



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NUMBER 329 OF 2013

RUMBA KINUTHIA. PLAINTIFF

VERSUS

RADIO AFRICA LIMITED T/A THE STAR. DEFENDANT

J U D G M E N T

In a plaint filed at the High Court of Kenya at Nairobi on the 14th day of August 2013, the Plaintiff, Rumba Kinuthia trading as Rumba Kinuthia & Co. Advocates sued the Defendant, Radio Africa Limited T/a the Star, the cause of action being founded on a publication carried out by the Defendant in their Newspaper Edition of Wednesday July, 31st 2013 where allegations were made concerning the Plaintiff.

The Plaintiff in paragraph 3 of the Plaint pleaded that on the said date, the defendant falsely and maliciously published or caused to be published of and concerning the Plaintiff the following defamatory words: -

“An 87 year old woman has accused a lawyer of grabbing her Kiamumbi Land more than 15 years ago. Rachael Njeri said she gave the half-acre land’s title deed to the lawyer when she sought his service in 1996 since she did not have money to pay his fees. Njeri said the lawyer was to keep the document until the case was determined. The lawyer would then deduct his legal fees after she is compensated. The lawyer Rumba Kinuthia had allegedly asked for Ksh.200,000/- as his fees. Njeri wanted the lawyer to sue the state on her behalf following a shoot-out at her home that left her son’s wife dead. Her son was shot in the chest by the police who alleged she was hiding criminals. Njeri said the lawyer has not yet told her the outcome of the case....”

The Plaint enumerated the various ways the said publication had injured the plaintiff’s reputation. According to the Plaintiff and in paragraph 4 of the plaint, the said words in the natural and ordinary meaning meant and were intended to mean that: -

- a. That he was a criminal.
- b. He was a land grabber.
- c. That he was a bad lawyer and could not be trusted by his clients.
- d. That he was a hypocrite and without any sense of obligation and propriety to his clients.
- e. That he was pre-disposed to short-change his clients.
- f. That he could not be trusted to keep his client’s documents in safe custody.
- g. The Plaintiff was heartless and ill bent to take advantage of the old and uneducated clients for his material gain.

Further and in the alternative, the Plaintiff pleaded that the said words meant or were understood to mean

by way of innuendo that: -

- a. The Plaintiff is a shoddy lawyer.
- b. The Plaintiff is not trustworthy.
- c. The Plaintiff is out to steal properties.
- d. The Plaintiff is a fraudster.
- e. The Plaintiff is not transparent to his clients.
- f. The plaintiff does not have a sense of professional ethics.
- g. The Plaintiff does not stick to and act on his client's instructions.
- h. The Plaintiff at the material time committed acts of forgery and fraud.

The Plaintiff has set out the particulars of innuendo, lies and falsehoods in paragraph 5 and 6 of the Plaintiff which I will not reproduce herein.

He further alleges that in the Newspaper Edition of 7th August, 2013, the defendant falsely and maliciously re-published and/or caused to be re-published of and concerning the Plaintiff the following defamatory words: -

...."A city lawyer has dismissed claims by an elderly Kiambu grandmother that he took her ksh.400,000/- plot without her knowledge. Rumba Kinutha said the allegation is blatant lies designed to add damage to his reputation which he had built for many years. He termed the accusations "Malicious" because the woman is lying that I took her Kiamumbi plot against her will. Rachael Njeri Kinuthia was reported in the star last week claiming Kinuthia did not inform her about the outcome of a case in which she had appointed him to act on her behalf. Kinuthia has written to the Star demanding a retraction of the story published on 31st July. He said the story is "highly defamatory and malicious". The lawyer said the lies are meant to discredit him.

"We demand a retraction and apology" the letter reads. The lawyer said failure to retract the story will lead the firm to sue the star. In a letter copied to the star reporter and the original complainant, Kinuthia has threatened to quantify the claim in special, general and exemplary damages"

The plaintiff avers that in the second story of the 7th August, 2013, the Defendant caused even more damage by deliberately changing the name of the Complainant from Racheal Njeri Mungai to Racheal Njeri Kinuthia, thereby implying that the complainant was a relative of the plaintiff and that the plaintiff had grabbed his own relatives parcel of land.

