



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 137 OF 2007

HON. SIMEON NYACHAE.....PLAINTIFF

VERSUS

1. ERIC ONGERI

2. EVANS NYAKUNDI

3. KALAMKA LIMITED.....DEFENDANTS

JUDGMENT

1. This is a libel case. The Plaintiff's claim was that on 3rd January, 2007, the 3rd Defendant falsely and maliciously printed and published and or caused to be printed and published on page 1 and 2 of 'The People Daily' newspaper a libellous article concerning the Plaintiff. It was stated that the story headed "***Kisii Votes: Raila Takes on Nyachae***" read as follows:-

"...that Nyachae, the Road and Public Works Minister has, for many years used circumcision - which is a compulsory rite among the Gusii-to rally the Abagusii against the Luo who traditionally do not undergo circumcision."

"...Nyachae had for a long time incited the Gusii against the Luos over circumcision."

2. It was alleged that the words in their natural and ordinary meaning meant and were understood to mean that the Plaintiff is a tribalist who uses leadership to antagonise Kenyan communities against each other; that the Plaintiff is a petty leader devoid of ideas, who uses cultural differences to incite communities against each other; that the Plaintiff is an intolerant cultural bigot and that by virtue of alleged pettiness and propagation of negative ethnic sentiment the Plaintiff is unworthy as a leader. It was alleged that the said publication were maliciously published with an intent of discrediting the Plaintiff, embarrassing and lowering the Plaintiff's dignity in his capacity as a leader and bring him to ridicule and contempt in the eyes of the right thinking members of the society. The Plaintiff claimed that as a result of the publication he has been injured in his office, calling, profession and occupation and has been brought to ridicule scandal, public odium and contempt. The Plaintiff denied that he has as a leader rallied the Abagusii community against the Luo community on the basis of circumcision or for any other reason; at any time incited the Gusii people against the Luo over circumcision or over any other issue; as a political leader made circumcision or any other cultural issue; non an issue of politics or leadership and as a leader has not at any time made ethnic animosity the basis of any political debate or discourse. The Plaintiff claimed that the Defendant published the said words calculating to increase the circulation of The People Daily and with a view of making profit from the sale of the said newspaper and in advertising space.

3. The Defendants filed a statement of defence and denied the Plaintiff's claim. It was particularly stated that the article complained of were a verbatim report of the address of Honourable Raila Odinga at a rally. It was stated that the words were true, factual and a fair bona fide report of criticism upon matters of public interest and concern especially having been the subject of an earlier public report published by the Kenya National Rights Commission on the Referendum held in November 2005 titled "**Politics of the Foreskin**" and "**Utterances on the issues of Circumcision**" and contended that the Defendant were under a social and moral duty to publish that article and that it was therefore a fair comment made in good faith and without malice and spite upon a matter of public interest.

4. In his testimony the Plaintiff maintained that the words published concerning him were false. He denied having talked of circumcision since it is a known rite or culture of certain communities. The Plaintiff gave the testimony of his stature and stated that he was a Minister in the government at the time; that he was and still is the chairman of Commercial Bank; a farmer in cereal and coffee production and exporter of flowers; that he is involved in property management; is a director of Kenindia Insurance and is a chairman of Credit Bank Ltd. It was his testimony that on reading the article his friends found it to be unbelievable and the article is therefore defamatory. In cross-examination, the Plaintiff stated that he knew of no rally where the said words were uttered and that he had no idea whether or not the said words were uttered by Honourable Raila Odinga.

5. Henry Onyancha Obwocha (PW2) expressed his shock on reading the article which he termed as false. He stated that he had known the Plaintiff for a long time and that the Plaintiff was not an inciter although the article gave that impression. He stated that the article indicated that the utterance were made by Honourable Raila Odinga and denied that campaigns had started by that time. It was his testimony that it is because of the article that the Plaintiff lost his bid as a Member of Parliament in the year 2007 general elections. The Defendants closed their case without tendering any evidence.

6. This suit was canvassed by way of written submissions. It was submitted that although the Defendants pleaded that the article was a fair comment, they failed to controvert the Plaintiffs evidence which was submitted was corroborated by PW2. On the issue of conduct, the Plaintiff took issue with the fact that the Defendants tendered no apology even after demand had been made to them to do so.

