



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 334 OF 2013

RAPHAEL KITUR.....PLAINTIFF

VERSUS

THE PEOPLE MEDIA GROUP LIMITED T/A THE PEOPLE....DEFENDANT

JUDGMENT

The Plaintiff filed this suit against the defendant in a Plaint dated 15th August, 2013 seeking damages for defamation arising from the defendant's publication of an article published by the defendant on 18th September, 2012 in the People Newspaper together with costs and interest. The impugned article was entitled ***“Ex MP in court over bad cheque.”***

The plaintiff claims that the effect of the publication has been to tarnish the Plaintiff's reputation as a respected former Assistant Minister, Member of Parliament and aspiring Senator, to expose him to public scandal, ridicule, odium and contempt in the eyes of his clients, peers, right thinking members of the society and all those who know him. Further, the plaintiff avers that the words were malicious, false and calculated to injure the Plaintiff and cause him pecuniary, political and moral damage.

The article complained of and as pleaded in the plaintiff's plaint is that:

“Former Konoin Member of Parliament Raphael Kitur was yesterday charged before a Nairobi Court with issuing a bouncing cheque. Kitur is accused of issuing the bad cheque worthy Kshs. 450,000/= to John Maina Muraguri at International Hotel on June 6, last year. He pleaded not guilty and was released on a cash bail of Kshs. 100,000/= by senior principal Magistrate Lucy Nyambura. Hearing continues on October 5th.”

The Plaintiff avers that the words were understood to mean that he was corrupt, unscrupulous, and untrustworthy, is a criminal who does not pay debts and should be shunned by members of the public.

The plaintiff pleaded that the Defendant's actions were motivated by ill will and malice demonstrated by the fact that the words published were false. The defendant did not seek clarification from the Plaintiff before publishing the information and that the defendant referred to the Plaintiff by name and his previous capacities and status in life.

The Plaintiff therefore prayed for orders that a permanent injunction be issued restraining the Plaintiff and its agents/employees from publishing further statements regarding the Plaintiff, an order for general, exemplary, punitive and aggravated damages and an order for publication of an apology. The Plaintiff also prays for costs of the suit and interest.

The plaintiff's claim was denied by the defendant through a defence dated 9th April, 2014. The defendant admitted publishing the impugned article but states that the publication was without malice under section 12 of the Defamation Act Cap. 36 (1992). The Defendant further denies that the statements were malicious, false and calculated to injure the Plaintiff.

The defendant also states that as soon as it discovered that it had published the article which wrongly referred to the Plaintiff, or as soon as the error was pointed out to it, it published a correction and apologized in the People Newspapers of 25th September, 2012. The defendant also entered the defence of fair comment and justification.

In the alternative the Defendant states that the Plaintiff has:

- (a) Failed to exercise his right under section 7 'A' of Defamation Act Cap. 36.
- (b) Failed to mitigate his alleged loss under section 7 "A" of the defamation Act Cap 36.

At the hearing of this suit, the Plaintiff called three witnesses whereas the defendant called one witness.

Raphael Arap Kitur, the Plaintiff herein testified on oath as PW1 and adopted his filed written statement. He testified that he is a prominent tea farmer in Bomet County where he resides. He is also a former M.P for Konoin Constituency between the years 1997-2002. He has also been a former Assistant Minister in the Ministry of Transport and Communication. He has been in the Clearing and Forwarding business in Nairobi industrial area. He testified that the case relates to the publication of 18/9/2012 and nobody from the defendant called him before the publication. As per his ID his name is Raphael Kiprono Arap Kitur whereas according to the charge sheet, the person who was charged is Raphael Kipkirui Kitur. Therefore the person charged is different.

At the time of the publication he was vying for the Senatorial Seat, Bomet County. He learnt of the publication when he was perusing the People Daily of 18th September, 2012 and was also alerted of the contents of the publication by his former constituents family members and fellow politicians who were concerned with the contents and impact on his future political plans. Further he testified that his former constituents were wondering how he could be trusted to discharge his duties as a Senator when he could not pay a debt of Kshs. 450,000/=. He further testified that he did not clinch the nomination to vie for the seat as a result of the publication which his political rivals made copies of and distributed to the constituents and the people in the village did not know whether there was a correction later on. He further avers that the Commissioner of Customs could not trust him and he had to pay for his goods first before they were released which was not the case before the publication. His name has been damaged and the defendant did not offer an apology.

