



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NUMBER 621 OF 2010

HON. MARTHA KARUA. PLAINTIFF

VERSUS

NATION MEDIA GROUP LIMITED. 1ST DEFENDANT

OTIENO OTIENO. 2ND DEFENDANT

J U D G M E N T

By a plaint dated 16th December, 2010 and filed in court the same day the Plaintiff herein Hon. Martha Karua has filed this suit against the Defendants jointly and severally seeking the following orders: -

- a) Damages on the footing of aggravated or exemplary damages.
- b) General damages
- c) An apology in terms and text approved by the Plaintiff to be published in a manner as prominent as the offending article.
- d) Costs of the suit.
- e) Interests on (a) and (b) above.

The Plaintiff's cause of action is founded on a publication carried out by the 1st Defendant in an article dated 28th November, 2010 wherein, it was alleged, the Defendants falsely and maliciously published to the general public of and concerning the Plaintiff the following words: -

“BATTLE OF FALLEN ANGELS AND DEMONS IN 2012 ELECTIONS”

“But years of mixing it up with the rest in power have soiled the reform credentials of the likes of Raila Odinga, Charity Ngilu and Martha Karua. The more they deny reports linking them to corruption, nepotism and association with drug barons, the less their chances of passing the tough integrity test set by Article 6 of the new Constitution.”

The Plaintiff alleges that the said words were false, malicious and highly libelous of her and that in their ordinary and natural meaning and in the innuendo thereat imputed, the said words meant and were understood to mean and/or implied and/or imputed that: -

- a) The Plaintiff has been implicated with the vice of corruption.

b) The Plaintiff has been implicated with the vice of nepotism.

c) The Plaintiff has been associated with drug barons.

In the Plaintiff's view, the publication by the Defendants of the words complained of was actuated by malice and the said words were false and calculated to discredit the Plaintiff and to damage her reputation and character in the eyes of members of Society and the public in general. That the said words were highly defamatory of her and were published by the Defendants with the aim of assassinating his character and to damage her reputation and character in the eyes of members of the society and the public in general.

The Plaintiff averred that by the said words she has been greatly injured in her character and her reputation as a politician has been compromised not only to Kenyans but to the rest of the world and for the said reason, she claims damages against the Defendants.

The Plaintiff avers that the article complained of not only embarrassed her family, her children, their friends, constituents but it also distressed her friends and well wishers who kept calling her, some crying, to protest this blatant violation of the law.

The Defendants filed a statement of defence on 22nd February, 2011 in which they admitted having published the words complained of but denies that the words were published falsely and/or maliciously either as alleged or at all. They further deny that the words were defamatory of the Plaintiff.

The Defendants avers that the words complained of formed part of the article and deny that in the natural and/or ordinary meaning of the words complained of in their proper context were or were capable of bearing the meanings or either of them as pleaded in the plaint or any defamatory meaning.

In further reply to paragraphs 7 and 8 of the plaint, the Defendants avers that in so far as the words and in their natural and ordinary meaning, or otherwise consists of expression of opinion they are fair comments and fair information upon facts which are matters of public interest namely the issue of politics in Kenya, the presidential aspirants and the election that was forthcoming in the year 2012 which were all matters of public interest and the Plaintiff being a public figure, the article was a matter of public interest.

The Defendants deny that they published the words falsely and/or maliciously as alleged or at all and further deny that the words were calculated to disparage the Plaintiff professionally, politically and/or socially as alleged in paragraph 9 of the plaint. They deny that the Plaintiff has been injured in her reputation and/or has suffered distress and/or embarrassment as alleged. They have urged the court to dismiss the suit.

In support of her case, the Plaintiff testified as PW 1 and relied on her statement filed in court on 14th May, 2012 which the court adopted as her evidence in chief. According to her evidence, she is a mother of two, a law graduate from the University of Nairobi, 1980, an Advocate of the High Court of Kenya and an MBA graduate of USIU. She served as a magistrate from July 1981 to July, 1987 rising to the rank of Senior Resident Magistrate when she resigned to join private practice and she established her own firm of Martha Karua & Company Advocates through which she practiced until December, 2002 when she was appointed to the Government. That she was an active member of the Law Society of Kenya and in the year 1989, she was elected a Council Member which position she held until March, 1993. In the year 1991 she was honoured by Human Rights Watch an internationally recognized Human Rights Body, based in New York, USA.

