf of M/s Karua.

That the plaintiff's Advocate, gave a factual background as to the role she played, specifically denying that she received any money on behalf of m/s Martha Karua and clarified that she could not have assisted in any dealings with Karua as she was supporting an opposition candidate without any useful contacts in government.

That thereafter, the 1st Defendant through its various publications and without seeking any comment from the plaintiff or her advocate, published several articles implying that the plaintiff was dishonest and corrupt for having acted as a conduit for bribes allegedly received.

The plaintiff avers that at the time the articles were published by the defendant, there was great public interest on issues of corruption which had been widely reported in the media. That the allegations of corruption had involved cabinet secretary Ms Anne Waiguru, Imperial Bank and the allegations of fraud that ultimately led to the Bank's closure and the Eurobond Saga among others.

The plaintiff further averred that in a bid to perpetrate the public dissatisfaction with corruption in public office and to increase circulation, the defendants purported to milk the story published in the independent without bothering to find out whether the allegations contained therein were true. The plaintiff contends that given the content of the publication, their frequency, the words and the photographs of the plaintiff were rightly understood by the general public to mean that the plaintiff was also dishonest, corrupt and unfit to hold public office.

That despite the falsity of the contents and malice in the publication being brought to the attention of the defendants promptly through formal correspondences, no apology was published and the defendants continued publishing the articles defaming the plaintiff. That the defendants having wrongfully condemned the plaintiff as dishonest have proceeded to pressurize the companies associated with the plaintiff to dismiss her or dissociate themselves with her.

That the words were malicious, hurtful and untrue and in their natural and ordinary content meant or were intended to mean that;

- 1) The plaintiff had taken a bribe.
- 2) She was an aide who was a conduit for a bribe to Martha karua
- 3) That she had wrongfully influenced the award of a multi-million shillings tender at KRA.
- 4) She was dishonest and unfit to hold public office.
- 5) That the plaintiff was a person of low moral character amenable to corrupt activities thus undeserving to hold any position in the corporate world.
- 6) That the plaintiff was a person susceptible to unlawful inducement.

It was further pleaded that by reason of the publication, the plaintiff has been severely injured in her character, integrity, reputation both as an individual and as a business woman and has been subjected to public ridicule, odium, contempt and her reputation has been lowered in the estimation of the right thinking persons generally.

The matter proceeded ex parte as the defendants failed to enter appearance and defence and interlocutory judgments were entered against both of them on different dates. At the hearing, the plaintiff called two witnesses. She testified as PW3 and in so doing, adopted her witness statement as her evidence in Chief.

In the said statement, she stated that in December 2015, she received an email from a Mr. David Connett purportedly employed by the independent Newspaper which is published in the United Kingdom. In the said email, Mr. Connett informed her that he was writing an article regarding payment of monies by BAT to Kenya presidential candidate in 2012 and wanted her to explain the role that she played in Martha Karua's campaign team and in particular whether she had received a bribe on her behalf.

That through her lawyer, she specifically denied the allegations and clarified that she could not have assisted in any dealings with KRA as she was supporting an opposition candidate without any useful contacts in the Government. That the Independent published an article on 18th December, 2015 in which it alleged that BAT had paid £ 50,000 to Martha Karua to block a rival from winning a multi-million contract and in the Article, the Newspaper clearly stated that the plaintiff's Advocate had denied ever receiving any monies on behalf of Martha Karua.

She further stated that thereafter, the defendant through its various publications, and without seeking any comment from her, published several Articles implying that the plaintiff is dishonest and had received bribes for onward transmission to Martha Karua. That in the Sunday Nation of 20th December 2015, the defendant gave Martha Karua's denial of having received a bribe extensive coverage and published the plaintiff's photograph under the headline "Whistle Blower" thereby suggesting that she was dishonest and corrupt for having acted as a conduit for bribes allegedly received.

She further stated that whereas the defendant was quick to publish m/s Karua's rebuttal, they did not bother with hers and they did not seek her comments. That the defendant did not bother to verify whether the contents of the article published in the independent were true or not, the defendant was aware or basic investigations would have revealed that BAT had not tendered for supply of excise tax stamps which was the alleged tender referred to by the independent.

