



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 382 OF 2004

HON. JAKOYO MIDIWO..... PLAINTIFF

V E R S U S

KTN BARAZA LIMITED.....DEFENDANT

JUDGEMENT

The Plaintiff's suit is in defamation. General as well as exemplary and aggravated damages are sought. The words pleaded by the Plaintiff to be defamatory of him are to be found in paragraph 3 of the **plaint** dated **10th April 2004**. Those words were published during the '**9 PMKTN Prime News**' of 14th February, 2004 aired by the Defendant's television network. It is alleged that the said words were the English version of the same news item aired and broadcasted by the Defendant in its 7 pm news.

At paragraph 5 of the **plaint**, the Plaintiff has pleaded that the words complained of, in their natural and ordinary meaning, and also by innuendo and inference, were defamatory of him. Particulars of their defamatory nature are listed in the same paragraph.

The Plaintiff has also pleaded that as a result of the said words, he has been gravely injured in his person, character and reputation and has been brought into hatred, ridicule, scandal, odium and contempt in the eyes of the public and has also been injured as a family man, in his office and calling as a Member of Parliament.

The Plaintiff has further pleaded that the words were published out of malice and spite towards him. Particulars of spite and malice are listed in paragraph 9 of the **plaint**.

The Defendant entered appearance and filed a **statement of defence dated 24th May, 2004**. Publication of the words complained of was admitted. However, the Defendant denied that the words complained of could be understood to bear any meaning defamatory to the Plaintiff for that the said publication was motivated by malice.

The Defendant further stated that the words complained of and images accompanying them were true in substance published without malice. On this premise, it was justified in publishing the statements.

The Defendant further denied that the Plaintiff suffered any injury known to law and therefore is not entitled to the reliefs claimed or at all.

At the start of the hearing of the case, the **Plaintiff's supplementary list and bundle of documents** dated **5th May 2009** was by consent admitted in evidence and marked **Exhibit P1**. The Defendant had no documents to produce.

The Plaintiff testified and called one witness. The Defendant did not call or lead any evidence. Written submissions were filed on behalf of both parties. The court has considered the testimonies of the witnesses and the written submissions including the cases cited.

In order to appreciate the meaning and import of the words complained of, it is necessary to reproduce them as pleaded in the plaint –

‘MIDIWO FIGHTS IN BAR’

Gem Member of Parliament Jakoyo Midiwo was early this Morning involved in a fight in a bar. Midiwo is reported to have fought with a middle aged man over a woman.

Boniface Opiyo who is 27 years old was hit with a bottle by an irate Midiwo after an argument....

He is rubbing the public the wrong way again.....

But at the Hotel different versions of the story emerged. It is alleged that the MP was accosted by Opiyo who wanted to know why Midiwo had been linked with the Koinange Street Saga.....’

It was further pleaded that the said statements were accompanied by images of the Plaintiff and came at a time when he had sued other media houses in connection with dragging his name as the MP who was allegedly arrested following a swoop on prostitutes on Koinange Street.

His testimony at the hearing which was uncontroverted was that he had successfully sued media houses over the ‘Koinange Street Saga’ in which reports had indicated that an MP and several ministers were involved with ‘Koinange street’ prostitutes.

As stated earlier, none of these averments were controverted by the Defendant as it did not call or lead any evidence. No documents were produced on its behalf either.

The article in its wording and tenor is highly abusive of the Plaintiff. It also accuses him then a Member of Parliament of assault and ‘rubbing the public the wrong way again’. This has the imputation that he had rubbed the public the wrong way time and again.

The Defendant has pleaded justification. However, it has not produced any evidence in court to concretise this defence. The Defendant failed to call the manager of the hotel where the incident allegedly occurred or even the police in the station where the matter was reported. In the absence of such evidence, the Court is entitled to draw adverse inference on the failure by the defence to do so and find that the evidence would have probably been adverse to their case. As already pointed out, there were images accompanying the defamatory statements and the ‘Koinange Street swoop’ that had happened way before this incident which was used to add weight to the unsubstantiated claims of the Plaintiff’s philanderer ways.