It was her further evidence that she has been active in Women's Rights Movement and was a member of FIDA Kenya, leading to her recognition by FIDA In 1995. She was active in the international Commission of Jurists, Kenya Chapter and was recognized as Jurist of the Year on 10th December, 1999 for exemplary performance in promotion and protection of Human right democracy and the rule of law.

That she was one of the women who founded the League of Women voters a political lobby group for

Women of all Shades and Political Affiliations which advocates for participation of women in politics and decision making. She was the chair since its inception in the year 1992 until May, 2003. She was elected Member of Parliament for Gichugu Constituency in December, 1992 which she represented for 4 terms. In the year 1993, she was elected as National Secretary for Legal and Constitutional affairs of the Democratic Party of Kenya a position she held until 1998.

That on 3rd January, 2003 she was appointed a Minister for Water Resources Management and Development as it was then known and in December, 2005 she was appointed the Minister of Justice and Constitutional Affairs a position she held until the year 2009 when she resigned.

It was her further evidence that on Sunday the 28th November, 2010 she read the article the subject of this suit in the Sunday Nation on line while she was on a trip to London. That she has never been linked to the vice of Corruption or nepotism or been associated with drug barons. According to her, the article was not only false but malicious and defamatory and totally without foundation. She averred that the article caused her embarrassment and lowered her standard in the society and her children who are adults were distraught on reading the article.

In support of her case, she called PW 2 Esther Waithira Chege as a witness who was a party official with NARC Kenya Party until the year 2007. She had accompanied the Plaintiff on a trip to London, UK on the 26th November, 2010 and while there, she accessed the online edition of the Daily Nation dated 28th November, 2010 when she came across the article complained of.

It was her evidence that she got shocked at the allegations in the article, that the credentials of the Plaintiff had been soiled and that she could be lined to corruption, nepotism and be associated with drug barons. She told the court that she was further shocked that the article indicated that the Plaintiff's chances of passing the integrity tests in Article 6 of the New Constitution were lowered by her alleged link to corruption and association with drug barons.

It was her further evidence that she was surprised especially because her opinion and view of the Plaintiff's character and conduct was drastically different as she knew her as a person who does not engage in corrupt practices, nepotism or associate with drug barons.

Though the defendants filed a defence and submissions, they did not call any witness to support their case. Parties filed their respective submissions which the court has duly considered.

The Plaintiff's submissions reiterate the evidence as adduced by PW 1 and PW 2 and it will not serve any purpose for me to reproduce it.

This court has carefully considered the pleadings, evidence adduced by the Plaintiff and the rival submissions. The cause of action herein is founded on defamation. The court must first establish what defamation is and its ingredients. In a suit founded on defamation of character, the Plaintiff must prove the following elements: -

- a) There must be publication of the words to a third party.
- b) The words as published must refer to the Plaintiff
- c) The words must be defamatory.
- d) The words must be false.
- e) In slander, there must be proof of resultant damage.
- f) The Plaintiff must demonstrate that the words were published maliciously.

It is clear from the material before the court that the publication refers to the Plaintiff as it mentions her

by name.

In paragraph 3 of the plaint, the 2nd Defendant has been described as the publisher and printer of the Sunday Nation Newspaper, a National Newspaper with a very substantial circulation throughout the Republic of Kenya and elsewhere in the world and that the said newspaper is also accessible on the internet. This fact is expressly admitted by the Defendants in paragraph 3 of the defence. This settles issue number one.

On issue number 3; was the article defamatory? The court will start by examining the meaning of defamation: -

In the English Case of **Scott Vs Sampson (1882) QBD 491** at page 503, Dave J defined the word '**defamation**' as

“A false statement about a man to his discredit”

The leading English monograph of **Gatley** on the subject of defamation defines it as thus: -

“Any imputation which may tend to lower the Plaintiff in the estimation of right thinking members of the society generally.”

The well known work of **Winfield** gives the following definition of defamation.

“It 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.”

In the Halsbury's Law of England 4th Edition Vol. 28 Paragraph 10 states: -

“A defamatory statement is a statement which tends to lower a person in the estimation of the right thinking members of the society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business.”

In **Jones Vs Skelton (1963) ICLR 1362 P 1371** the court stated:-

“The ordinary and the natural meaning may therefore, include any implication or inference with a reasonable reader guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction would draw from the words. The test of reasonableness guides and directs the court in its function of deciding whether it is open to a jury in any particular case to hold that reasonable persons would understand the words explained of in a defamatory sense.”

The common law of defamatory protects every person from harm to their reputation by false and derogatory remarks about their person known as defamation. The same protection is anchored in the constitution under Article 33(1) (a) as read with Clause (3) of the Constitution.

