



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NUMBER 247 OF 2005

EMMANUEL KURIA WA GATHONI.PLAINTIFF

VERSUS

EAST AFRICAN STANDARD LIMITED.1ST DEFENDANT

MATTHEW MUTUMA.2ND DEFENDANT

J U D G M E N T

By a plaint dated the 3rd March, 2005 and filed in court the same day, the Plaintiff herein Emmanuel Kuria wa Gathoni has filed this suit against the Defendants jointly and severally seeking the following orders: -

- a) An order that the Defendants do make a full and unqualified apology, make amends and withdrawal of the said complained of remarks and statements and such apology, amends and withdrawal to be given the widest possible prominence and circulation, similar to the publications complained of the text and substance thereof to be approved by the Plaintiff.
- b) General damages, the quantum thereof to be determined by this Court.
- c) Exemplary and aggravated damages for defamation and libel, the quantum thereof to be determined by this Honourable Court.
- d) Costs of this suit.
- e) Interest on (b), (c) and (d) at Court rates.
- f) Any further and/or other relief as this Honourable Court may deem fit and just to grant.

The Plaintiff's cause of action is founded on a publication carried out by the 1st Defendant in an article dated the 8th March, 2004 wherein it is alleged that the Defendants falsely and maliciously published and/or caused to be printed and published of and concerning the Plaintiff the following statement on the front page of the said newspaper. **"THE BIG ISSUE" – It was one of the Kenya's most sensational murder trials. The suspects were set free. So who killed estate's rights activist Charles Sosah?"**

It is further alleged that besides the said statement, the Defendants maliciously, contemptuously and disparagingly published and/or caused to be printed and published a picture of the Plaintiff with one

Kimani Kongo and an inset of the photograph of the late Charles Yawe Sosah (hereinafter called (**“the deceased”**)) and a big question mark between the two with the following words in bold letters **“who killed Sosah.”**

Further, on page 1 of **‘THE BIG ISSUE’** magazine of the said Newspaper the defendants maliciously, contemptuously and out of spite printed and/or published and/or caused to be printed and published on a full page an enlarged picture of the Plaintiff and the said Kimani Kongo with an inset of passport size photograph of the deceased between them and a big question mark beneath the said photograph together with the following statement printed over the said question mark: -

“WHO KILLED SOSAH”

Further below the said pictures and statement, the Defendants did reproduce and/or printed the following statement: -

“The suspects were free so who killed estate rights Charles Sosah.”

It is further alleged that on page 11 of the said magazine the Defendant’s printed and published and/or caused to be printed and published another prominent heading reading **“Justice system fails to get to the root of the city murder”** and below the said heading, the Defendants produced the Plaintiff’s photograph with the said Kimani Kongo and the following statement and concerning the Plaintiff: - **“Murder suspects Kimani Kongo (left) with Kuria was Gathoni in court. Inset: Gathoni’s wife (right) celebrates her husband’s freedom with a friend.”**

Further, immediately below the photograph and the statement aforesaid, the Defendants printed and/or caused to be printed in bold letters the following words: -

“Prime suspects are freed after a long legal battle to bring killers to book”

The Plaintiff avers that the said statements and publications were published despite the fact that the Defendants knew and/or ought to have known that the Plaintiff was tried for the offence of Murder of the deceased and was acquitted on the 8th September, 2003 whereupon the Plaintiff ceased being a suspect of the said murder. According to the Plaintiff, the statements and the publication aforesaid were malicious and defamatory to the Plaintiff and the Defendants in so publishing were actuated by extreme malice and spite and the same were calculated to injure the Plaintiff’s reputation and image. The particulars of malice, spite and contempt are set out in paragraph 10 of the plaint.

The Plaintiff further avers that by reason of the said false, malicious and defamatory publication, he has been injured in his character and reputation as an architect and City Planner and a former high ranking Government Official of many years and that he suffered considerable distress, agony, mental torture and he has also been brought to public scandal, contempt and public ridicule hence the suit.

The Defendants filed a joint statement of defence on the 7th April, 2005 in which it is admitted that the Defendants published the words complained of, but denies that the same were falsely and maliciously printed and published. It is also admitted that the pictures and the words referred to in the plaint were published by the Defendant but it is denied that they were maliciously, contemptuously and disparagingly printed and published. Accordingly to the Defendants, the publication complained of was not malicious and defamatory, was not actuated by any malice or spite and were not calculated to injure the Plaintiff’s reputation or image.

The Defendants further avers that the publication was true in substance and in fact and the words therein consisted of a fair and accurate report of legal proceedings against the Plaintiff and accordingly were published in an occasion of qualified privilege. The Defendants have also relied on the defence of qualified privilege.

A reply to defence was filed on the 21st April, 2005 wherein the Plaintiff has joined issues with the

Defendant's defence.

