



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 19 OF 2010

SUSAN WANGUI CHOMBA..... PLAINTIFF

VERSUS

PETERE KISA OTABONG.....DEFENDANT

JUDGEMENT

In this suit, the Plaintiff seeks against the Defendant an injunction, general and aggravated damages for libel, costs of the suit and interest. Her case is that the Defendant published defamatory statements about her in various e-mails addressed to numerous people including Bangor University where she studied, the British High Commission, her employer, the Danish Embassy among others. It is pleaded in the plaint dated 21st December 2009 that the Plaintiff and Defendant cohabited as husband and wife until 2006 when they separated due to the Defendant's cruelty. It is further pleaded that the parties had a child together.

The e-mails are pleaded in paragraph 4 (published on 6th January 2009), paragraph 9 (published on 12th February 2009), paragraph 14 (published on 18th February 2009) and paragraph 19 (published on 24th March 2009) of the plaint.

It is the Plaintiff's case that the words contained in the e-mails, in their common and ordinary use, meant, and were understood to mean:-

- i. That the Plaintiff had kidnapped the Defendant's son to be illegally adopted by other men hence her moral standing is questionable.**
- ii. That the Plaintiff was a wanted person who had run away from police at Malaba Police Station and the Children's officer at Amagoro, Teso district.**
- iii. That the Plaintiff not only neglected her child but was also a suspect in a child abduction case.**
- iv. That the Plaintiff was liable for illegal adoption, child trafficking and child labour.**
- v. That the Plaintiff was a thief sought by police in regard to loss of various items.**

Interlocutory judgment was entered against the Defendant on 11th May 2010 as he failed to enter appearance or file defence after being duly served with summons to enter appearance and copy of the plaint. The case was then fixed for "formal proof".

The Plaintiff testified and did not call any other witness. She produced in evidence her list and bundle of documents dated 7th March 2012 as **Exhibit 1**.

As already pointed out, there is already judgment on liability. But it is interlocutory judgment which may or may not be confirmed upon “formal proof” of the case. After reading the words complained of, the court is satisfied that they are indeed defamatory of the Plaintiff in the manner pleaded at paragraphs 4, 9, 14 and 19 of the plaint. The words were published to a number of persons who knew the Plaintiff and being electronically produced meant that they could easily be forwarded to several others at the click of a button. Judgment on liability already entered for the Plaintiff is thus affirmed.

Damages for defamation are usually at the discretion of the Judge. The defamation, as pleaded and proved, is libel. Libel is actionable *per se*. In other words, the Plaintiff need not prove actual damage to her character and reputation to be entitled to some damages. General damages are awarded to compensate the claimant for injury to her reputation and the hurt to her feelings. Such damages, it is anticipated will vindicate her to the public as well as console her for the wrong done to her.

In assessing compensatory damages, the court will take into account the distress, hurt and humiliation which the defamatory publication has caused the Plaintiff. But obviously the quantum of such damages will depend upon the seriousness of the libel and any actual, proved damage that the same may have caused the Plaintiff. The more closely it touches the Plaintiff’s personal integrity, professional reputation, honour, courage, loyalty and the core attributes of her personality, the more serious the libel is likely to be. See the case of *Johns –vs- MGN Limited [1996] All ER 34*. In this case, it was also stated -

“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. A successful plaintiff may properly look to an award of damages to vindicate his reputation; but the significance of this is much greater in a case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libellous publication took place. It is well established that compensatory damages may and should compensate for additional injury caused to the Plaintiff’s feelings by the defendant’s conduct of the action, as when he persists in an unfounded assertion that the publication was true, or refuses to apologise, or cross-examines the plaintiff in a wounding or insulting way.”

The court will thus consider the conduct of the defendant after the defamation, and even the conduct of the plaintiff; whether or not there has been a satisfactory apology or attempt at correction of the wrong impression created; whether there has been malicious and/or insulting conduct and whether the plaintiff was accorded an opportunity to give his side of the story in order to correct the wrong impression created.

The Defendant in the present case did not publish an apology. As already stated earlier, the Defendant did not enter appearance or attempt to give his side of the story in these proceedings despite being given the opportunity to do so. It is thus correct to conclude that the e-mails were motivated by malice towards the Plaintiff.

However, the Plaintiff apart from stating that she suffers from embarrassment in her place of work in Kenya and abroad while also defending herself when she applies for visas, produced no evidence of any tangible damage she may have suffered, for instance to her career or other prospects. Also taken into account is the fact that the defamatory e-mails were not published to the world at large. Still, this does not take diminish the very grave nature of the defamation committed against her by the Defendant.

Courts must guard against unduly high awards in defamation cases as such awards would no doubt negatively impact upon the freedom of speech and press. That is not to say however, that one is at liberty to address anyone to the detriment of innocent parties.

Having considered the cases cited in support of the quantum suggested by the Plaintiff’s learned counsel I hereby award general damages of KShs. 2,000,000/= and punitive or exemplary damages of KShs. 500,000/=. That makes a totall award of KShs. 2.5 million. The plaintiff shall also have the costs of the suit

Dated and delivered at Nairobi this 22th Day of April, 2015.

A.MBOGHOLI MSAGHA

JUDGE