



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 1206 OF 2006

DENIS OKELO JUMA..... PLAINTIFF

V E R S U S

CHACHA MWITA..... 1ST DEFENDANT

THE STANDARD LIMITED..... 2ND RESPONDENT

JUDGEMENT

1. Dennis Okelo Juma, the plaintiff herein filed an action Chacha Mwita and the Standard Ltd, the 1st and 2nd defendants herein vide the plaint dated 14.11.2006 in which he sought for judgment in the following terms inter alia:

- a. **General damages for libel**
- b. **Aggravated and/or exemplary damages**
- c. **Costs of the suit**
- d. **Interest on (a) and (c) above**
- e. **Any other relief this court deems fit.**

2. When served the defendants filed an appearance and a statement of defence to deny the plaintiff's claim

3. The plaintiff was a gym instructor at creation at 680 Fitness Centre Ltd in 680 hotel within Nairobi. The plaintiff fully relied on his qualification as a gym instructor for his livelihood and those of his dependants. The plaintiff avers that on or about 15.10.2006, the defendants falsely, maliciously and spitefully printed and or published or caused to be published or cased to be written, printed and or published a sensational feature in the society magazine of the publication in an article entitled "world of male Escorts." With the plaintiff's pictures. The plaintiff averred that the feature was intended and calculated to contrive, injure the reputation of the plaintiff and or lower him in the estimation or right thinking members of the society in general, his chentele, employer, parents and peers. The plaintiff averred that the feature was published in a manner that was meant to give it maximum coverage in order to attract and increase sales. The plaintiff's pictures were run alongside a feature not consented to by the plaintiff which feature the defendants ought to have known would lower and injure the reputation of the plaintiff and his career. The plaintiff further averred that anyone seeing the feature alongside the plaintiff's pictures will infer and understand mean that the plaintiff

- i. Is a male escort
- ii. Is of loose morals
- iii. Was utilizing his career s a gym instructor as a mere front

- iv. Was and is still unfit to be a gym instructor
- v. Was and is still engaged in criminal acts and or unethical acts
- vi. Is not sensitive to societal values
- vii. Is a commercial sex worker

4. The plaintiff also averred that by virtue of the aforesaid publication the plaintiff was shunned, avoided and injured in his credit, reputation and was brought into public scandal, odium and contempt. It is argued that as a result of the publication the plaintiff lost his only source of livelihood as he was summarily dismissed by his employer, Creative at 680 Fitness Centre Ltd.

5. The plaintiff testified and also summoned an independent witness. The plaintiff (PW1) told this court that in 2003, he used to work at Creative Fitness Centre at 680 hotel as a fitness/gym instructor.

6. In 2006, PW1 said, a lady by the name Christine approached him and told him that she wanted to take photos of him as a fitness model. PW1 said he was later taken to the 2nd defendant's offices at I & M Building along Kenyatta Avenue where his photos were taken with no payment. PW1 said that Christine promised him that he would have an opportunity of reviewing the intended article about fitness before it was published which promise was never fulfilled. The plaintiff said he was surprised to see his images in the Standard Newspaper magazine called Society with the wording 'Male Escort'. PW1 averred that shortly he received numerous calls from friends, clients, employers, parents and colleagues making inquiries. He said that in their understanding a male escort was a male prostitute. PW1 said that he was fired from employment a week after the publication.

7. Josephat Amutabi Amino (PW2) told this court that he knew the plaintiff through his interaction as a fitness instructor. PW2 said he was surprised to see the feature published in the Standard newspaper referring to PW1 as a male escort which according to him meant that the plaintiff was a male prostitute. PW2 further stated that he was aware that the plaintiff was terminated following the publication of the article. It is the evidence of PW2 that there was nothing in the feature that showed or indicated that the photos were posed by models but instead spoke of confessions of a male escort. PW2 further said that while undertaking fitness instructor course they were taught on what constitutes a code of conduct which is utterly inconsistent with being a male prostitute. PW2 averred that the article made him have a wrong impression of the plaintiff.

8. Though the defendants filed a defence they did not deem it fit to summon witnesses to testify to buttress their defence.

9. At the close of evidence the parties were invited to file written submissions. I have considered the evidence, the submissions and the authorities cited. In their defence, the defendants aver that the plaintiff and two models had knowingly and voluntarily agreed to participate in a photo shoot for the purpose of the feature.