Looking at the article complained of, the article associates the Plaintiff with corruption, nepotism and with drug barons. It goes on to say that the more the Plaintiff and the others mentioned in the said article deny reports linking them to those vices stated therein, the less their chances of passing the tough integrity test set by Article 6 of the New Constitution. The words as published are defamatory as they tend to lower the Plaintiff in the estimation of the right thinking members of the society generally. In defamation cases, it is trite law that the statement is presumed false unless the defendant proves the truth. Defamation law puts the burden of proving the truth of the alleged defamatory statement on the Defendant rather than the Plaintiff and especially where the defences of justification and fair comment are pleaded.

The Defendants herein have pleaded the defence of absolute privilege. In support of this defence, it is pleaded that the article was a fair comment on a matter of public interest and that the Defendants were commenting on issues of politics in Kenya, the Plaintiff having been a presidential candidate in the year 2012 and the Plaintiff being a public figure.

For this defence to succeed, the following are the guidelines as laid down in the case of **Reynolds Vs Times Newspapers (1999)**.

1. The seriousness of the allegation i.e. if the allegation is not true what will be the level of misinformation to the public and what will be a corresponding harm to the individual.
2. The nature of the information and the extent to which the subject 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 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 the 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 investigations.
9. The timing of the publication.

The Defendants herein did not call any witnesses in support of their defence that they have pleaded and relied on and in the circumstances, the defences cannot aid their case.

On issue number 4, the Plaintiff denied that the words were true and this court having observed (supra) that the burden was on the Defendants to prove that the article is true, I return a finding that the article was false in the absence any evidence on the part of the Defendant.

Having found that the article was defamatory of the Plaintiff, she is entitled to damages which I now proceed to consider. In so doing, regard is had to the Plaintiff's standing in the society and more so at the time the article was published. This court has already set out her credentials elsewhere in this judgment.

Section 16A of the Defamation Act Cap 36 Laws of Kenya provides: -

“In any action for libel, the court shall assess the amount of damages payable in such amount as it may deem fit; 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 not less than three years, the amount assessed shall not be less than four hundred thousand shillings.”

The latitude in awarding damages in an action for libel is very wide. In the case of **Johnson Evans Gicheru Vs Andrew Morton & another (2005) eKLR** the court had this 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 the case of **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 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.”

As Windeyer J, said in the case of **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 fair and reasonable awards, I could draw considerable support in the guideline of **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 from the prominence itself but from 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.*

On quantum of damages, the Plaintiff has proposed a sum of Ksh.10,000,000/- as general damages and Ksh.4,000/- as aggravated damages. They have relied on the cases of **John Patrick Machera Vs Wangethi Mwangi & Nation Newspapers Ltd**, HCCC No. 1709 of 1996, **Johnson Evans Gicheru Vs Andrew Morton & another (2005) eKLR C.A. No. 314 of 2000** where a sum of Kshs. 8 Million and 6 Million respectively were awarded.

The Defendant on their part have proposed a sum of Ksh.5 Million and they have been guided by the following cases: -

- a. Kwacha Group of Companies & another Vs Tom Mshindi & 2 Others (2011) eKLR.**
- b. Esso Standard Limited Vs Semu Amanu Opio SCCA 343 of 1987** quoted by G.V. Odunga in the case of **Ndungu Njoroge & Kwach Advocates & Another Vs Standard Ltd & 2 Others (2012) eKLR**, where the Honourable Judge stated that he would have awarded Ksh.5,000,000/- as damages had the Plaintiff's case succeeded.
- c. Nation Media Group Vs Daniel Musinga t/a Musinga & Co. Advocates**, Civil Appeal No. 120 of 2008 where the Appellant was awarded Ksh.4,000,000/- in damages.
- d. Johnson Gicheru Vs Andrew Morton & another (2005) Eklr** where he was awarded Ksh.6,000,000/-

For those reasons, this Honourable court do exercise its discretion and award the Plaintiff a sum of Ksh.7,000,000/- in general damages and a further sum of Ksh.1,000,000/- as exemplary damages for the Defendants failure to tender an apology and the flurry of insistence on the defence of privilege which they did not support by way of evidence. The court declines to grant prayer (c) in view of the time lapse.

Costs of the suit are awarded to the Plaintiff plus interest from the date of this judgment.

Dated, signed and delivered at Nairobi this 29th day of September, 2016.

.....

L NJUGUNA

JUDGE

In the presence of

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

..... **For the Defendant**