According to the Plaintiff as pleaded in paragraph 12 of the plaintiff, the publication of the 7th August, 2013 is not publication of the **"whole story"** as alleged by the defendant in its letter dated 6th August, 2013 and further that the said letter reached the plaintiff too late in the day after more damage had been done to the plaintiff's reputation. He avers that the two publications and the allegations therein are entirely false and that at the time of the publication the defendant knew or ought to have known the dispute between him and the alleged granny since the same had been previously explained to the defendant's reporter one Albert Nyakundi who reported the highly defamatory and malicious story.

The Plaintiff has enumerated the various ways the said publication has injured the Plaintiff's reputation and has prayed for aggravated and/or exemplary damages and general damages for libel.

The defendant filed a defence where it has admitted publishing the words complained of but denied that the same were false and maliciously and averred that the article and words referred to therein were true in substance and in fact. The defendant in essence pleaded the defence of privilege and justification.

The matter came up for hearing before me on the 6th day of October, 2015 when the Plaintiff's case was heard and was stood over to 19th November, 2015 when the defence case was heard.

The Plaintiff testified that he is an advocate of the High Court of Kenya, who has been in practice since

September, 1983. He adopted his witness statement dated 14th day of August, 2013 and filed in court the same day which basically reiterates the contents of the plaint. He told the court that when he saw the Article he was very upset as the contents of the same were not factual, it was lies and that the reporter who wrote the article had met him before he published the story and the Plaintiff had furnished him with all the documents in support of the position that he had bought the said piece of land. It was his further evidence that during the same period of time he had written a note to Albert Nyakundi giving him copies of dismissal of Rachael Njeri's complaints which she had lodged with the Advocate's Complaint's Commission, Law Society of Kenya, Criminal Investigations Department at Kasarani and the anti-Corruption Commission. The Plaintiff further alleged that the said Albert Nyakundi before the article was published had approached him demanding a bribe to kill the story but he refused to pay and according to him, the story was published as a result of his non-co-operation to that end.

As a result of the publication, the Plaintiff avers that one of his clients namely Gimwany Holdings Limited wrote to him cancelling instructions that they had given his law firm for some legal work. It was his further evidence that as a result of the publication he suffered a lot of mental anguish in that he was unable to socialize with friends for quite some time as many of them would bring up this issue of him having stolen land from an 87 year old grandmother. This forced him to confine himself to the life of a loaner for quite some time. He lost several other clients who withdrew instructions from his firm and in general, the article negatively affected his legal practice and personal social life.

The Defendant called one witness namely Albert Nyakundi who testified as DW 1. He told the court that he works as a journalist with the Star Newspaper (the Defendant herein). He adopted his witness statement sworn on the 30th day of October, 2013 and filed in court on the 1st November, 2013.

He admitted having authored the article and averred that the same was true in fact and in substance and that the words referred to in the plaint were and are a fair and accurate report of a complaint's commission as well as the police whose proceedings were open to members of public and were published contemporaneously in the Defendant's Newspaper without any malice towards the Plaintiff and was therefore made on an occasion of qualified privilege.

He further testified that the publication referred to was a matter of public concern the said publication was of public benefit, was and is, therefore, privileged without explanation or contradiction for the reasons he has set out in paragraph 7 of his statement. It was his evidence that the article and the words referred to were published by the Defendant innocently in relation to the Plaintiff and an offer of amends was made on the 6th August, 2013, being as soon as practicable after the defendant received notice that the words were or might be defamatory to the Plaintiff.

