



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL SUIT NO. 10 OF 2015

HON. KENNEDY NYAKUNDI.....PLAINTIFF

VERSUS

MR.JACKSON ONGUBO.....1ST DEFENDANT

GUSII STAR.....2ND DEFENDANT

JUDGMENT

Pleadings

1. The Plaintiff herein, Hon. Kennedy Nyakundi sued the two defendants, Jackson Ongubo and Gusii Star in a cause of action founded on a publication carried in the 2nd Defendant's issue No. 222 for the month of March 2015. The plaintiff's case is that in the publication under the title; "**Contractors accuse MCAS over procurement**" the defendant's falsely and maliciously caused to be written, printed and published an article which had words that were defamatory to his character as they named him as having been involved in misappropriation of development funds.

2. The Plaintiff enumerated the various ways that the said publication had injured his reputation by stating that the natural and ordinary meaning of words meant and were understood to mean the following:

1. "That the plaintiff is a dishonest honorable member.
2. That the plaintiff is a liar and professionally dishonest person who carries out private assignments beyond the scope of his official mandate as an elected member.
3. That the plaintiff who is an honourable member of the county assembly is not worth his office.
4. That the plaintiff is a pretender who undertakes subterranean business and or his social activities at the expense of the Kenyan public.
5. That the plaintiff is not fit to serve as a public servant in Kenya."

3. The plaintiff therefore prayed for the following reliefs:

- (a) General damages
- (b) Costs of this suit

(c) Interest on damages and cost at court rates.

4. The plaintiff's case is that the publication discredited him, lowered his standing in the society and that as a holder of a public office, he has been brought into public ridicule, scandal, odium and contempt among the right thinking members of society. He contends the said publication was unfair, false, unjustified, was actuated by extreme malice and calculated to injure his reputation and standing in the society. The plaintiff further states that the defendants' defamatory publication has traumatized him by subjecting him to a lot of stress, anxiety and hostility from his colleagues, seniors, juniors alike and the public in general. Lastly, he states that the defendants, have refused, failed and neglected to withdraw the said defamatory statements and/or apologize to him despite notice of intention to sue having been sent to them thereby making the filing of this suit necessary.

The defendants did not enter appearance or file a defence despite service with summons to enter appearance and plaint and therefore interlocutory judgment was on 6th August, 2015 entered against both the defendants after which the case was listed for formal proof.

Oral Evidence

5. When the case came up for hearing before me on 6th February, 2016, the plaintiff testified that he is the duly elected member of County Assembly of Keumbu ward in Nyaribari Chache Constituency. He produced copies of his national identity card and the original certificate of the result of the 2013 elections as P exhibits 1 and 2 respectively. He testified that his job entails representing his ward at the County Assembly where he participates in law making among other duties.

6. His case was that sometime in March 2015, he received several calls from residents of his ward informing him of a story contained in page 2 of the 1st defendant's newspaper, Gusii Star. He then referred to page 2 of the said newspaper in which there was a story about contractors who were complaining about an MCA taking off with Kshs. 200,000/= earmarked for payment of the said contractors which story he said referred to him.

7. The plaintiff contended that the said publication portrayed him as a dishonest person who was not suitable to lead and that later, he found copies of the offending newspaper strewn all over his ward where residents held demonstrations to protest against him. It is this turn of events that prompted the plaintiff to instruct his lawyers m/s Otwere & Co. Advocates to write demand letters to the defendants before filing the instant suit. He produced the demand letters and the offending newspaper article as P exhibit 3, 4 and 5 respectively.

8. The plaintiff's case was that the publication has affected his work as a member of the county assembly as his constituents no longer respect him and now view him as a thief.

9. PW2, George Sagero Mwanje, a resident of Keumbu Ward and the personal assistant to the plaintiff testified that he similarly read the story appearing on the 2nd defendant's Gusii Star newspaper to the effect that an MCA had taken off with money meant for development projects. He added that residents of the ward were angered by the publication that portrayed their member of the County Assembly as a dishonest person.

Determination

10. Having considered the plaintiff's pleadings, the evidence tendered and the written submissions, the issues before this court for determination are:

- 1. Whether the plaintiff has made out a proper case for a claim on defamation.**
- 2. Whether the plaintiff is entitled to the orders sought.**
- 3. What should be the award on damages?**

11. Before determining the above issues it is important to define the term 'defamation' and outline the principles underpinning the law on defamation.

