



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 297 OF 2015

PROF. DR. DR. MW.....PLAINTIFF/APPLICANT

VERSUS

HEADLINK PUBLISHERS LTD.....DEFENDANT/RESPONDENT

RULING

The plaintiff/applicant has approached the seat of justice and vide a plaint dated 16th August 2015, filed simultaneous with an application for injunction, claims that the defendant Headlink Publishers Ltd did by their weekly publication “the [Particular Withheld]” Newspaper VOL. 17 NO. 34 of 24th August - 30th August 2015, publish of and concerning the plaintiff in their caption “**Sex escapades unravel at Lawyers conference**” alleging that the plaintiff Professor Dr. Dr. MW was involved in the alleged sex escapade at the [Particular Withheld] Lodge Mombasa. Paragraph 16 of the plaint reproduces the actual words as published by the defendant which the plaintiff avers were defamatory of him, his reputation being tainted and in the eyes of right thinking members of the society, he is now considered to be a person of loose morals. He denies that the said publication had any scintilla of truth and contends that the same is actuated by malice, and calculated to portray him as an extremely amorous person and therefore unfit to hold the public positions that he holds as a law lecturer, Dean, school of law at [Particular Withheld] University, Associate professor of law among other public positions, as he was also alleged to be soliciting sex from young university students in consideration for academic marks.

He prayed for general damages, compensatory and aggravated damages, an injunction restraining the defendants whether by themselves, their agents, servants and or any other person acting on their behalf from circulating, distributing, selling, any further publication or any other dealings with the impugned story touching on the plaintiff in print or electronic form; an apology on the front page of their news paper; An injunction restraining the defendant from making any further or future publications of the [Particular Withheld] Newspaper until and unless they offer an apology; and costs of the suit .

Vide a Chamber Summons dated 26th August 2015 and filed in court on 28th August 2015, the plaintiff sought from this court order:-

1. Spent
2. Spent
3. That the respondent /defendants whether by themselves, agents or servants and or any other person acting on their behalf be and are hereby restrained by an injunction from circulating, distributing, selling, any further publication or any other dealings with the story in [Particular Withheld] Newspaper VOL 18 NO. 34 of August 24th-30th 2015 touching on the

- applicant/plaintiff in print or electronic form.
4. That the respondent/defendant issue an apology to the applicant/plaintiff on the front page of their newspaper.
 5. That the respondent/defendant whether by themselves, agents or servants and /or any other person acting on their behalf be and are hereby restrained from making any further and future publications in the [Particular Withheld] Newspaper until and unless they comply with the orders in (3) and (4) above .
 6. That costs of this application be awarded to the applicant/plaintiff.

The application is premised on 20 grounds on the face of the application and a supporting affidavit by the plaintiff professor Dr. Dr.MW sworn on 26th August 2015. The depositions in the affidavit mirror grounds and principally, the plaintiff deposes that he is the person whose photograph appears on page 1 and referred to by name at page 23 of the [Particular Withheld] Newspaper VOL 18 NO. 34 of August 24th-30th 2015 as shown by an annexed original newspaper in question and marked MWO1.

That he attended an annual Law Society Kenya Conference of 2015 from 13-15th (sic) and spent two nights at the [Particular Withheld] Hotel and that contrary to the publication by the defendant he was neither involved in nor is he aware of any sex escapades at the lawyer's conference 2015.

Further, that during his stay at the hotel, he did not entertain any lady leave alone the alleged not less than 4 ladies in his room and neither did he solicit for sex from the wife of a prominent advocate as alleged, or even sending her a text message using his phone. The plaintiff continues in his depositions that contrary to the publication, he has never been sacked as Dean Faculty of Law as alleged and neither has he ever been subjected to any disciplinary proceedings on allegation of sex for marks and neither was there any such pending complaint against him since he is an objective lecturer.

The plaintiff further deposes that he is the founding Dean of [Particular Withheld] University School of Law which position he founded in June 2011 and which term expired in August 2012 as shown by annexure MW O2 with a subsequent reappointment in August 2014 as shown by annexure MO3 . He also deposes that he is Associate professor from 5th August 2014 and that if he were the kind of person described in the defendant's publication, he would not be retained as professor.