10. The following issues were identified and actually arose for the determination of this court :

- i. **Whether the story in the feature referred to the plaintiff**
- ii. **Whether the story is defamatory to the plaintiff**
- iii. **Whether the story was published with malice or intention to disparage the plaintiff**
- iv. **Whether the plaintiff is entitled to damages and how much?**

11. On the first issue as to whether the story in the feature referred to the plaintiff. To start with, it is not denied that the plaintiff's photo was used in the publication by the defendants. The feature indicates that the name of the person whose story was published was Jeff Otieno accompanied by an asterisk indicating that the same was not the true name. According to the defendants there would be no logic in displaying a picture of a person and then indicating a totally different name from theirs in an effort to conceal their identity, if at all the story was about that same man whose picture was displayed.

12. In my humble view, I do not think a right thinking member of society would think that way. The

plaintiff's picture placed alongside a story will on the first instance be associated with the story despite the fact that a different name has been used. The plaintiff (PW1) told this court that when the picture and the story were published, he received many phone calls from people who knew him. The fact that the story used a different name did not help much because people who saw and read the story instantly associated the plaintiff with the story. PW2 a colleague instructor to PW1 associated him with the story.

13. The second issue is whether the publication was defamatory to the plaintiff. The defendants made submissions stating that the feature did not impute on the plaintiff any traits or things alleged to have been imputed to disparage or lower his estimation before right-minded people. The defendants further submitted that the story was a true account of the life of a real person which touches on matters of public importance and therefore constitute fair comment on a matter of public concern. It is not denied that alongside the photos, the words 'male escort' and a story piece on the male escort business in Kenya ran alongside. This was in contravention of what the plaintiff was told by Christine, the 2nd defendants employee who told him that the photos would be used in an article on fitness. According to the plaintiff that was the sole reason why he accepted to pose for the photos. The plaintiff also had been promised an opportunity of reviewing the intended article on fitness but this was not done. In my view, the article had the effect of seriously damaging the image of the plaintiff before right thinking members of the society and particularly when it is published in a newspaper with country wide circulation. There is no denial that the words 'male escort' are understood to mean a male prostitute. PW1 and PW2 gave evidence showing that the plaintiff was immediately sacked shortly after the publication came out. After the publication, the defendants did not deem it fit to communicate with the plaintiff despite the plaintiff making frantic efforts to contact them. No apology was offered by the defendants to the plaintiff.

14. The third issue is whether the defendant exhibited any malice with intention to disparage the plaintiff. It is not difficult to determine the issue.

15. The plaintiff has specifically said that the defendant have not bothered to get in touch with him despite informing them of the offending article. The plaintiff has further told this court that he was never called to review the pictures and story before publication. He has also told this court that the defendants have not offered any apology. In my estimation I am satisfied that the element of malice on the defendants' part was established. The story cannot be said to be of public interest or regarded as fair comment.

16. Having come to the conclusion that the plaintiff was defamed, the next question is what is the quantum of damages.

17. In assessing damages for libel, a court is enjoined to look at the conduct of the defendant before action, after the filing of suit and during the process of trial. There is uncontroverted evidence that the plaintiff was having a steady job at the time of the publication and his future looked promising. From his salary the plaintiff supported his parents and siblings. The plaintiff was able to show that the loss of his job had devastating effect on his personal life and health. Eh publication of the defamatory article made friends have a negative impression of him. In the case of **Wangui Chomba –vs= Peter Kisa Otabong (2015) eKLR** this court awarded general damages of ksh.2,000,000/= and exemplary damages of ksh.5000,000/= to the plaintiff. In the case of the plaintiff, the publication made him lose his job and earnings for himself and family

18. The plaintiff asked this court to award him ksh,6,000,000/= for general damages and kshs.500,000/= for exemplary damages and kshs.1,000,000/= aggravated damages. The defendant did not propose any figures on awards for damages.

19. In the circumstances of this came I am satisfied that an award of kshs.2,500,00/= is reasonable for general damages. The defendant decided not to communicate with the plaintiff. They did not offer any apology. I award the plaintiff ksh.500,000/= aggravated damages. I am also convinced that there is need to award exemplary damages. On this head I award the plaintiff ksh,200,000/=

20. In the end judgement is entered in favour of the plaintiff and against the defendants with the following

awards:

- i. General damages ksh.2,500,000/=
- ii. Aggravated damages ksh. 500,000/=
- iii. Exemplary damages ksh. 200,000/=
- iv. Net total ksh.3,200,000/=
- v. Costs of the suit.
- vi. Interest on (i), (ii) and (iii) at court rates from this date until full settlement.

Dated, Signed and Delivered in open court this 27th day of May, 2016

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant