



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 403 OF 2009

JMM.....PLAINTIFF

VERSUS

HEADLINK PUBLISHERS LIMITED.....DEFENDANT

JUDGMENT

The Plaintiff has pleaded in his amended plaint that in the weekly issue for the week of 25th-30th August 2008 of the front page of the newspaper called the '*WEEKLY CITIZEN*', the Defendant published of and concerning the Plaintiff under the bold headlines-

MINISTER CAUGHT IN ENVOY DIVORCE SAGA

This was accompanied by a photograph of the plaintiff captioned '*Ambassador JM handing over papers to Somali President*'

The said article contained the following words -

“The Assistant Minister’s name crops up in the saga over a company, Onyx Computers which was awarded a multi-million tender by Department of Defence (DOD) with Ambassador M’s influence and her dealings with the envoy who has two cases in court relating to his social life”

Ambassador M who in May 2000 declined an offer of freedom until seven abducted Kenyan Soldiers on UN peacekeeping mission in [Particulars Withheld] were freed, is said to be one of those who financed the Wavinya’s campaigns in Kathiani on Chama Cha Uzalendo party last year

It has also emerged that M was the brains behind political gimmicks that made former area MP Kyalo Kaindi, perform dismally in the 2007 general elections. Kaindi vied on the Vice-President Dr. Kalonzo Musyoka’s led ODM-K and lost to Ndeti. Ndeti had won the ODM-K nominations but the certificate was handed to Kaindi forcing her to dash to OCU for emergency nomination. Those well-versed Kathiani politics have it that M took charge of Ndeti’s campaigns.

The ambassador was recently served with a divorce petition through the Daily Nation by the husband of the estranged wife who has an affair with JM

M the petitioner goes ahead to state in affidavit sworn before Henry Murange, Advocate, Commissioner for oaths that the first respondent (K) has committed various acts of adultery with different men especially one JKM. The embattled is also alleged to be behind the woes that have

befallen a city lawyer who is embroiled in several criminal suit

SMK was recently charged with four counts of fraud and altering documents and released on a Kshs. 150,000 cash bail

According to M, K committed adultery with M in December 2005 while living in Mombasa and persisted in doing so thereafter in various places within the towns Ukambani

And as if that is not all, M lost a civil case to LM, a former lover, in a case that was filed in the High Court at Nakuru.

Magistrate H.N. Tanui ordered M on June 30, 2008 to pay interim civil maintenance of Kshs. 60,000 per month pending the hearing and determination of the application”

The Plaintiff’s case is that the two articles meant, and were understood by right-thinking members of the society to mean, that:

1. The Plaintiff is of immoral character and is a womanizer;
2. The Plaintiff is a corrupt person who is engaged in shoddy deals;
3. The Plaintiff who is a Kenyan Ambassador to Somali has committed an adulterous offence;
4. The Plaintiff is unfit to hold a public office;
5. The Plaintiff has political inclination despite holding a Public Office;
6. The Plaintiff is of unquestionable character.”

The Plaintiff has also pleaded that in writing and publishing the articles complained of the Defendants were motivated by malice. Particulars of malice are set out in paragraph 6 of the plaint.

The Plaintiff therefore claims general and exemplary damages. He also claims a permanent injunction to restrain the Defendants from further publishing or causing to be published the words complained of, or any other words to the same or similar effect, defamatory of the Plaintiff. Costs of the suit and interest are also sought.

On 16th May 2012, interlocutory judgment was entered against the Defendant as appearance had not been entered on its behalf or defence filed within the prescribed period even after being duly served with summons to enter appearance and copy of the plaint.

The Plaintiff testified and called one witness. He adopted his witness statement dated 19th May 2015 as his evidence-in-chief. The original newspaper report containing the defamatory words was produced and marked **Exhibit 1**. The list and bundle of documents was also produced and marked **Exhibit 2**.

He stated that when the defamatory words were published, he was the Ambassador of Kenya to **[Particulars Withheld]** and prior to that worked as a Military officer for 34 years before retiring in 2007 at the rank of Major General. He averred that as a diplomat the words complained of affected him especially in his work and he had to write to his bosses with a view to clearing his name.

The second witness for the Plaintiff Brigadier (Rtd) Michael Mwololo Fundi (PW2) adopted his witness statement dated 19th May 2015 as part of his testimony. He stated that he had known the Plaintiff since their days in the military and when he read the words complained of he was ‘surprised and shocked’. When he called to inquire, the Plaintiff assured him the story was not true but according to him it was a very damaging article as the Plaintiff was a senior Public officer.

As already pointed out, there is already judgment on liability. This could either be confirmed or not confirmed upon ‘formal proof’ of the case. Having read the words complained of, this court has no doubt that they are defamatory in the manner pleaded at paragraph 5 of the amended plaint. The words were published to the public in a newspaper that has national coverage. The words in the articles were defamatory of the Plaintiff in their ordinary meaning. They tended to lower his reputation in the opinion

of right-thinking members of society. Judgment on liability is therefore affirmed.

Regarding damages, it is to be noted that libel is **actionable per se**. The defamation in this case was libel. The Plaintiff therefore did not have to prove damage to his reputation to be entitled to damages. However, the **quantum** of such damages is another matter altogether.

As a starting point, a successful Plaintiff in a defamation action is entitled to recover, as **general compensatory damages**, such sum as will compensate him for his hurt feelings and damage to his reputation. The damages must be such as may vindicate his good name, taking into account the distress, hurt and humiliation which the defamatory publication has caused. See the case of **John –vs- MGN Ltd [1991] QB 586**, where it was stated at page 607:

“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 attributes of his personality, the more serious it is likely to be.”

In the case of **Fowes vs Pollard [1997] EMLR, 233** comparable factors were set out in libel actions:-

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 reputation.
2. The subjective effect on the plaintiff’s feelings, not only from the prominence itself, but from the defendant’s conduct thereafter, both up to and including the trial itself.
3. Matters tending to mitigate damages, such as the publication of an apology.
4. Matters tending to reduce damages.
5. Vindication of the plaintiff’s reputation, past and future.

Defamation is the kind of harm to a person that is not measurable in money. General damages cannot compensate the damaged reputation. But the claimant gets damages because he was injured in his reputation. The damages will be a vindication to the public and a consolation for the wrong done.

The Plaintiff has had an illustrious career in public service, and in business. He was, at publication of the offending words and at the hearing, an Ambassador of Kenya to **[Particulars Withheld]**, a high level diplomatic post.

He had a long illustrious career in the military and retired in the rank of **[Particulars Withheld]** in 2007 and was subsequently appointed as an Ambassador.

I have considered the Plaintiff’s place in society and his illustrious career in public service; I have also considered the gravity of the defamation. The words complained of implied that he was a corrupt individual who corruptly peddled his influence to obtain a tender unprocedurally, participated in politics, had loose morals and is of questionable character. The Defendant went to the extent of fabricating documents allegedly filed in court in a Divorce petition.

I have also considered the wide circulation and readership that the Weekly Citizen enjoyed at the time of publication. It still enjoys these attributes.

Damages for defamation are entirely at the discretion of the court. However, the Court must bear in mind that damages should not be so high as to become a threat to the freedom of the press and free speech. Huge awards may also encourage litigation in this line of civil claims.

Doing the best that I can, I will award the Plaintiff compensatory damages of KShs.5 million.

The Plaintiff has claimed exemplary damages. Exemplary damages go beyond merely compensating the complainant and are meant to punish the defendant. They will be awarded where the plaintiff proves that the defendant, when he made the publication, knew that he was committing the tort of defamation, or was

reckless whether his action was tortious or not, and decided to publish nevertheless because he expected profits would likely outweigh any damages that the Plaintiff may recover. In other words, there must be guilty knowledge on the part of the defendant.

In the present case the Plaintiff did prove that the Defendant had such guilty knowledge. The letter sent to the plaintiff's Counsel by the Executive Officer confirming that the alleged Divorce case had not been filed in the Malindi Senior Principal Magistrate's Court, proves that the Defendant did not bother to inquire into the substance of that claim as the benefit it was going to gain after publishing the sensational defamatory words and the sales of the newspaper, by far outweighed the damages the Plaintiff might recover if he instituted proceedings against it.

The Plaintiff also pleaded malice. The particulars of malice pleaded in paragraph 6 of the amended plaint include:-

1. Failure to check with or ask the Plaintiff to confirm or deny the allegations complained of before publication.
2. Refusal to publish a suitable correction and offer a suitable apology and continued publication of the defamatory words even after this suit was filed.

After publication, a written demand for correction and apology was made which did not elicit any response from the Defendant. Malice may be inferred where there is failure to apologize. A demand for apology was made in this case. None was forthcoming.

I am satisfied that the Plaintiff has proved malice, which entitles him to some exemplary or aggravated damages. I assess such damages at KShs.500,000/00.

I will in the event enter judgment for the Plaintiff in the total sum of KShs.5.5 million. There shall be interest at court rates on that sum from the date of delivery of judgment until payment in full.

The Plaintiff also sought a permanent injunction to restrain the Defendants from further publishing or causing to be published the words complained of, or any other words to the same or similar effect, defamatory of the Plaintiff.

The words complained of in this suit were published nearly seven years ago. It appears that there is no longer any danger of the defamation being repeated. In any event, a permanent injunction such as is sought would unduly encroach upon the Defendant's constitutional freedom of expression. The permanent injunction is therefore declined.

The Plaintiff shall have costs of the suit and interest thereon at court rates from the date of filing suit until payment in full.

Dated and delivered at Nairobi this 23rd day of July, 2015

A. MBOGHOLI MSAGHA

JUDGE