The plaintiff avers that he holds other positions as a senior Scholar at the University of [Particular Withheld] as shown by his letter of appointment MO5; a member of the [Particular Withheld] Committee of the National Council of Science, Technology and Innovation as shown by his letter of appointment MO6; appointed as member of the Anti-doping Agency of [Particular Withheld](MO7); served as resource person for Ministry of Sports, Culture and Arts MWO8, Council of [Particular Withheld] Education MWO9; [Particular Withheld] Technical Training Institute (MW10); and that the publication in question widely being circulated via Whatsup medium and going wider beyond geographical immigration, which publication has injured his reputation both domestically and internationally. The plaintiff also filed evidence of a demand letter dated 25th August 2015 having been served upon the defendants urging them to offer an apology, withdrawal of all offensive copies from the market and an admission of liability which service was effected on 1st September 2015 but that the defendants have persisted in circulating the publication and that they had not offered any apology.

Vide an affidavit of service sworn by Charles Soita on 9th September 2015, the plaintiff effected process on the defendants by affixing a copy of summons on their front door at their Summit House, Moi Avenue 5th Floor Room 310 after they refused to acknowledge receipt and the plaintiff also send the said summons via email to [Particular Withheld] @ yahoo.com; info@ the [Particular Withheld].co.ke on 8th September 2015 at 15.48 hours but there was no response to the application and neither was there any attendance in court on 10th September 2015 by the defendant's representatives when the application was heard.

The affidavit of service by Saib Wasike sworn on 4th September 2015 show that the certificate of

urgency, chamber summons, supporting affidavit, plaint, verifying affidavit, list of witnesses and list of authorities were on 1st September 2015 served upon the defendants at their offices along Moi Avenue, Summit House 3rd Floor Room 310 and were received by Mr Tom Alwaka who acknowledged receipt by signing on the copies.

The plaintiff was granted leave of court on 10th September 2015 to be heard during the vacation and he argued his application in person not only as a party to the proceedings herein but as an advocate of this Honourable court. He urged this court to grant him the prayers sought in the interim for reasons that he had been highly defamed by the defendants publication which bore no truth or at all in it and that the said publication was done with malice, calculated to injure his reputation, being a renowned scholar and public figure in and out of the country of Kenya, serving as Associate professor and Dean of [Particular Withheld] University, that his photograph was prominently placed in the said publication on the front page and the relevant article did not hide the naming of him as the one at the centre of the alleged sex escapades at Leisure Lodge during the lawyers Annual Conference held in Mombasa in 2015. He relied on the cases of **CFC Stanbic Bank Ltd v COFEK** to advance the proposition that the defendants were under a duty to verify the allegations from him before publishing it.

The plaintiff also submitted that he had established a prima facie case with high chances of success and relied on **Dorcas Florence Kombo v Royal Media Services Ltd** case and in his view, he had satisfied the conditions for grant of orders sought against the defendant.

I have carefully considered the application by the plaintiff/applicant, he grounds thereof, supporting affidavit and annexures together with the authorities relied on in the brief submissions made by the applicant prose.

The only issue for determination at this stage is whether the plaintiff has made out a case for the orders sought in the application dated 26th August 2015.

It is not denied that the subject publication exists. The original annexed to the supporting affidavit of the plaintiff had prominent display of the plaintiff's photograph at the top right and the first writings in white pink background titled "**Sex escapades unravel at Lawyers conference**" (page 23). At page 23 of the said paper the lower part of the page is titled "**Lawyers turn into he-goats in annual Mombasa conference.**" Part of the article states in the second column from third paragraph:

"A case in hand is that of a law professor MW, a Sports enthusiast who doubled up as a presenter at the said conference. The professor booked on room 71 at Leisure Lodge, it is alleged not less than four young advocates visited and spent the night in room 71 with the professor lawyer. The big question then is how is the same "respected" law don and Law Society Kenya presenter who is expected to instill ethics found in such a compromising situation. Could the young advocates be the ones soliciting for sex from them?"

The Don allegedly portrays a different character during the day as "a gentleman" and resorts to weird character at night a kin to a person who preaches water and drinks wine..... He is known for his generous invitations for tea, lunch or dinner to young advocates, students and colleagues whom he seduces, it is claimed".....

Things backfired on the professor on August 14th 2014 at midnight when he allegedly attempted to solicit for sex from wife of a prominent city advocate who was attending a conference. According to SMS allegedly sent by the professor through his mobile number [Particular Withheld] at 12.14 midnight to the lady advocate which reads:

"I saw u dancing are u through I come and pick you' I am in room No. 71 can you come over" After the message went unanswered, he quipped.