He told the court that the said offer has not been withdrawn for the reasons that he gave in paragraph 8 of the statement, which are that: -

- a. The Plaintiff wrote to the defendant on 1st August, 2013 about the publication of 30th July, 2013 and requested for a publication of an apology in respect thereof.
- b. On 6th August, 2013, the defendant responded, inviting the plaintiff to tender his reply in order that the same could be published in pursuit of the right of reply and offer of offends.
- c. The plaintiff did not respond to the defendant's aforesaid letter any time before the institution of the suit or at all.

According to him and in paragraph 9 of his statement, the words contained in the article are neither defamatory on their face nor by innuendo and he did not know of circumstances by virtue of which they might be understood to be defamatory to the Plaintiff.

In cross-examination, DW 1 admitted having met the Plaintiff in the year 2012 before the month of August which meeting took place in the Plaintiff's office at City Hall Annex. He held a discussion with the Plaintiff whom he told about the story that he intended to write which is the story contained in the article the subject matter of this suit. He was given some documents which included the letters that the

Plaintiff had written to the complaints commission which documents did not include the sale agreement and this is the crucial document that he was seeking from the plaintiff and which was not availed to him.

The witness confirmed having called the Plaintiff on the 30th July, 2013 a day before the publication who denied grabbing the land and said he bought it from the granny. The witness admitted that he saw the sale agreement and got in touch with Rachael Njeri who denied having signed the agreement and that this denial was in the original article that he published. In re-examination, he admitted that though they gave the Plaintiff a chance to give his position regarding the contents of the article, they chopped off because of space constraints and what was chopped was his side of story and that was what was published on 7th August, 2013. He concluded his evidence by stating that the story of 31st August, 2013 and that of 7th August, 2013 were as told to him by Rachael Njeri and the plaintiff.

Parties filed their respective submissions to which they annexed list of authorities which I have duly considered. Having set out the background of this matter and the parties respective positions and decided cases which I have considered in detail, I now set out to indentifying issues for determination which in my view are as follows: -

1. Whether the articles published in “The Star Newspaper of 31st July, 2013 and 7th August, 2013 by the defendant were false and malicious of the Plaintiff.
2. Whether the articles and the words referred to the plaintiff.
3. Whether the articles and the words were absolutely privileged.
4. Whether the plaintiff has suffered injury as a result of the articles and words published therein.
5. What is the quantum of damages, if any, payable to the plaintiff?
6. Who is liable to pay the costs of the suit?

The tort of defamation was well described in 1970 British Columbia Court of Appeal decision of **Murphy Vs Ha March (13 DLR 3d 484)** where a Member of Parliament Judy La March wrote about the Plaintiff as follows: -

“A brash young radio reporter, named Ed Murphy (heartily detested by most of the press gallery and the members had somehow learned that Maurice Lamontagne (then Secretary of state and a long-time friend and adviser of the Prime Minister had purchased furniture but had not paid for it”

In finding that there was actionable libel, the British Columbia Supreme Court in dismissing the appeal wrote;

“Defamation is where a shameful action is attributed to a man (he stole my purse), a shameful character (he is dishonest), a shameful course of action (he lives on the avails of prostitution) or a shameful condition (he has small pox). Such words are considered defamatory because they tend to bring the man named into hatred, contempt or ridicule. The more modern definition of defamation is words tending to lower the plaintiff in the estimation of right thinking members of the society generally.”

Another authority often cited as definitive on defamation is that of **Thomas Vs CBC (1981) 4 WWR 289** as follows: -

“The gist of the torts of libel and slander is the publication of matter (usually words) conveying a defamatory imputation. A defamatory imputation is one to a man discredit or which tends to lower him in the estimation of others, or to expose him to hatred contempt or ridicule or to injure his reputation in his office, trade or profession, or to injure his financial credit. The standard of opinion is that of right-thinking persons generally. To be defamatory an imputation need not have actual effect on a person’s reputation; the law looks only to its tendency. A true imputation may still be defamatory although its truth may be a defence to an action brought on it; conversely untruth alone does not render an imputation defamatory.”