In cross-examination, PW1 testified that he did not read the apology and his constituents were also not aware of he same. He named some of the constituents who photocopied the article. He also stated that the Commissioner for Customs could only accept banker's cheques from him and there was delay in clearing his goods.

In re-examination, PW1 stated that what was published was a correction and not an apology. He is not aware of the money that was deposited in court.

Julius Kipng'eno Langat (PW2) testified that he has known the Plaintiff for 15 years. He was his chief campaigner when the article was published. He read the article and brought it to the attention of the Plaintiff. He further testified that people started saying that he was campaigning for a "mkora". He himself also got disappointed with the Plaintiff when he read the article and almost gave up on the campaigns but just continued to campaign because he had started. He stated that the Plaintiff did not get as many votes because of the publication. As a person on the ground campaigning for PW1, he testified that he was aware that the constituents started doubting the plaintiff's capability to hold a public office and that his opponents took that advantage to spread the rumours that the Plaintiff had issued a bad cheque and had been charged with the offence. He was not aware of the correction.

Bernard Kibet Koros (PW3) testified that he is a farmer and was involved in campaigns for the Plaintiff when the publication was brought to his attention. He was not aware that a correction had been published.

The Defendant called one witness Sarah Muthoni Ndungu (DW1), a reporter working with the Defendant, who testified that she wrote the subject article which was published on 18/9/2012. That on or about 19/9/2012 the Defendant received a demand letter from the Plaintiff's lawyer that he was not the suspect. The Defendant did investigation and after finding out that the suspect was not the Plaintiff, they published a correction on 25/9/2012 that the person named in the article was not the correct person.

In cross examination, DW1 testified that he got the information from the prosecutor but there was no reference to the suspect being a former MP. DW1 could not confirm that an apology was given. They got interested in the story because the Plaintiff was a former MP.

In re-examination DW1 testified that there was no malice in the publication.

At the close of the defence hearing, Counsels agreed to file and exchange written submissions.

The plaintiff filed his submissions dated 8th November, 2015 and the defendants filed their submissions dated 6th November, 2017. I have read and considered the said submissions.

The Plaintiff's counsel submitted that the article was reckless and malicious as the Defendant did not contact the plaintiff before the publication. Further that the charge sheet did not describe the accused as a former M.P and up to date no apology has been published. The article was published at the peak of his elections. On liability the Plaintiff relied on a number of cases to establish that they have proved their case on a balance of probability as well as to show that the defence of fair comment is not available and must fail because there was no evidence to show that the facts published were true.

The plaintiff relied on the case of **Machira v Mwangi & another [2001] eKLR** where the court held that;

“Any evidence which shows that the defendant knew the statement was false or did not care whether it be true or false will be evidence of malice. In the instant case, the plaintiff had supplied the defendant with the true position of the matter before the publication was made. Inevitably therefore, at the time of publication, the defendant knew or is taken to have known that the relationship between the plaintiff and Ms Grace Wahu Njoroge was not an advocate/client relationship and there was no relationship of such a nature between them.

Further, considering also the post-publication conduct of the defendant, the correction was made more than a week after the publication, which was made with the knowledge that it was false. I have no hesitation in finding the publication as being malicious”

The plaintiff also relied on **HCCC No.1896 of 1999 Nguni & Company Advocates Vs. Nation Newspapers & Printers** where it was held that ,

“ ... The law relating to publication of defamatory words is also trite in that the defence of justification or fair comment can be extinguished by malice ...”

On quantum of damages, the Defendant proposed an award of 25,000,000 in general damages, Kshs. 2,000,000 in lieu of apology, Kshs. 5,000,000 in aggravated damages. He argued that his reputation had been damaged at a time when he was campaigning, the defendant did not bother to confirm the allegations before publishing and that no apology was ever published.

The Plaintiff relied on the case of **Samuel Ndung'u Mukunya v Nation Media Group Limited & another [2015] eKLR** where the plaintiff was awarded general damages of Kshs. 15,000,000.00, aggravated damages of Kshs 3,500,000.00 and damages in lieu of an apology of Ksh1,500,000.

The Plaintiff also relied on **HCCC No. 1230 of 2004, Francis Ole Kaparo Vs. The Standard Limited** where the Plaintiff was awarded Kshs. 7,000,000

On the other had, the Defendant submitted that they carried an apology at the earliest opportunity which was within 7 days after the publication and that, at the time of filing the defence , the defendant made a payment of Kshs. 50,000 in to court by way of amends to signify no ill will. The defendant urges the court to find no liability. However in the event that the court decides otherwise, the Defendant proposed an award of Kshs. 1,200,000 and relied on the case of **Lucy Kagwiria Rutere V. Standard Limited & 4 others (2015) e KLR.**

The Defendant submitted that aggravated damages should not be awarded since the Defendant did not have a malicious intent in the libel. It was 5 years since the time of the publication and the Defendant urged that publication of and apology will not serve any purpose.

Having considered the evidence that was adduced by the Plaintiff and the Defendant during the trial including the impugned article published in the People Newspaper on 18/9/2012, whose publication is not denied by the defendants herein, and having considered the written submissions, and the authorities herein cited, I identify the following issues for determination;

- a) Whether the words in the said article, in their natural and ordinary meaning were defamatory of the plaintiff's reputation and professional standing.***
- b) Whether the defence of fair comment and justification is available to the defendant.***
- c) Whether the plaintiff is entitled to aggravated and general damages for defamation.***
- d) Who meets the costs of the suit?***

In a defence of justification and fair comment, the law is that the burden of prove shifts from the Plaintiff to the Defendants where a defence of fair comment and justification is pleaded. In **Gatley on Libel and Slander**, 9th edition paragraph 13.45 it was stated that,

“The onus of proving that the report is fair and accurate lies on the defendant, but it is sufficient if this clearly appears from the Plaintiff's own evidence. If the Defendant fails to prove that the report is fair and accurate, the plaintiff is entitled to succeed, however honestly it may have been published...it is for the judge to decide whether the matter complained of can fairly be said to be a report of judicial proceedings.”

The case of **Wycliffe A. Swanya v Toyota East Africa Ltd & another [2009] eKLR** laid down the elements to be considered in a defamation suit when the Court of Appeal observed that:

“For the purpose of deciding a case of defamation, the Court is called upon to consider the essentials of the tort generally and to see whether these essentials have been established or proved. 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 defamatory statement or utterance 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.”***

In the instant case, the plaintiff contends that the article was defamatory, false and malicious. It is admitted by the defendant that the words complained of were published by them. However, the defendants have disputed that the publication was malicious. Malice can be inferred from intent and

recklessness. The Plaintiff having been a prominent M.P, it would be obvious that he was well known and an article touching on him would attract attention. In fact DW1 testified that the matter caught her interest since the Plaintiff was a former MP. That being the case it would have been prudent for the writer to have contacted the Plaintiff to seek clarification from him before the publication. I find that the article was defamatory of the Plaintiff as it painted him in bad light as a person who could not pay a debt of Kshs. 450,000/=. The Plaintiff called two witness who testified that they read the impugned article and who testified that the article had a negative effect on the plaintiff who was campaigning for a seat as a Senator.

Even though the Plaintiff testified that the publication affected his clearing business such that the commissioner of custom could not trust him and had thereafter to pay in advance in bankers cheque to have his goods released, no evidence was tabled to support these allegations. At the time of the publication the Plaintiff also testified that he was campaigning for the senatorial seat and lost because of the publication.

Under Article 33(2), as well as Article 33(3) of the Constitution, every person has the right to freedom of expression **which does not extend to**, among others, propaganda for war, incitement to violence, hate speech or advocacy of hatred that- constitutes ethnic incitement, **vilification of others** or incitement to cause harm or is based on any ground of discrimination specified or contemplated in Article 27(4) and that **in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.**

The Defendant claims that the publication was a fair comment and justified. At the same time the Defendant admits that the suspect in the charge sheet was not the Plaintiff. In this case there is no way the Defendant could seek to justify what it admits was not correct. It is absurd for the defendant to rely on this defence which must fail.

The Defendant published a correction that the person named in the article was not the correct person. A correction does not amount to apology. An apology has a connotation of remorsefulness which was absent in the Defendant's correction. In fact the correction was carried out in a small column which was titled "**Briefly**". It was possible that it could have escaped the attention of the readers as the Plaintiff and his witnesses testified not to have seen it. The Defendant did not bother to inform the Plaintiff after publishing the correction. On the other hand, the impugned article was published in a wide Column and in larger letters on the columns titled "**Courts**". If the Defendant was apologetic enough it would have published the correction in the same "Courts" column where the article was published and in the same size of letters and not only correct but also apologise for the mistake.