"Hey, hope you are not mad at me"

It is now claimed that the professor was on a hunting mission was soliciting for sex from a married young advocate but his advanced were thwarted.

It is said the lady in question who is respected and religious was recently married in a show case wedding to a prominent city lawyer repulsed the professor's attempt and reported the incident to her husband. Efforts to reach the professor on his phone for comments were futile."

I have carefully examined the article as reproduced above in part in the plaint and as contended in the application herein. The words as published are not minced. They directly refer to none other than the plaintiff whose picture is prominently displayed thereat. The only issue is whether the plaintiff has established, prima facie, that the said words carry defamatory meaning in their ordinary sense or by innuendo thus lowering him in the estimation of right thinking members of the society generally and that they are malicious.

The words complained of referred to the plaintiff as one of *he-goat lawyers* at the annual conference who was soliciting for sex from young female advocates including an advocate who was recently married to another advocate. Secondly, that those students solicit sex from him in consideration for marks at the university where he teaches.

For a renowned scholar, and public officer, as evidenced from the array of appointment letters annexed to his affidavit in support, a Dean of a public law school and a lecturer who is expected to instill ethics and integrity in student lawyers whose moral fitness is one of the values that matter before being admitted to the bar, and noting that Chapter 6 of the Constitution commands public officers to uphold high standards of moral character, such allegations of a university Don going on a sex holiday with young advocates including a married one and having sex for marks with students is not a light one.

Any right thinking member of the society including the plaintiff's employer, family members, friends, students associates and even prospective employers reading such information may have serious reservations associating with such a person and will view him with contempt and ridicule upon reading the publication which is weekly and widely published and read in this country as a gutter press. The said paper can also be accessed globally online in today's digital environment.

Therefore, in my view, prima facie, the published words are defamatory of person of the plaintiff and are calculated to injure his reputation and character by exposing him to public odium as a person who is morally unfit to hold public office.

On whether the words as published were actuated by malice, this court adopts the holding by Odunga J in **Phineas Nyaga v Gitobu Imanyara (2013) e KLR** that :

"Evidence if malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice.....Malice may also be inferred from the relations between the parties....."

The failure to inquire in the facts is a fact from which inference of malice may properly be drawn."

From the pleadings, the publication and affidavit evidence on record, and the language used in the said publication such as *"lawyers turn into he-goats"* and *"amorous senior advocates pay for their younger colleagues to attend the conference during which period they engage in sexual escapades"* "the annual event has lost its meaning and turned into sex holiday in the name of a conference." Parenthesized connotations such as: - how is the same ***"respected" law don.....*** "the don allegedly portrays different character during the day as "a gentleman" and resorts to weird character at night akin to a person who preached water and drinks wine," this court infers malice on the part of the defendants who have not filed any response to the application herein invoking the defence of truth or justification as the language used in the publication is reckless and is utterly disproportionate to the facts.

The defendant's publication alleges that the information was received from its undercover reporter. The plaintiff did issue demand letter on 1st September 2015 seeking an apology, withdrawal of the offensive copies of the publication from the market but the defendant has not responded to that Demand Notice and neither has it published an apology or shown any intention of withdrawing the offensive edition of the publication from the market which is not only found in print but electronic form.

In view of the foregoing observations it is arguable that the plaintiff has, prima facie, on a balance of probabilities, at this interlocutory stage, established that the defendant has defamed him unjustifiably by publishing defamatory matter. The [Particular Withheld] weekly paper, it is not denied, has wide circulation and readership. Nonetheless the plaintiff only alleged that it was circulating on whatsapp. He did not attach any evidence of publication via electronic or social media means. What therefore remains unchallenged at this stage is the publication via print media as shown by the original newspaper annexed to the supporting affidavit of the plaintiff. This, however, is not to say that the said publication cannot be accessed online in this hysteric electronic age.

There is also no evidence that there has been a republication of the defamatory allegations. However, a publication is a publication, as long as it is defamatory, it injures the character and reputation of the person it refers to, and exposes that person to public ridicule and odium. It lowers his reputation and in this case, the plaintiff has demonstrated that he is a responsible member of the society and serving in public institutions of higher learning both at the domestic level and regionally. For such a public figure who is also variously described as sports enthusiast, and whose holding of public office as well as private office can be gravely affected by the said spurious allegations, I am satisfied that the words as published would injure him in his reputation and profession.

