



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL CASE NUMBER 395 OF 2011**  
**PETER MAINA NDIRANGU T/A EXPRESS SERVICE AGENCY.....PLAINTIFF**  
**VERSUS**  
**THE STANDARD GROUP LIMITED.....DEFENDANT**

**J U D G M E N T**

The Plaintiff filed this suit against the Defendant claiming the following reliefs: -

- a. General damages plus interest thereon.
- b. Costs plus interest thereon.

The Defendant is the publisher and printer of the Standard Newspaper which is distributed for sale to the general public in Kenya and beyond the borders.

The Plaintiff is an adult of sound mind carrying out auctioneering business in Nairobi in the name and style of Express Service Agency.

The Plaintiff in paragraph 4 of the Plaint pleaded that on the 16<sup>th</sup> September, 2010 the defendant falsely and maliciously published or caused to be published of and concerning the Plaintiff the following words.

***“Former Kabete MP Paul Muite’s wife has been allowed to apply for private prosecution against an auctioneer, a Senior Police Officer and two other people for allegedly destroying her property. Edith Ndeto Muite got the green light after a Nairobi Court rejected an objection by the Auctioneer Peter Maina Ndirangu. Mrs. Muite intends to prosecute Ndirangu of Express Services, Administration Police Joseph Mulatya, Mr. Nelson Havi and Mrs. Jackson Mwangi, she claims the four and 200 others destroyed property worth Ksh.896,726/- from her house on June 10<sup>th</sup> last year.”***

The Plaintiff further pleaded that the said words meant and were understood to mean, in their material and ordinary meaning and/or by innuendo that the Plaintiff was a suspected criminal by himself and in the course of his business as an auctioneer. The Plaintiff avers that as a result of the said words, he has been gravely injured in his credit and reputation and has been brought into scandals, odium and contempt in the eyes of the public and has also been injured in his business as an auctioneer and as a result he has suffered loss and damage. He prays for general damages, costs and interest thereon.

The Defendant filed a defence on the 21<sup>st</sup> December, 2011 in which he admits the contents of paragraphs 2 and 20 of the Plaint but denies all the other contents. In particular, the Defendant denies that it falsely or maliciously published any words or statement as alleged in paragraph 4 of the plaint and puts the Plaintiff to strict proof. It further denies the publication, article, words or innuendo complained of in their natural and ordinary meaning were meant to mean that the Plaintiff was a suspected criminal by himself or in the course of his business as an auctioneer.

In its further defence, the Defendant avers that the words in the publication consists of facts, they are true in substance and in fact and in so far as they consist of opinions, they were a fair comment on a matter of public interest especially business carried on by the Plaintiff. It denies that the Plaintiff's credit, character or reputation has been brought to scandal, odium and contempt in the eyes of the public or that the Plaintiff has suffered any loss, damage or injury as alleged.

According to the defendant, the Plaintiff's suit does not disclose any reasonable cause of action and should be dismissed.

In his evidence, the Plaintiff testified that he is a licenced Auctioneer since 1998 and relied on his witness statement dated 14<sup>th</sup> September, 2011. He produced his business licences for the years 2010 and 2011. He referred the court to the proceedings in CMCC No. 1/2010 which was an application for private prosecution wherein he has been named as the 4<sup>th</sup> Accused person yet he was not an accused as what was pending before the court was an application for leave by the complainant Mrs. Edith Muite to file prosecution against the Plaintiff. That Notice of Motion was withdrawn on 20<sup>th</sup> May, 2011 and the file closed.

He told the court that when the matter came up on 15<sup>th</sup> September, 2010, it was fixed for mention on the 27<sup>th</sup> September, 2010 for purposes of fixing of a hearing date for the application aforesaid yet on the 16<sup>th</sup> September, 2010, the Defendant reported that the complainant Mrs. Muite had been allowed by the court to prosecute him and the others for criminal offences. This report made him panic and was frightened as it was contrary to what he was told by his advocate about the proceedings of 15<sup>th</sup> September, 2010. Following the report, many friends and relatives called him about the report because they believed what was reported in the Newspaper was true and he had a difficult time in convincing his friends and relatives that the Newspaper report was false.