The Common Law of defamation protects every person from harm to their reputation by false and derogatory remarks about their person known as defamation. The elements of the tort of defamation were well laid out in the case of **John Edward 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.

These elements are substantially in tandem with the issues for determination by the court, which I hereby proceed to consider.

First, it is not disputed that the article was published by the defendant and that the same referred to the plaintiff. In fact the article mentions the Plaintiff by name. What is in issue is whether it is defamatory, false and malicious. I have looked at the article published on the 31st July, 2013 and 7th August, 2013 the contents of which I have reproduced earlier on in this judgment. For the Plaintiff to succeed the claim of malice has to be proved. On the other hand, malice can be inferred and for malice to be inferred the language of the published article ought to have altered the facts and their meaning and there ought to be animosity. In the persuasive 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 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.”

In his evidence, the defence witness Albert Nyakundi in cross-examination testified that he called the plaintiff a day before the article was published. The plaintiff denied grabbing the land and said that he had purchased the same from the old granny. He told him that there was a sale agreement which he admitted having seen and even got in touch with Rachael Njeri who denied having signed the same.

Though the author of the article was aware of the facts as told by the Plaintiff before he published the article, it is evident from the contents of the article that he did not capture them when he first published the article. The Plaintiff's exhibit number 4 is a letter dated 6th August, 2013 addressed to the Plaintiff by one Edwin Mulochi who is/was the legal officer of the defendant. In the said letter he confirms a telephone conversation between DW 1 (Albert Nyakundi) and the Plaintiff which was done prior to the writing of the story. The letter further confirms that the Plaintiff gave his side of the story to the said Albert Nyakundi which it states was included in the original story, but due to space constraints, the sub-editor working on the same chopped off the portion that captured the Plaintiff's sentiments and changed the headline.

The said letter goes further to say; after discussing the matter with the management we suggest that you please let us republish the whole story to erase the wrong impression that was created. We will publish it in the Star Edition of 7th August, 2013. We hope republication of the story will put this matter to rest.

My understanding of that letter is that: -

1. Prior to the publishing of the article the defendant through its agent (employee) Albert Nyakundi knew the Plaintiff's side of the story.
2. The Plaintiff's side of the story was meant to be captured in the original story i.e. publication of the 31st July, 2013 which was not done due to space constraints as a result of which the plaintiff's sentiments were chopped off and the headline changed.
3. The defendant offered to republish the whole story to erase the wrong impression that was created.

The re-publication was done on the 7th August, 2013, see exhibit 2. The relevant part of the said publication reads: -

“A city lawyer has dismissed claims by an elderly Kiambu grandmother that he took her Ksh.400,000/- plot without her knowledge. Rumba Kinuthia said the allegations are blatant lies designed to damage his reputation which he has built for many years.

He termed the accusations “malicious because the women is lying that I took her Kiamumbi plot against her will.”

The aim of publishing the article dated 7th August, 2013 as per the letter dated 6th August, 2013 was to publish the Plaintiff's side of the story and to erase the wrong impression that was created by the article published on 31st July, 2013. A casual look at the article shows that it did not set out the Plaintiff's side of the story. It is just a general denial by the Plaintiff of the allegations level against him by Rachael Njeri. This is notwithstanding the fact that the Defendant knew the Plaintiff's side of story vide the letter dated 1st August, 2013. Even in his own evidence on oath, Albert Nyakundi told the court that a day before the publication, he called the Plaintiff who gave him all the facts as he knew them. The letter dated 1st August 2013 on page 2 captures the facts of the matter on the part of the Plaintiff and its imperative to note that none of those facts were captured in the publication of the 7th August, 2013.

In my mind, failure by the Defendant to capture the Plaintiff's side of the story when the facts were within its knowledge, amounts to malice on its part. The Plaintiff produced an agreement for sale - see exhibit 3(b) between him and the said Rachael Njeri for the plot that he is alleged to have grabbed. He also produced acknowledgment of receipt of purchase price which was paid in instalments produced as exhibits 3(c), (d), and (e). Of particular importance is exhibit 3 (e) in which Rachael Njeri Mungai acknowledged receipt of Ksh.10,000/- from the plaintiff and she confirms that the Plaintiff does not owe her any more money in connection with the said plot.

