



REPUBLIC OF KENYA
IN THE HEIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 220 OF 2008

GICHINGA NDIRANGU.....PLAINTIFF

VERSUS

1.THE STANDARD LIMITED

2.JOHN BUNDOTICH

3.ABIYA OCHOLA

4.BEAUTTAH OMANGA.....DEFENDANTS

JUDGMENT

1. The Plaintiff's complaint is based on a publication by the 3rd and 4th Defendant at page 4 in the Standard Newspaper of 12th April, 2008 for which he sought general damages, aggravated damages or exemplary damages. The said publication was as follow:-

“KRIEGLER BEGINS WORK, GAZETTE RULES, EVENTS

BY ABIYA OCHOLA AND BEUTTAH OMANGA

THE Independent Review Commission of Inquiry (Irec) has started investigating the December 2007 General election, as ODM raised a red flag there was a scheme to derail the inquiry's operations. Yesterday, the Commission gazetted its rules and procedures of operation giving it the necessary legal backup to work.

The Kreigler Commission was set to begin its work on March 15, but delayed because the rules had not been gazetted. Having been gazetted any person who contravenes the commission's orders shall be guilty of an offence and liable to a fine of Sh. 50,000.

Addressing the Press yesterday at KICC, Commission chairman Justice Johann Kreigler said the commission's offices at the facility were ready, but it was yet to pick on the date to commence public hearings.

'Even though we have given notice to the public to give evidence, we are still working on modalities and undertaking research and investigations before starting public hearing,' he said.

Protection:

He said the commission would next week hold sessions with leaders of civil society, political parties, religious groups and observer missions. According to the rules, the commission will hold its hearings in public but may take evidence in camera to ‘protect the person, property or reputation of any witness’ if it deems desirable.

But ODM said that the Electoral Commission of Kenya (ECK), which has been identified by the Kreigler Commission as the principle body of the investigation, had started a scheme to derail the commission.

The ODM said the ECK had on January 17, hired a lawyer under the guise of a media and communications adviser whose brief was to give legal advice and strategy on how to undermine the Kreigler Commission.

The party claimed that the lawyer, who was a classmate and roommate of one of the commissioners, was hired irregularly without competitive tender.

‘The lawyer has advised all ECK staff to record what they know about the tallying of the presidential votes with the aim of preventing any staff with adverse evidence from appearing in person to testify before Irec,’ said ODM in a statement.

According to a copy of the appointment letter, the adviser will be paid Sh. 14,000 per day starting February, 21 for the next six months. This is the duration of the Kreigler Commission.”

2. The Plaintiff alleged that the Defendants falsely and maliciously wrote, printed and published or caused to be written, printed and published the said article concerning the him in the way of his profession as a lawyer and media and communication consultant or adviser. It was alleged that as an adviser to the Electoral Commission of Kenya was a matter of public knowledge and notoriety having been covered and reported in the Kenyan media, both electronic and print, within the fortnight preceding the Defendant’s offensive article. He stated that the said words in their natural and ordinary meaning meant and were understood to mean that he was:-
 - a. ***Unqualified quack masquerading as a media and communications adviser.***
 - b. ***Willingly and knowingly involved in acts of sabotage against a commission of Inquiry of national importance.***
 - c. ***A practitioner and beneficiary of cronyism, undue influence and conflict of interest.***
 - d. ***Unqualified for the job for which he was hired.***
 - e. ***His appointment was tainted with irregularity.***
 - f. ***Involved in acts of corruption.***
 - g. ***Involved in witness-tampering.***
 - h. ***Involved in the suppression of evidence.***
 - i. ***An enemy of the interests and aspirations of the Kenyan people.***
 - j. ***Had conducted himself in a manner unworthy of a conscientious and patriotic citizen.***
 - k. ***A disgrace to the legal profession.***
3. He lamented that by reason of the words and publication, he was gravely injured in his reputation, credit and character and in his said office, occupation and calling as a lawyer and a media and communications adviser and has also been exposed to public and countrywide ridicule, embarrassment, contempt, hatred, odium and scandal and has been lowered and diminished in the estimation of right-thinking members of society. He alleged further that the Defendants published the said words out of malevolence and spite towards him in that:
 - a. ***They made absolutely no attempt to establish the veracity of claims allegedly emanating from a political party with a high likelihood of one-upmanship exaggeration and partisanship in a highly charged political atmosphere.***
 - b. ***They wrote and published the said words without seeking the Plaintiff’s or his employer’s comment for balance and completeness.***