It was her further evidence that on 25th December 2015, the business Daily published yet another article under the headline banner "**2015 year of corruption storm**" where her photograph was placed on the front page alongside people who had been accused of corruption including M/s Waiguru, Mr. Jan Mohammed of Imperial Bank and Mr Githinji of National Youth Service. Again on 7 to 9 of 25th December, 2015 editorial of the "Business Daily" under the heading "**year of Grand Corruption**" with a sub heading "**The Tsunami of Graft**", her photograph was once again placed alongside those of people accused of graft. That whereas there was an article on the alleged BAT scandal, there was no mention of the corrupt role that the plaintiff played, the rebuttals that the plaintiff had made neither did it seek her comments on the allegations.

The plaintiff averred that the articles were malicious, demeaning, hurtful, untrue and were highly defamatory of her personal integrity, professional reputation and character.

Cecilia Njoki Muhoho testified as PW2. She adopted her witness statement as her evidence in chief. It was her evidence that she has known the plaintiff for the last 20 years and that she has interacted with her numerous times. That she has engaged the plaintiff in numerous joint consultancy assignments for high caliber companies and based on such interactions, she holds her in high regard.

According to her, the plaintiff is very professional, goal oriented, meticulous and passionate about her job and she is a firm believer in systems and values.

She stated that she was taken aback by that information because she had always known the plaintiff to be a citizen of good repute and high esteem. That the plaintiff had been associated as part of a corrupt group as a result of which she started avoiding her and did not want to be associated with her as she believed the allegations as she kept reading numerous articles in the Daily Nation Newspapers and the Business Daily Newspaper which convinced her that the allegations were true.

Karanja Kabage testified as PW3. It was his evidence that he has known the plaintiff for the last 30 years and that he had interacted with her severally both personally and professionally. That based on his interactions with the plaintiff, he holds her in high regard as she is very professional, goal oriented

meticulous and passionate about her job. She is also a firm believer in systems and values.

That when he read the article published in the Sunday National, Newspaper on the 20th December 2015, he was shocked and shaken as he had always held the plaintiff in high esteem. That initially, he did not believe the article because he had known the plaintiff to be an upright citizen who would not do anything so unashamedly illegal but due to the fact that it was published in the Daily Nation which is an authoritative Newspaper and due to the subsequent articles on the issue, he believed the statements to be true. That he started avoiding the plaintiff when they would meet in public and also as a professional.

The court has carefully considered the evidence on record and the submissions filed by the plaintiff.

The plaintiff has sued the defendants for defamation. Defamation as a tort does not fit one definition, it depends on the circumstances of each case. In the 7th Edition of Salmond on the law of Torts, 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 **Odonkara Vs Astles (1970) E.A 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 man”

The Elements of the tort of defamation were laid out in the case of **John Edwards Vs Standard Limited** as follows;

- 1) The statement must be defamatory
- 2) The statement must refer to the plaintiff
- 3) The statement must be published by the defendant
- 4) The statement must be false.

From the evidence on record, it is clear that the articles were published by the defendant in a newspaper that they own and/or have control over and that the articles refer to the plaintiff.

On whether the Articles were defamatory; a defamatory statement as defined in the case of **John Edward Vs Standard Ltd**

“A statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule, or contempt or which causes him to be shunned or avoided or has a tendency to injure him in his office, profession or calling.”

Such a statement has to attack the reputation of the plaintiff and lower it in the estimation of right thinking members of the society.

In the Articles, the plaintiff who was at the material time a director of KRA, was accused of being the conduit through which cigarette manufacturer BAT allegedly paid the former justice minister Martha Karua a €50,000 (about 7.5) million bribe to block a rival firm from winning a mult-billion tender floated by the tax agency. The plaintiff was by then the campaign adviser and fundraiser for Martha Karua’s unsuccessful presidential bid in 2013.

In the Article published on 6th January 2016, it stated that the Kenya Revenue Authority had said that its only the treasury that has the legal mandate to take disciplinary action against one of its Board members

accused of taking hefty bribes from British American Tobacco (B.A,T) and the plaintiff is named therein being the said Board member.

The above statements had the effect of lowering the plaintiff's reputation in the eyes of right thinking members of the society as they depict her as a corrupt person. Indeed this was confirmed by the evidence of PW1 and PW2 who in their evidence testified that after they read the articles, they changed their opinion of the plaintiff and they started avoiding her.