This court exists to protect the rights of individuals so that they are not trampled upon with impunity. The tort of libel unclothes a person and exposes him to ridicule. He loses his human dignity when he is recklessly described the way the plaintiff herein was described in the publication. That kind of sexual appetite and group sex orgies only happens to the stars in the soap operas.

We live in a society that upholds values and principles which include human dignity, high morals and respect for the reputation of others. These values and principles are enshrined in the Constitution and bind all. The right to freedom of the media and of expression are subject to the right to respect other people's rights to human dignity and to the respect of the reputation of others. It is not an absolute right. Reputation is an integral and important part of the dignity of the individual and once besmirched by an unfounded allegation, one's reputation can be damaged forever, especially if there is no opportunity to vindicate one's reputation see **Nation Media Group Ltd & 2 Others V John Joseph Kamotho & 3 others (2010) e KLR.**

This court is conscious of the fact that application for injunction in defamation cases are treated differently from ordinary cases because they bring out a conflict between private interests and public interests As was held by Lord Coleridge, CJ in **Bernard & Another V Periman (1891-4) ALL ER 965** that

“ The right of speech is one which it is for the public interest that individuals should possess, and indeed,, that they should exercise without impediment, so long as no wrongful act is done; and unless an alleged libel is untrue there is no wrong committed.”

Lord Denning MR in Frazer V Evans & Others (1969) ALL ER 6 was also instructive that:

“ There are some things which are of such public concern that newspapers the press and indeed everyone is entitled to make known the truth and to make their comment in it . This is an intergral part of the right of speech and expression. It must not be whistled away.”

However, Article 33(2) of the Constitution is clear that in as much as freedom and independence if the electronic, print and all other types of media is guaranteed in Article 34, that freedom does not extend

to among others, hate speech or advocacy of hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm or is based on any ground of discrimination specified or contemplated in Article 27(4). And in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.

Defamation of a person's character is taken to be until it is proved to be true and if a person has stated that which is false and defamatory, malice is also assumed. See **KL V Standard Ltd (2014) e KLR**.

Though generally speaking, the conditions applicable to granting interlocutory injunctions as set out and settled in the case of **Giella V Cassman Brown & Co Ltd (1973) EA 253** generally apply, in defamation cases, it has been held time and again that those conditions operated in special circumstances. The court's jurisdiction to grant an injunction is exercised with greatest caution so that an injunction is granted only in the clearest possible cases. The court must be satisfied that the words or matter complained of are libelous and also that the words are so manifestly defamatory that the verdict to the contrary would be set aside as perverse. (See **Cheserem V Immediate Media Services (2000) IEA 371**).

Courts have also been firm that where a mandatory injunction is sought, there must be special circumstances. Thus, the case must be clear and one which the court thinks ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempted to steal a match on the plaintiff. See **Kenya Breweries Ltd v Washington Okeyo CAPP 332/2000 and Halsbury's Laws of England VOL 24, 4th Edition at paragraph 948**.

I have carefully considered the impugned publication. I find the words used therein, with the captioned coloured picture of the plaintiff not only defamatory but highly inflammatory, and are calculated to cause hatred and ridicule against the plaintiff in the estimation of right thinking members of the society generally. Any reasonable fair minded person reading that article gets a straight message that the plaintiff is engaged in immoral, amorous, sexual orgies with his students in consideration for marks and therefore lacks the moral or ethical ethos to instill any ethics and or moral standards in the students that he is expected to mentor. That he affords the luxury of going on a sex holiday.

In my view, that is a clear case of manifest defamation such that any further publications would be highly injurious to the plaintiff's character and reputation which he has established, prima facie, to be respectable. No amount of damages would indeed adequately compensate his lost dignity and reputation.

I therefore find the prayers sought at this interlocutory stage merited. In the end, I grant prayers 3 and 6 of the application dated 26th August 2015 pending hearing and determination of this suit.

Prayer No. 4 & 5 of the application are declined at this stage since demand was made and no apology was offered, and as prayer 5 is ambiguous.

Dated, signed and delivered in open court at Nairobi this 15th day of September 2015.

R.E. ABURILI

JUDGE

15.9.2015

BEFORE R.E. ABURILI J

C.A Samuel

Professor Moni Wekesa plaintiff in person present

No appearance for respondent.

COURT- Ruling delivered in open court as scheduled.

R.E. ABURILI

JUDGE

15.9.2015