- c. *They made grave and false assertions on matters of fact the true position whereof they could easily and with minimum effort have established.*
 - d. *The entire tone and content of the article based on wrong and false premises was intended to disparage, belittle, humiliate and condemn the Plaintiff.*
4. He alleged that by carrying the said story in the manner they did the Defendants were painting and projecting themselves as vigilant protectors of the public interest and crusaders against nepotism, cronyism, corruption and malpractices in electoral and other aspects of public service calculating thereby to endear themselves to the reading public and increase the circulation of their said newspaper and make profits from the sale thereof and of advertising space therein.
 5. The Defendants disputed the Plaintiff's claim. They admitted to printing the publication but denied that the said words were published out of spite or malevolence, that the words bore or were understood to bear the meanings alleged by the Plaintiff and they sought to rely on Section 14 and 15 of the Defamation Act, Cap 36 Laws of Kenya. They denied injury of the Plaintiff's character, reputation, credit, professions and calling as a lawyer and media communications adviser as alleged. The ill motive or intention for the publication was denied and the Defendants stated that they printed and published the Plaintiff's right of reply on 9th May, 2008 in which they corrected any erroneous impression that may have been caused by the publication. They in the alternative alleged that they were under legal, social and moral duty to publish the said words to the public who had a like duty to receive them more particularly as the words concerned the affairs and conduct of the Electoral Commission of Kenya which is charged with the responsibility of overseeing elections against the backdrop of the disputed December, 2007 Presidential Elections.
 6. In his testimony, the Plaintiff stated that he was working for Health Action International as a Regional Coordinator. He stated that the said publication made him appear to be unqualified for the job, and was hired on corrupt methods with the purpose of hindering the work of the Kreigler Commission. He stated that he demanded an apology vide a letter dated 16th April, 2008 (P. Exhibit 2 (a)) and got a reply from the Defendants vide a letter dated 24th April, 2008 (P. Exhibit 2 (b)). On cross-examination he stated that the 2nd article was not false. That in the 3rd article he was served under quest. He stated that what was published was what the ODM party said. He however denied that part of the remuneration was not true and that the period of the commission was not true and that he was appointed in 1st February, 2009.
 7. The Plaintiff's submission was to the effect that defamatory words published about him and the said publication lowered his reputation on the eyes of right thinking members of the society considering that he is a person of high standing in the society occasioning him damage. He proposed an award of KShs. 4 Million.
 8. The Defendant on the other hand submitted that the Plaintiff failed to prove on a balance of probability that the published words were defamatory. That the Defendant pleaded fair comment made in good faith without malice. That the Plaintiff having failed to establish the perception of the third parties, did not discharge the burden of proving defamatory elements of the article. It was further submitted that the Plaintiff failed to establish a case against the 2nd 3rd and 4th Defendants. That the said parties were merely mentioned in the plaint as being employees of the 1st Defendant. The Defendants held the opinion that malice, ill will, spite or improper motive was not established. They contended that the Plaintiff failed to avail himself to the right of reply which is a factor to be considered in assessment of damages as per Section 7A (7) Defamation Act. It was submitted that compensation in defamation is a solatium rather than harm measurable in money. It was further submitted that there being no evidence that the defendant had direct financial gain brought by the publication he was not entitled to exemplary damages. It was submitted that a claim for aggravated damages was not made and further it was not established that the conduct of the Defendants led to the increase of the injury to the Plaintiff therefore that damage was unavailable to the Plaintiff. The Defendant on a without prejudice basis proposed general damages of KShs. 50,000/=.
 9. I have carefully read and considered the pleadings, evidence and submissions by the plaintiff. The case of **Joseph Kudwoli v. Eureka Educational and Teaching Consultants & 2 Others HCCC No. 126 of 1990**, sets out the issues a plaintiff in a suit founded on defamation be it libel or slander must prove:-