12. Defamation Act (Cap.36 Laws of Kenya) defines defamation as a publication without justification, lawful excuse, calculated to injure reputation contempt or ridicule.

13. **Blacks Law Dictionary** (9th Edition) defines defamation as a statement that is defamatory in or of itself and is not capable of an innocent meaning.

14. **P.H. Winfield** defines defamation in the 5th Edition of his book, **A Textbook of the Law of Tort**, as follows:

"Defamation is the publication of a statement which tends to lower a person in the estimation of right-thinking members of the society generally or which tends to make them shun or avoid that person."

15. In the case **Phineas NyagahG Vs Gitobu Imanyara [2013] eLKR Odunga J.** observed as follows:-

"The defamatory statement is one which has tendency to injure the reputation of the person to whom it refers by lowering him in the estimation of the right thinking members of society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike and disesteem and typical examples are an attack upon the character of the plaintiff attributing to him any form of disgraceful conduct such as crime, dishonesty, cruelty and so on. Publication is the communication of the words to at least one other person other than the person defamed. Publication to the plaintiff alone is not enough because defamation is an injury to one's reputation and reputation is what other people think of a man and not his own opinion of himself. An action for defamation is essentially an action to compensate a person for the harm done to his reputation. Defamation is not about publication of falsehoods against a person. It is necessary to show that the published falsehood disparaged the reputation of the plaintiff or tended to lower him in the estimation of right thinking members of society generally."

16. On the whole defamation as a tort whether as libel or slander, has been judicially defined to encompass imputation which tends to lower a person in the estimation of right thinking members of the society generally and thus expose the person so disparaged (Plaintiff) to hatred, opprobrium, odium, contempt or ridicule.

17. Turning to the second issue of the principles underpinning defamation law, it is now trite law that in determining defamation cases the court must strike a balance between the provisions of Articles 32, 33, 34 and 35 of the Constitution, dealing with freedoms of expression and media freedom and the individual's right to access information on the one hand and Article 28 in respect of the inherent dignity of every person which dignity must be respected and protected.

18. On the right to access information and the freedom of expression, the words of **Lord Denning MR in Fraser v Evans & others (1969) All ER 6** are instructive that:

"There are some things which are of such public concern that newspapers, the press and indeed everyone is entitled to make known the truth and to make their comment in it. This is an integral part of the right of speech and expression. It must not be whistled away."

19. **Lord Coleridge, CJ in Bernard & another v Perriman (1891-4) ALL E.R 965** had previously stated that:

"The right of speech is one which it is for the public interest that individuals should possess, and indeed, that they should exercise without impediment, so long as no wrongful act is done; and unless an alleged libel is untrue there is no wrong committed."

20. Freedom of expression is guaranteed under **Article 33 of the Constitution** and it provides:

“Every person has the right to freedom of expression, which includes-

a. Freedom to seek, receive or impart information or ideas.”

21. On the other hand, Freedom of the media is guaranteed by **Article 34** of the Constitution as follows:

“Freedom and independence of electronic, print and all other types of media is guaranteed, but does not extend to any expression specified in Article 33(2).”

22. Under **Article 33(2)** specified above, 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.*

23. From the above provisions of the constitution, freedom of expression and of the media is guaranteed but is not absolute as the limitations are also clearly spelt out therein.

24. In **Phineas Nyagah Vs Gitobu Imanyara** (supra) Odunga J. commenting on the above Articles of the Constitution stated as follows:

“Accordingly, the law of defamation is not just anchored on a statutory enactment but has been given a constitutional underpinning as well. In a tort of defamation the court is therefore under a duty to balance the public interest with respect to information concerning the manner in which its affairs are being administered with the right to protect the dignity and reputation of individuals.”

25. The next question to address is how pleadings are to be drawn in defamation cases and whether or not the alleged defamatory words must be reproduced in the plaint.