It would have been prudent for a responsible journalist to contact the victims of his story before publication. In this court's view, the Defendant was malicious and the words published of and concerning the plaintiff, used in their natural and ordinary meaning portrayed the plaintiff as person not able or not willing to pay his debts.

Reputation is an integral and important part of the dignity of the individual and once besmirched by an unfounded allegation a reputation can be damaged forever, especially if there is no opportunity to vindicate one's reputation. See **Nation Media Group Ltd & 2 others v John Joseph Kamotho & 3 others [2010] eKLR.**

Having so said I will move on to consider the issue of damages. The Court of Appeal in **C A M v Royal Media Services Limited Civil Appeal No. 283 of 2005 [2013] eKLR** established the guidelines in awarding damages in defamation suit when it stated that:

"No case is like the other. In the exercise of discretion to award damages for defamation, the court has wide latitude. The factors for consideration in the exercise of that discretion as enumerated in many decisions including the guidelines in Jones V Pollard (1997) EMLR 233-243 include 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; subjective effect on 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; matters tending to mitigate damages for example, publication of an apology; matters tending to reduce damages; vindication of the Plaintiff's reputation past and future."

The Court of Appeal in the case of **JOHNSON EVANS GICHERU V ANDREW MORTON & ANOTHER [2005] eKLR** stated that in an action of libel the trial court in assessing damages is entitled to look at the whole conduct of the defendant from the time libel was published down to the time the verdict is given. It may consider what his conduct has been before action, after action, and in court during the trial. In the said case the learned Judges of Appeal quoted with approval the checklist of compensable factors in **Jones v Pollard [1997] eMLR 233, 234** which I apply in this case. The checklist was 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 on the plaintiff's feelings not only from the prominence itself but from the defendant's conducts thereafter both up to and including the 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.**

The Plaintiff's image was tarnished and considering that he is held in the public as having been a former M.P and a former Assistant Minister he ought to be compensated by an award of damages.

However, I must take cognisance of the fact that the defendants deposited the sum of Kshs. 50,000/= with court as a way of amends and they also endeavored to publish a correction. Therefore, by virtue of this, the Plaintiff does not qualify for aggravated damages and the damages will be mitigated by the fact that there was a correction even though not an apology. True to the submissions of the Defendants, time has lapsed since the publication was done and the same might not be in the minds of the readers to warrant a publication of an apology at this time. But I have to note that the Plaintiff's reputation would have been rectified even though not fully had the Defendant published an appropriate apology. Section 7A of the defamation Act requires the defendant to seek a reply before publishing the article which was not the case herein.

In addition to the authorities cited by the parties on award of damages, I will be guided by following awards by the High Court and Court of Appeal in similar cases of defamation concerning important personalities in Kenya.

In **Arthur Papa Odera v Peter O. Ekisa [2016] eKLR** justice Mbogholi awarded the Plaintiff a composite award of KShs.5, 000,000.00 to the plaintiff who was a Member of Parliament.

In **Nation Media Group Ltd & 2 others v John Joseph Kamotho and 3 other [2010] eKLR** the Court of Appeal upheld and award of Kshs 6,000,000 for general damages and Kshs 1,000,000 aggravated damages made by the High Court Ojwang J.B J on 1st July, 2005 in favour of JJ Kamotho the 1st respondent being a cabinet Minister, a prominent politician with reputation.

In **Kenya Tea Development Agency Limited Vs. Benson Ondimu Masese (2008) eKLR** the Court of Appeal reduced an award of Kshs. 7,000,000 and Kshs. 3,000,000 in general damages and exemplary damages respectively to a total sum of Kshs. 1,500,000/= in which case the Respondent in the Court of Appeal was an Advocate of the High Court of Kenya.

The Plaintiffs is a public figure having been a former M.P and a former Assistant Minister and I find that on a balance of probability the defendant defamed the Plaintiff by the publication of 18/9/2012 in the

People Newspaper.

The plaintiffs are entitled to an award of damages as follows

- a. General damages Kshs.....3,000,000
- b. Exemplary damages – Nil

The plaintiff is awarded the costs of the suit.

It is so ordered.

Dated, Signed and Delivered at Nairobi this **20th** day of **December, 2017**

.....

L. NJUGUNA

JUDGE

In the presence of:-

..... FOR THE PLAINTIFF

..... FOR THE DEFENDANT