In their defence, Defendants have raised the defences of justification and that the publication was a matter of public concern and therefore privileged.

It is trite law that a defamatory statement is presumed to be false, unless the defendant can prove its truth. Defamation law puts the burden of proving the truth of alleged defamatory statements on the defendant rather than the Plaintiff. On the defence of public interest, my learned brother Justice John. M Mativo quoting the case of **Reynolds Vs Times Newspapers (1999)**, <http://www.publication.parliament.uk/pa/id/199899/id/jdugmt/jd/1028/reyo.1.htm> laid down the following guidelines.

1. The seriousness of the allegations i.e. If the allegation is not true what will be the level of misinformation to the public and what will be the corresponding harm to the individual.
2. The nature of the information and the extent to which the subject matter is a matter of public concern.
3. The source of the information and whether it is reliable or motivated by malice and/or avarice.
4. Whether suitable steps have been taken to verify the information.
5. Whether the allegation in a story has already been the subject of an investigation by a government body which commands respect.
6. Whether it is important that the story be published quickly.
7. Whether comment was sought from the claimant, or whether that was not necessary in the context of the story.
8. If the article or story is written in such a way as to amount to statements of fact, or whether it raises questions and is suggestive of the need for further investigation.
9. The timing of the publication.

Going by the above guidelines, the Defendant heavily relied on the information given by Rachael Njeri and failed to include the version as given by the plaintiff and therefore, that defence fails. The publication concerns a client and a lawyer and in my view, it was not a matter of public concern as alleged by the

defendant.

The Defendant has also relied on the defence of justification which essentially means that the contents of the article are true. This defence is closely related to that of fair comment which the defendant has equally relied on. In considering the defence of fair comment, the court considers whether the statement was a view that a reasonable person could have held. In support of these two defences, the defendant alleges that the article was an accurate report of a complaint made against the Plaintiff before the Advocates Complaint's Commission as well as to the Police whose proceedings were open to Members of the public.

In his evidence, the Plaintiff told the court that the complaint against him by Rachael Njeri to the Complaint's Commission, and to the police were both dismissed. The Defendant did not deny this fact nor did it tender any evidence to the contrary. The Defendant ought to have gone further to justify its defences of fair comment and justification which it failed to do. With the evidence on record, I can only hold that the Plaintiff was vindicated by the two authorities and therefore the contents of the publication are untrue.

Upto this point, I think I have said enough to justify my finding that the articles dated 30th July, 2013 and 7th August, 2013 were defamatory of the Plaintiff and I do not therefore hesitate to find that indeed they were.

I now turn to the award of damages and before I can venture to do so, I find it important to quote the following passage as was said by Windeyer J, in the case **Vein Vs John Rairax & Sons Pty Limited, 117 C.L.R. 115,150**: -

“It seems to me, properly speaking, a man defamed does not get compensation for his reputation that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways – as vindication of the Plaintiff to the public and as a consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money.”

I would think that in the instant case to arrive at what could have been said to be a fair and reasonable awards, the learned trial judge could have drawn considerable support in guidelines in **Jones Vs Pollard (1997) EMLR 233-243** where a checklist of compensatable 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 forms the prominence itself but forms the defendant's conduct thereafter both upto 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.

Still on assessment of damages, Tunoi JA (as he then was) in Civil Appeal No. 314 of 2000 (**Johnson Evans Gicheru Vs Andrew Morton & another (2005) eKLR**) had this to say about the assessment of damages.

“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 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.”

In **Broom Vs Cassel & Co. Ltd (1972) A.C. 1027** The House of Lords stated that: -

“..... in actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of restitution in integrum has necessarily, an even more highly subjective element, such actions involve a money award which may put the Plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he rediscover the estimated

sum of his past and future losses, but in case of libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a by-stander of the baselessness of the charges.”