26. In the case of **Nkalubo vs Kibirige (1973) EA 102**, it was held as follows:-

“In all suits for libel the actual words complained of must be set out in the plaint. In libel and slander the very words complained of are the facts on which the action is grounded. It is not the fact of the defendant having used defamatory expressions, but the fact of his having used those defamatory expressions alleged, which is the fact on which the case depends....This is not a mere technicality, because justice can only be done if the defendant knows exactly what words were complained of, so that he can prepare his defence. In this case the letter having been written in luganda, the particular words complained of should have appeared in the plaint in that language, followed by a literal translation into English...Whereas it is true that relief not founded on pleadings will not be given but a court may allow evidence to be called, and may base its decision, on unpleaded issue, the court does not think that it can be invoked to allow the introduction of what amounts to a new cause of action....The essence of defamation suit is that certain specific words used by the defendant were defamatory of the plaintiff. Where one is dealing with spoken words, it may of course transpire in the course of evidence that the words used were not exactly what the plaintiff believed them to have been, but if they were to the same effect, he can still recover, although an application for leave to amend would be prudent. If, however, a suit were founded on an allegation that certain words were used and then, without any amendment of the pleadings, the plaintiff were awarded damages on evidence that substantially different words were used, no defendant would know how to prepare his case and injustice rather than justice would result.....It must be borne in mind that rules of court are drafted to aid the efficient administration of justice and failure of one party to observe these rules can result in a failure of justice to the other. This is a case in which there was no

miscarriage of justice and it would be unjust now to allow the appeal to succeed on this issue”

27. My understanding of the above authority is that where the words are not pleaded in the plaint but in the course of the evidence the words come out clearly, the court may well find for the plaintiff. In the case of **Dr. Lucas Ndingu Munyua vs Royal Media Services Ltd & Another High Court Civil Case No.52 of 2008 Odunga J.** when dismissing a defamation case on similar grounds had this to say:-

“In this case however, neither in the plaint nor in the evidence were the exact words reproduced so that the court is handicapped in finding whether the words published were in fact defamatory”

28. In the present case I find that during formal proof, the plaintiff produced an extract of the newspaper article that contained the alleged defamatory words. I have perused the plaintiff's exhibit 5, which is the article published by the 2nd defendant in its newspaper that is the subject of this suit, and noted that it was worded as follows:

“A contractor Jackson Ongubo said that he was given a tender to construct five water springs in Keumbu ward in Nyaribari Chache constituency at kshs. 500,000 but was only given kshs. 300,000 as the area MCA walked off with kshs. 200,000/= and that he has since gone to court to protest the matter”.

29. In respect to the 2nd defendant, I find that it is not in dispute that it published the defamatory words in its newspaper. The article in question referred to the plaintiff and no one else as the plaintiff tendered both oral and documentary evidence to prove that he is indeed the Keumbu Ward member of the County Assembly. The impugned publication reports that the plaintiff walked off with money earmarked for the payment of contractors and it is my finding, that it portrayed the plaintiff as a dishonest person. The newspaper was widely circulated in the plaintiff's ward and, according to the plaintiff and his witness, the area residents who became aware of the said article, held demonstrations to vilify and condemn him.

30. In a defamation case, the claimant must prove, to the required standards, that the words complained of were published of and concerning him, that they were published by the defendant, that they were false, and that they were defamatory in character of the claimant and finally, that the publication was done with malice. See **J Kudwoli vs Eureka Educational and Training Consultant & 2 Others Civil case 126 & 135 of 1990, Wycliffe A. Swanya v Toyota East Africa Ltd & another [2009] eKLR**

31. On malice, **Odunga J held in Phineas Nyagah Vs Gitobu Imanyara (2013) eKLR** 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.”

32. I am satisfied that the defamatory words were published by the 2nd defendant, they had the effect of lowering the reputation of the plaintiff in the eyes of right-thinking members of the society. It is therefore my finding that the plaintiff has proved his case against the 2nd defendant to the required standards.

33. Turning to the case against the 1st defendant, the impugned newspaper article reports that he is the one who uttered the defamatory words. While the case against the 2nd defendant is founded on libel, the case against the 1st defendant is based on slander because it is alleged that the 1st defendant said the offensive words, it was therefore necessary for the plaintiff to reproduce the actual words that were uttered by the 1st defendant and not the words as they were reported by the 2nd defendant, to enable the court determine whether or not they are defamatory. **Emukule J in Kariungu Kirubua & Co Advocates vs The Law Society Of Kenya & Others [2009] eKLR** citing with approval the case of **Collins vs**

Jones (1955) 1 QB 571 and **Lougheed vs CBC (1978) WWL 338** were it was held that “*he (Plaintiff) must in his pleading set out the words with reasonable certainty.....*”

34. I find that in jurisdictions similar to ours, there is general unanimity that alleged defamatory words must be pleaded in the original language they were uttered. This position was ably stated in the case of **Muir vs January (1990) BLR** where it was held:-