In his evidence, the Plaintiff applied to adopt his statement filed in court on the 20th September, 2013 which the court adopted as his evidence in chief. It was his evidence that between the years 1972-2000, he was working for Nairobi City Council as an Architect and a City Planner until he retired in the year 2000 by which time, he had risen through the ranks to become the Director of City Planning. That on the 14th February, 2001 he learnt through the media that his name was being adversely mentioned in connection with the murder of Sosah. He decided to present himself to Kilimani Police station where he was immediately arrested. He was latter charged with the offence of murder of Charles Sosah in High Court Criminal Case No. 70 of 2001, went through the trial and in the end, he was acquitted in September, 2003.

In his evidence he told the court that the publication implied that he was still a suspect yet he had been acquitted of the charge. That the article was very agonizing to him bearing in mind that he had been acquitted. According to him, the article was written out of malice in that by the time it was written, he had been acquitted and the Defendants knew that because when he was acquitted they wrote an article to that effect.

In his view, the statement in the article pre-supposes that they were not entitled to an acquittal and the effect of the article to the members of the public was that they looked at him with hatred and that the Defendants were inciting members of the public against him.

The Defendants did not call any evidence in support of their case.

I have carefully considered the pleadings filed herein, the evidence on record and the submissions made by the parties and in my view, the following issues fall for determination.

- 1) *Whether the article published in the East African Standard Limited on 8th March, 2004 by the Defendant was libelous and malicious of the Plaintiff.*
- 2) *Whether the article was defamatory of the Plaintiff.*
- 3) *Whether the Plaintiff suffered injury to his reputation as a result of the article and the words published therein.*
- 4) *Whether the Plaintiff is entitled to damages and if so the quantum thereof.*
- 5) *Whether or not the aforesaid words were published on an occasion of qualified privilege being a fact and accurate reporting of the proceedings.*
- 6) *Who is liable to pay the costs of the suit?*

With regard to the first issue: 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 **Phineus 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.”

Also relevant is the case of **J. P. Machira t/a Machira & Co. Advocates Vs Wangethi Mwangi & Nation Newspapers**, Civil Appeal No 179/1997 where the Judge expressed himself thus: -

“..... malice as I have said can be inferred from a deliberate or reckless or even negligent ignoring of facts....”

The Judge went on to say: -

“... I dare say, sensationalism may be permitted journalism, but deliberate and malicious suffocation of information calculated to give a wrong impression is unacceptable...”

In the case of **Phineas Nyagah (supra)** Odunga, J had this to say:

“Malice here does not necessarily mean spite or ill will but recklessness itself may be evidence of malice. Evidence of malice may be found in the publication itself or the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice but the law does not weigh in a fair balance and it does not allow merely because the words are excessive, there is therefore malice. Malice may also be inferred from the relations between the parties before or after the publication or in the conduct of the Defendant in the course of the proceedings. Malice can be founded in the publication itself if the language used is utterly beyond the facts. The failure to inquire into the facts is a fact from which inference of malice may properly be drawn. Any evidence which shows that the Defendant knows the statement was false or did not care whether it be true or false will be evidence of malice.”

It is not in dispute that the Plaintiff was charged with the offence of murder of the deceased in High Court Criminal Case No. 7 of 2001 and was acquitted of the said offence. On the 8th day of September, 2003, the article complained of was published, that was six (6) Months after the acquittal. In the article, the Plaintiff and his co-accused in the Criminal case are referred to as suspects.

Any person reading that article would get the impression that the Plaintiff and his co-accused had just been acquitted whereas they had been acquitted six months before the date of the article. The Defendants knew of his acquittal, a fact which they admitted in their defence and they gave a wide coverage/reporting to the proceedings in the 1st Defendant's Newspaper.

The Plaintiff also took issue with the prominence the story was given and wondered why the Defendants had to print his photo alongside that of the deceased (Sosah) long after he had been acquitted. In the submissions the Defendants have justified the photo and the headline used in the article as being a fair and natural consequence of the contents of the story and meant as a guide to have the readers read the story. That the reading of the story clearly puts in the public domain, in prominent manner, the acquittal of the Plaintiff and the events that led to the same. In my view, I do not think so. The sensational way in which the story was told and the prominence that it was published, yet it was not the first time that it was being reported, left a lot to be desired. In this, I find support in the Machira case in which Judge Akiwumi JA (as he then was) had this to say: -

“..... I dare say, sensationalism may be permitted journalism, but deliberate and malicious suppression of information calculated to give a wrong impression is unacceptable...”