Finally, on this subject and in a judgment delivered by the Court of Appeal in Civil Appeal No. 148 of 2003 **Wangethi Mwangi & another Vs J P Machira t/a Machira & Co. Advocates (UR)** the court delivered itself thus in the course of judgment.

“We think that while the “Gicheru” judgement will continue to be a useful guide as regards the level or quantum of damages in similar situations, it was never intended to be a yardstick cast in concrete for all time and for this reason we think that peculiar facts of each case should continue to be the hub upon which the awards gravitate or revolve, provided that the Court remains alert to other relevant considerations such as wider public interest goals, juridical basis for awards, including any pressing public policy considerations a sense of proportionality and the need for the courts to always recognize that they are often the last frontier of the need to ensure that truth is never sacrificed at the altar of recklessness, malice and even profit making. In addition, the awards should also be geared where circumstances permit to act as a deterrence so as to safeguard and protect societal values of human dignity, decency, privacy, free press and other fundamental rights and freedoms, including rights of others and personal responsibility without which life might not be worth living. The category of considerations will no doubt change as our societal needs change from time to time. In this regard we think that courts must strive to strike a proper balance between the competing needs in the special circumstances of each case.”

Coming from the background of the authorities quoted herein above it is not in dispute that the Plaintiff is an advocate of the High Court of Kenya and a long standing member of the legal profession and going by the evidence on record is a person who has reasonably acquired a reputation for high moral integrity and character. The publication was made without due regard to its accuracy. The Plaintiff testified that as a result of the publication he lost quite a number of his clients and it also led to cancellation of specific instructions by one of his clients Gimwany Holdings Co. Ltd. He has sought general damages, special damages, damages on footing of aggravated or exemplary damages, a permanent injunction and costs of the suit.

In his submission on damages the Plaintiff has suggested a sum of Ksh.20,000,000/- (Twenty Million) for general damages, 2 million (2,000,000/-) as punitive damages and Ksh. Two Million Four Hundred Thousand (Ksh.2.4 Million) as special damages. Several authorities were quoted in support of his claim on damages all of which I have taken due consideration of.

On its part, the defendant has suggested a figure of Ksh. One Million (Ksh.1,000,000/-) as sufficient and it has equally quoted several authorities in that regard.

I have carefully read and considered the submissions by the respective parties with regard to the issue of quantum of damages. The Plaintiff has claimed exemplary damages in addition to the special and general damages. In the English Court of Appeal decision in the case **John Vs MGN Ltd (1996) 2 ALL E.R. 35**, the court held: -

“The successful plaintiff in a defamation action is entitled to recover, the general compensatory damages such sum as will compensate him for the wrong he has suffered. That must compensate him for damages to his reputation, vindicate his name, and taken account of the distress, hurt and humiliation which the defamatory publication caused.....

Exemplary damages on the other hand had gone beyond compensation and are meant to “punish” the defendant. Aggravated damages will be ordered against a defendant who acts out of improper motive e.g where it is attracted by malice; insistence on a flurry defence of justification or failure to apologize”.

All considered and going by the evidence on record. I find that the Plaintiff is entitled to damages and I

enter judgment in his favour as follows: -

- a. **General Damages Kshs. Two Million (Ksh.2,000,000/-)**
- b. **Exemplary and aggravated damages in the sum of Kshs. One million (Kshs.1,000,000/-)**
- c. **A permanent injunction restraining the defendant whether by itself, its servant, or agents from publishing the allegation that the Plaintiff grabbed Rachael Njeri's land.**
- d. **Costs are awarded to the Plaintiff and interest in A and B above from the date of the Judgment until payment in full.**

As for the claim of special damages, I make no award as the same was not proved.

Dated, signed and delivered at Nairobi this 9th day of June, 2016.

.....

L NJUGUNA

JUDGE

In the presence of

..... ***for the Plaintiff***

..... ***for the defendant.***