On whether the articles were false and malicious, it is trite law that for the plaintiff to succeed in defamation, she has to prove malice. On the other hand, malice can be inferred and for malice to be inferred the language of the publication ought to have altered the facts and their meaning and there ought to be animosity.

No evidence was led by the plaintiff to prove that there was animosity between her and the defendants. In the case of **Phineas Nyagah Vs Gitobu Imanyara (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 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 into the facts is also a fact from which inference of malice may properly be drawn. From the record, it is clear that the defendant when publishing the articles left out the part where the plaintiff had denied the allegations. Secondly, the defendant did not seek any comment from the plaintiff and failed to refer to her rebuttal. This is clear evidence of malice on the part of the defendant. The plaintiff denied the allegations and it was the defendant's duty to prove that the same were true. In the absence of such evidence, the court finds that the publication was false and actuated by malice on the part of the defendants. I do find the plaintiff has proved her case on a balance of probability and I find the defendants liable for defamation.

On damages, I have considered the plaintiff's submissions and the authorities relied on. Before I venture into quantum of damages, let me quote a passage in the case of **Brigadier Arthur Ndong Owuor Vs the Standard Limited Nairobi Hccc No. 511 of 2011** as follows;

“Once a reputation is lost in my view, monetary damages might not be adequate compensation. Monetary damages might be a consolation yes, but they will never be an adequate compensation for a lost reputation. In the eyes of the public, once a person's reputation has been damaged it will remain in memory possibly throughout his life.”

In awarding damages the court draws considerable support in the guidelines laid down in the case of **Jones Vs Pollard (1997) EMLR 233-243** where a check list of compensable factors in the libel actions were enumerated as follows;

- 1.The objective features of the libel itself such as the gravity, its prominence, the circulation media in which it is published and any reputation.
- 2.The subjective effect of the plaintiff's feelings not only from the prominence itself, but from the defendants conduct thereafter both upto and including 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.

These principles were referred to in the case of **Johnson Evan Gicheru Vs Andrew Morton & another (2005) eKLR** where the court had this to say;

“In an action of libel the trial court in accessing damages is entitled to look at the whole conduct of the defendant from the time the libel was published down to the time the verdict was given. It may consider what the conduct has been before action and in court during the trial.”

On damages, the plaintiff has suggested the following figures

- a) General damages ksh. 10,000,000
- b) Aggravated damages ksh 2,000,000
- c) Exemplary damages ksh 30,000

She has relied on the cases of

- 1) Kalya & another Vs Standard Limited (2002) eKLR** where Ksh 9,000,000, 2,000,000 and 300,000 were awarded as general, aggravated and exemplary damages respectively.
- 2) John Joseph Kamotho & 3 others Vs National media Group Limited & 2 others (2010) eKLR** where 6 million, 1 million were awarded as general and aggravated damages respectively.
- 3) Francis Xavier Ole Kaparo Vs standard Limited & 3 others (2010) eKLR** where ksh. 5 million, 2 million were awarded as general and exemplary damages respectively.

This court has considered the plaintiff’s station in life and her qualifications and the positions she has held in different organizations. That she has a Bachelor of Commerce from the University of Nairobi, she worked with Esso petroleum institute for 17 years, she worked as the managing Director of the petroleum institute for 4 years, She worked as the managing director of National Oil Corporation between 2003 – 2007 and has served as a member of the Board in various companies.

The court has also considered that the Nation Newspaper is a daily publication which is widely read. The above factors considered, I find that an award of ksh. 2 Million is reasonable as general damages and I award the same.

On aggravated damages, I note that the defendant published several articles in quick succession and a demand for apology by the plaintiff was never responded to. In the circumstances of this case, I find that the plaintiff is entitled to exemplary and aggravated damages and I do award a total of ksh. 1 million under both heads being ksh. 500,000 under each head.

I do also grant prayers (c) and (d) of the amended plaint and costs of the suit to the plaintiff.

It is so ordered.

Dated, signed and delivered at Nairobi this **29th** day of **November, 2017**.

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L. NJUGUNA

JUDGE

In the presence of

..... *for the Plaintiff.*

..... *For the 1st Defendant*

..... *For the 1st Defendant*