“In an action for defamation the actual words used are the material facts. It is an elementary rule of pleading that all material facts must be pleaded. Therefore in an action for defamation the actual words, or the part complained of, must be pleaded by setting them out in the declaration. It is not enough to describe their substance, purpose or effect. If the words are in a foreign language, the actual words used must be set out in the foreign language, followed by a literal translation. Failure to comply with this rule of pleading rendered the pleading defective, and in the absence of an amendment to cure the defect, the plaintiff could not obtain judgement on the basis of the pleading”

35. The importance of quoting the actual words uttered or published in pleadings was also emphasised in the High Court of Uganda in **Capt. Kibuika Mukasa vs The New Vision Publishing Co. Ltd Misc. App. No. 148 of 2013** in which it was stated as follows:

“In the instant case, it was not good to merely describe the substance of the articles complained of in one paragraph. The law requires the very words in the libel to be set out in order that the court may judge whether they constitute a ground of action. The plaintiff has not done this. For example, the Luganda words complained of ought to have been quoted verbatim and translated into English the official court language to make part of the pleadings.”

36. From the above cited authorities, it is clear that ‘the law requires the very words of the libel to set out in the pleadings in order that the court may judge whether they constitute a ground for action.

37. Pleadings serve the purpose of enabling the defendant to know the case against him so that he can properly defend himself with the result that the issues between the parties can be resolved. This purpose cannot be achieved in a defamation case unless the defamatory words are pleaded with sufficient particularity and clarity. In the instant case, the plaintiff did not establish the nexus between the 1st and the 2nd defendant and neither were the exact words allegedly uttered by the 1st defendant quoted verbatim either in the pleadings or the newspaper extract produced as P exhibit 5 in order for this court to determine if they were defamatory or not.

38. Guided by the authorities cited above, which are, in my view relevant to the case before me, I find that the omission to plead the exact defamatory words uttered by the 1st defendant in the plaint accompanied by their literal interpretation was fatal to the plaintiff's case against the 1st defendant and on that basis the case against the 1st defendant fails.

39. Having considered and dealt with the issue of proof of defamation, the only issue that now awaits my determination is that of the quantum of damages payable to the plaintiff.

40. Section 16A of the **Defamation Act Cap 36 Laws of Kenya** provides as follows:

“in any action for libel, the court shall assess the amount of damages payable in such amount as it may deem just provided that where the libel is in respect of an offence punishable by death the amount assessed shall not be less than one million shillings, and where the libel is in respect of an offence punishable by imprisonment for a term of not less than three years the amount assessed shall not be less than four hundred thousand Kenya shillings.”

41. It was the plaintiff's testimony that after the above publication, the people in his ward started referring to him as a thief. It is to be noted that the plaintiff is a member of the County Assembly of Kisii and therefore a politician and a public figure. The damage done to the plaintiff's reputation cannot be gainsaid

or underrated especially in the highly competitive political environment currently prevailing in the country. It is with these facts in mind that one can say that a injury to any politician's reputation may spell doom to his chances of future re-election or advancement of his political ambitions..

42. I have considered the written submissions filed by the plaintiff's advocate, the authorities cited and the proposals on quantum made therein. My attention is particularly drawn to the case of **John Vs M.G.N 110 (1196) 2 ALLER 35** which was quoted with approval in **Mikidadi Vs Khalfan & Another (2004) 2 KLR 503** where the Court of Appeal held as follows:

"The successful plaintiff in a defamation action is entitled to recover as general compensatory damages, such sums as will compensate him for damages to his reputation, vindicate his good name and take account of the distress, hurt and humiliation which the defamatory publication has caused"

43. Guided by the above dictum and considering the status of the plaintiff as an elected member of the county assembly I find that an award of Kshs. 3,000,000/= general damages will be adequate compensation.

44. I therefore enter judgment for the plaintiff against and 2nd defendant only, for the sum of kshs. 3,000,000/= together with costs and interests from the date of this judgment until the same is paid in full. The plaintiff's case against the 1st defendant is dismissed with no orders as to costs.

Dated, signed and delivered at Kisii this 15th day of August 2016

HON. W. A. OKWANY

JUDGE

In the presence of:

- Mr. Nyagaka for the Plaintiff
- N/A for the Defendant
- Omwoyo: court clerk