It is also noted that the Defendants in their letter dated 8th April, 2004 to the Plaintiff's advocates admitted that there were some marginal errors in the article which may have given the Plaintiff (or any other person for that matter) an impression that the publication could have meant otherwise. The Defendants had even offered to publish a correction which they never did. If indeed the Defendants intended to publish the fact of the Plaintiff's acquittal in a prominent manner as alleged, then they would not have made the admission. I am persuaded by the Plaintiff's arguments that the article was libelous and malicious.

With regard to the second issue; a publication is said to be defamatory if it 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.

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 same protection is also anchored in the constitution under Article 33(1) (a) as read together with clause (3) thereof both of which provides: -

“33(1) (a) Every person has a right to freedom of expression, which include freedom to seek, receive or impart information or idea.”

Clause 3 provides:-

“In exercise of the right of freedom of expression every person has to respect the rights and reputation of others”

The Plaintiff herein had gone through a rigorous murder trial after which he was acquitted of the offence. The article published six months down the line refers to him as a suspect and as I have noted elsewhere in this judgment, the article was done in a sensational manner and with great prominence which was uncalled for. It was defamatory of the Defendants to refer to the Plaintiff as a suspect long after he had been acquitted. The publication of the article must have caused injury to the Plaintiff's reputation taking into account his standing in the society and the fact that he was a family man. At the material time, he was the Director of City Planning and Architecture with the defunct City Council of Nairobi. It was his evidence that the article was very agonizing to him bearing in mind that he had been acquitted and for that reason, this court finds that he is entitled to an award of damages.

As to whether the article was published on an occasion of qualified privilege, the Defendants have argued that the words published were true in fact and substance in that there were criminal proceedings against the Plaintiff who was prosecuted and acquitted of murder.

The defence of qualified privilege is provided for in Section 7 of the Defamation Act which provides: -

“7(1) subject to provisions of this section, the publication in a Newspaper of any such report or other matter as is mentioned in the schedule to this Act shall be privileged unless such publication is proved to be made with malice.”

With regard to this defence, I find useful evidence in the book Gately on Libel and Slander 9th Edition.

“It has been said that for privilege to apply, a report must be strictly confined to the actual proceedings in court and must contain no defamatory observations or comments from any quarter whatever, in addition to what forms strictly and properly the legal proceedings”

In the **Machira** Case supra, Omollo J (as he then was) in his judgment stated: -

“I think it is trite law and I must state it here and now, that qualified privilege can be destroyed by malice whether express or implied.

This court has already made a finding of malice on the part of the Defendant sin publishing the article and having made the finding, the defence of qualified privilege cannot come to their aid.”

This court now turns to the question of damages that the Plaintiff is entitled to, and before I venture into it, the following passage by Windeyer J, in the case of **Vein Vs John Rairax & Son Pty Limited** is helpful.

“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.”

In the case of **Johnson Evans Gicheru Vs Andrew Morton & Another [2005] eKLR**, Hon Tunoi JA (as he then was) 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 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.”

To arrive at what could be said to be fair and reasonable awards, I could draw considerable support in the guidelines laid down in the case 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.*

Coming from the background of the authorities quoted herein above, it is not in dispute that the Plaintiff was a senior officer with the defunct City Council of Nairobi as the Director of City Planning and Architecture, a position he held until his retirement in April 2000. He is a registered Architect, a registered Physical Planner, an associate member of the Architectural Association of Kenya (AAK) and an Associate Member of Kenya Institute of Planners (MKIP)

This court has considered the submissions by the respective parties on quantum of damages. The Plaintiff has suggested a figure of Ksh.20,000,000/- in general, exemplary and aggravated damages and a further sum of Ksh.2 million as damages in lieu of apology.

He has relied on the cases of **Hon. Christopher M. Obure Vs Tom Oscar Alwaka t/a Headline Publishers & 3 others** (High Court Civil Case No. 956/2003), **Karega Mutahi Vs Headlink Publishers Ltd & another (2014) eKLR**, **J. P. Machira Vs Wangethi Mwangi & Another** Civil Case No. 179 of 1997.

On their part, the Defendants have suggested a figure of Ksh.500,000/- and has urged the court to disallow the claim for aggravated damages.

The Plaintiff has also claimed exemplary and aggravated damages. In the English Court of Appeal decision in the case of **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 take 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”.

The court has noted that though the Defendants had offered to publish an apology, the same was not published.

Having considered all the evidence on record and the submissions, this court finds that the Plaintiff is entitled to damages under the various heads and judgment is hereby entered in his favour as follows: -

- a) **General damages in the sum of Ksh.3,000,000/-.**
- b) **Exemplary and aggravated damages in the sum of Ksh.2,000,000/-.**
- c) **Costs of the suit.**

Dated, signed and delivered at Nairobi this 22nd day of September, 2016.

.....

L. NJUGUNA

JUDGE

In the presence of

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

..... ***for the Defendants***