He told the court that he believed the report was malicious and as a result of the same he was subjected to public embarrassment, odium and contempt as a person and in his business of an auctioneer and has suffered loss and damage. It was his further evidence that many firms stopped giving him work because they believed he had turned out to be a dishonest person.

The Defendant did not call any evidence in support of its case.

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 the decided cases which I have considered in details, I now set out to identifying issues for determination which in my view are as follows: -

1. Whether the Article published in the Standard Newspaper of 16<sup>th</sup> September, 2010 was false and malicious.
2. Whether the article and words referred to the Plaintiff.
3. Whether the Article and the words were true in substance and in fact.
4. Whether the plaintiff has suffered loss and damage as a result of the publication.

6. 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 in **Murphy Vs Ha March (13DLR 3d 484)** where a member of Parliament Judy Ha 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 learnt 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) s shameful character (he is dishonest) a shameful course of action (he lives on avails of prostitution) or a shameful condition (he has small pox). Such words are considered defamatory because they tend to bring the man’s 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 C.B.C (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’s 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.

Halsbury’s Law of England 4<sup>th</sup> Edition Vol. 28 in libel and slander etc says of the two types of defamation: -

***1. Libel and slander actions in English law, speaking generally every man is entitled to his good name and to the esteem in which he is held by others, and has a right to claim that his reputation shall not be disparaged by defamatory statements made about him to a third person or persons without lawful justification or excuse.***

***If a defamatory statement is made in writing or printing or some other permanent form, the tort of libel is committed and the law presumes damage. If the defamation is oral, or in some other transient form, it constitutes the tort of slander which is not actionable at common law without proof of actual damage, except where the statement is one of a particular character.”***

Thus by libel generally one feels defamed if the words complained of are written or printed or appear in some other permanent form. Here damage is presumed in law. However, if the defamation is oral and only passing, it is not actionable at common law unless actual damage is suffered. But then, there is actionable slander and for this the same author says: -

***“A slander for which an action will lie is defamatory statement if made or conveyed by spoken words, sounds, looks, signs, gestures or some other non-permanent form, published of and concerning the Plaintiff to a person other than the Plaintiff, by which the Plaintiff has suffered actual damage, often referred to as special damage which he must allege and prove or which is actionable per se.”***

The elements of the tort of defamation were 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.

Looking at the pleadings, it is not in dispute that the Defendant published the article complained of and that the same referred to the Plaintiff among other people. What is in issue is whether the words were defamatory, false and malicious. The law is clear that, one who alleges must prove and therefore, the Plaintiff has a duty to prove malice. On the other hand, malice can be inferred and for it 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.”***

The Defendant did not adduce any evidence at the trial. This however, did not absolve the Plaintiff from his duty to prove his case on a balance of probability. All it did was to make the Plaintiff’s task of proving his case on a balance of probabilities easier because the case is one-sided and the court does not have to compare the case of the Plaintiff with any other evidence from the Respondent but burden and standard of proof remained the same.

I have considered the evidence on record as adduced by the Plaintiff and rather than what is pleaded in paragraph 4 of the Plaint, there is no evidence whatsoever to prove that in publishing the article complained of, the Defendant was driven by malice. In fact, there is no iota of evidence to suggest malice on the part of the Defendant.

The Plaintiff has not succeeded in proving that he was defamed and that he suffered injury to his reputation as a result of the article complained of.

In the premises, I find that he has not proved his case on a balance of probability and I hereby dismiss the same but with no orders as to costs. However, had the Plaintiff succeeded in proving his case, a nominal award of Ksh.50,000/- in general damages would have sufficed.

Dated, signed and delivered at Nairobi this 9<sup>th</sup> day of June, 2016.

.....

**L NJUGUNA**

**JUDGE**

*In the presence of*

.....*for the Plaintiff*

.....*for the Defendant*