- a. That the matter of which he complains was published by the defendant;
 - b. That it was published of and concerning him;
 - c. That it is defamatory in character;
 - d. That it was published maliciously and;
 - e. In slander, subject to certain exceptions, that he has thereby suffered special damage.
10. The issues for determination therefore are as follows:-
- a. Whether the Defendants acted recklessly and without any justification causing the plaintiff ridicule odium and contempt by right thinking members of the society and injury to his recognition and reputation?
 - b. Whether the Defendants published the said words maliciously?
 - c. If a and b is in the affirmative what damages are available to the Plaintiff?
11. The plaintiff contends that the statements published were actuated by malice and spite against him. The defendant did not make an effort to ascertain the contents of the report. In the case of Kudwoli (supra) the court stated that:

“When a man is falsely accused of conduct which tends to lower him in the estimation of a substantial number of persons, there can be no doubt that the door has been opened to business or social injury, or both; it will not wait for right-thinking members of society generally.”

12. Accordingly, in the circumstances I find and hold that the defendants actions were reckless, unjustified and defamatory. It was necessary for the defendant to check the veracity of the story. The court has a duty to award substantial damages for injury to reputation even though the claimant is unable to prove any financial loss or even distress. Damages act as vindication rather than merely as compensation in the ordinary sense and they also serve as an effective deterrent. In an action of defamation action the claimant’s aim is to vindicate his reputation, to clear his name considering that reputation has value, once tainted by unfolded allegations in a newspaper, a reputation can be damaged forever especially if there is no opportunity to vindicate one’s reputation. This was held so in the case of **Daniel Musinga T/A Musinga & Co. Advocates –V- Nation Newspapers Ltd HCCC No. 102 of 2000** which stated that:-

“The success for a plaintiff in a defamation action is entitled to recover as general compensatory damages such sum as will compensate him for the wrong he has suffered. That sum must 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.”

13. On the claim of aggravated damages, when assessing damages, the court is entitled to look at the whole conduct of the defendant from the time libel or slander was published to the time the verdict is given. That is, what the conduct has been before action, after action and in court during the trial. The Defendant printed and published the Plaintiff's right of reply on 9th May, 2008 in which they corrected any erroneous impression that may have been caused by the publication.
14. It is trite that an award of damages should not enrich a party but restore him to the position he was in before the injury. In the case of **John v. MGN Ltd [1997] QB 586** the court held:-

“In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel; the more closely it touches the plaintiff’s personal integrity, professional reputation, honour, courage, loyalty and the core attributed of his personality the more serious it is likely to be. The extent of publication is also very relevant; a libel published to millions has a greater potential to cause damage than a libel published to a handful of people.”

15. Further, awards in past decisions are mere guides and each case should depend on its own circumstances. I also appreciate the authorities cited by the parties. Accordingly, judgement is hereby entered for the plaintiff in the sum of KShs.1,000,000/- general damages. damages with interest at court rates from the date of this judgement till payment in full and costs. Since the Defendant printed and published the Plaintiff's right of reply, its actions were in a sense mitigated. I decline to award aggravated damages.

I therefore enter judgment as follows: -

- i) Kshs 1,000,000 in general damages.
- ii) An apology to be published by the Standard.
- iii) Costs to the plaintiff.

Orders accordingly.

Dated, Signed and Delivered in open court this 27th day of March,2015.

J. K. SERGON

JUDGE

In the presence of:

N/A for the Plaintiff.

Maende h/b for Echesa for the Defendant.