7. The first issue I would like to deal with is the consequence of the Defendants' failure to tender any evidence. Makhandia J., discussed the consequence of such failure in **Karuru Munyoro v. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988** where he held as follows:-

“The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff’s evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon.” (Emphasis mine)

8. In **Janet Kaphiphe Ouma & Another v. Marie Stopes International(Kenya) HCCC No. 68 of 2007**, Ali-Aroni j, stated:-

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence.”

9. In addition to these holdings I must also mention that it is a presumption in the law of evidence that a party who has in his possession evidence which he fails to tender, that evidence is presumed to have been adverse to him. The defendant had pleaded qualified privilege against the claim based on libel and that the public policy basis for the claim on this head of privilege was fulfilled. The authors of the *Gatley on Libel and Slander*, 8th ed. at (pp.185) – 186) stated as follows of this principle:-

“There are occasions upon which, on grounds of public policy and convenience, a person may, without incurring legal liability, make statements about another which are defamatory and in fact untrue. On such occasions a man, stating what he believes to be the truth about another, is protected in so doing, provided he makes the statement honestly and without any indirect or improper motive. These occasions are called occasions of qualified privilege, for the protection which the law, on grounds of public policy, affords is not absolute but depends on the honesty of purpose with which the defamatory statement is made. The rule being founded on the general welfare of society, new occasions for its application will necessarily arise with continually changing conditions.” (emphasis mine)

at para.454 (on pp.192 – 193) of **Gatley on Libel and Slander (op. cit.)**:

“Whether there is a duty to communicate which the law will recognise as creating a privileged occasion depends on all the circumstances, and no previous decisions can be conclusive. Nevertheless, some circumstances have long been recognised as giving rise to such a duty, and are likely to continue to be so. Where a person is asked a question about another by or on behalf of someone who appears to have a legitimate interest in knowing the answer, the law has recognised that he is under a duty to answer, and that the occasion is privileged; so long as he speaks honestly, he is protected, and the law will not usually inquire into the reasonableness or otherwise of his beliefs. In some cases, on the other hand, a previous relationship with another, or the gravity and apparent reliability of information which a man possesses, may put on him a duty to communicate that information without any prior request.” (emphases added)

10. A defendant who places in his defence a plea of the truth of a fact then subsequently fails to establish during the trial is included in that statement and as such warrants the imputation of aggravation of the situation deserving exemplary damages. Having published the words complained of but denied that those words were false, malicious and negligently published, the Defendants should have adduced evidence to vouch the truth of the allegations. If they were the sources of the material published should have given evidence for the Defendants who pleaded the truth and lack of falsity in the publications complained of. The natural inference to be drawn from the Defendant’s failure to call those witnesses is that evidence from those witnesses would have been adverse to the Defendant’s assertions in their statement of defence. As a result of such failure the publication remains malicious and false.

11. On quantum the Plaintiff cited **Civil Appeal No. 314 of 2000., Johnson Evan Gicheru and Andrew Morton & Another** and **HCCC No. 1230 of 2004., Francis Xavier Ole Kaparo v. The Standard Limited and 3 Others** and urged that he be awarded KShs. 9,000,000/= and KShs. 3,000,000/= as general and exemplary damages respectively. I have considered the said authorities in respect of this suit. Damages in defamation are at the discretion of the judge. Libel is actionable *per se*. The claimant does not have to prove actual damage or harm to his reputation to be entitled to damages. General damages are awarded to compensate the claimant for the injury to his reputation and the hurt to his feelings. It will be expected that such damages will vindicate him to the public as well as console him for the wrong done to him. In assessing compensatory damages, the court will consider the gravity of the libel. The more closely it touches the Plaintiff’s personal integrity, professional reputation, honour etc. See **Johns v. MGN Limited [1996] All ER 34** where it was 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.”

12. The conduct of the defendant after the defamation will be considered by the court, whether or not there has been an apology or attempt to correct the wrong impression created.

As has been stated elsewhere in this judgment, the Defendants did not publish an apology. I therefore find that the article was motivated by malice towards the Plaintiff.

Considering the Plaintiff's place in society, including the fact that he was and he is a well-known politician and business man there is no doubt that he is a man of good standing, reputation and character. In view of the aforesaid disposition, I make an award on general damages for KShs. 1.5 million and exemplary damages for KShs. 500,000/= plus costs and interest.

Dated, signed and delivered in open court this 15th day of May 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

.....for the Defendant