The essence of a defamatory statement is its tendency to injure the reputation of another person. A statement is defamatory of the person of whom it is published if it tends to lower him in the estimation of right thinking members of society generally or if it exposes him to public hatred, contempt or ridicule or if it causes him to be shunned or avoided.

Any ordinary and reasonable member of the public watching the news and listening to the statements would have no hesitation at all in concluding that the Plaintiff was not only a philanderer but could also assault when slightly provoked. Therefore, the words complained of were highly defamatory of the Plaintiff, both in their natural and ordinary meanings and also by innuendo. On liability, the Plaintiff has proved his case on a balance of probabilities.

Damages in defamation are at the discretion of the judge. Whereas libel is actionable *per se*, the claimant in slander must prove actual damage to his reputation. However, there are circumstances under which slander is actionable *per se* when it is calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him; (Section 3). In this case the plaintiff was vilified as a Member of Parliament.

The Plaintiff has sought both general as well as exemplary and aggravated damages. The essence of damages in defamation cases is to restore to the injured party what he lost and in exceptional circumstances punitive or exemplary damages may be awarded.

In assessing compensatory damages, the court will take into account the distress, hurt and humiliation which the defamatory publication has caused the Plaintiff. The more closely it touches his professional reputation and the core attributes of his personality, the more serious it is likely to be. See **Johns vs MGN Limited [1996] All E.R.34**

The exemplary damages are awarded where compensatory damages are not sufficient, and when the Plaintiff proves that when the publication was made, the Defendant knew he was committing a tort or was reckless on whether his action was tortious or not and decided to publish it because the prospect of material advantages outweighed the prospects of material loss. In this case, the Defendant has not shown that it investigated the matter before it was aired in its prime time news bulletin.

Aggravated damages are meant to compensate the plaintiff for additional injury going beyond that which flowed from the words complained of. The Defendant in this case did not publish any apology even after institution of this suit which means there was no remorse on its part. In deciding whether to award such damages the conduct of the Defendant prior to trial, at the trial and after the trial and its conduct of the case and whether the Plaintiff was accorded an opportunity to give his side of the story in order to correct the wrong impression created are all material facts. See **Nairobi HCCC No. 42 of 1997 Abraham Kipsang Kiptanui vs Francis Mwaniki and 4 Others(unreported)**.

In this case, there was no attempt at all to correct the wrong impression created by the offending words. This imputes malice.

Considering the Plaintiff's place in society as a well-known politician who has been and still is a Member of Parliament. There is no doubt that he is well known locally and internationally. He is also an outspoken member of his party the Orange Democratic Movement. In a nutshell he is no doubt a man of good standing, reputation and character.

The words complained of accused him of assaulting a member of the public with a bottle after an argument over a woman. These were allegations the Defendant did not bother to substantiate.

As already stated, the Plaintiff called one witness who watched the news and heard the words complained of but when he called the Plaintiff to verify the same, the Plaintiff denied the allegations and he believed him. It appears that the words did not change his view of the Plaintiff's character and reputation. In any case, the Plaintiff is still a Member of Parliament for Gem constituency, so it can be inferred that members of his constituency were not influenced in any negative way by the defamatory statements as far as his bid for re-election was concerned. However, this does not take away anything from the very grave nature of the defamation committed against him by the Defendants.

Still, the court in such matters must act with great caution when making a decision so as not to interfere with independence of the media and in particular, to clog the freedom of expression by giving unduly high awards perceived to unjustifiably enrich litigants.

Bearing all these in mind, the Court awards the Plaintiff compensatory damages of Kshs. 2,000,000/00 (Two Million) and aggravated damages of Kshs. 500,000/00 (Five Hundred Thousand). This makes a global award of Kshs. 2.5 million. Judgment for that sum will attract interest at court rates from the date of judgment until payment in full. There shall be judgment for the plaintiff against the defendant in the

said sum. The plaintiff shall also have the costs of the case.

Dated and delivered at Nairobi this 28th Day of July, 2015.

A.MBOGHOLI MSAGHA

JUDGE