



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL CASE NO. 145 OF 2006

ODERO O. ALFREDPLAINTIFF

VERSUS

THE ROYAL MEDIA GROUP LIMITED.....DEFENDANT

J U D G M E N T

1. By a plaint dated 7th December 2006 filed on 19th December 2006, the plaintiff herein, **ODERO O. ALFRED**, sued the defendant, **The Royal Media Group LTD** seeking an order of Permanent Injunction, general and special damages as well as the costs of the suit. The plaintiff's cause of action was premised on a broadcast made by Radio Ramogi, a radio station owned by the defendant, in their 9:00pm news bulletin on the 21st February 2006.

THE PLAINTIFF'S CASE

2. According to the plaintiff on the said day, without any justifiable cause published of and concerning the Plaintiff and caused to be widely broadcasted a defamatory news item during its 9:00pm news bulletin aired in Dholuo. The words published in dholuo were as follows:

"nitie japuonj moro St Mary's Kibuye Girls Primary ma ilungo ni Mr. Alfred Odero na ohero mulo thund nyithindo manyiri kendo odhodho thindi gi to oluongo no chak mar tuzo e sache ma odong kog gi e tutuion. Samoro ka odhiyo e buche maoko to owawo achiel kuom gi odhi godo."

3. The said words according to the plaintiff in their English translation mean:

"There is a teacher by the name Alfred Odero at St Mary's Kibuye Girls Primary who likes touching the breasts of female pupils and even breastfeed whenever he remains coaching them. He went ahead to nick-naming them TUZO milk. Sometimes he persuaded one of them to accompany him whenever he attends outside meetings."

4. In the plaintiff's view the said words were not only false and malicious but were also calculated to disparage the Plaintiff's character and were meant to mean that the Plaintiff was a pervert who was in the habit of sexually molesting school girls and that he had actually committed a sexual harassment offence; that the Plaintiff is lacking in professional ethics. It was pleaded that publication of the said words to the world at large has caused grave damage to the plaintiff's credit and his reputation has been lowered in the eyes of the right thinking members of the public. That as a result, he has suffered great mental torture, loss and damage. It was pleaded that despite the plaintiff having sent a demand notice seeking retraction and apology and threatening to sue, the same never elicited any response.

5. In his evidence, the plaintiff who testified as PW1 apart from relying on his statement filed in Court told the Court that he has been a Primary school teacher since 1st April 1985 and has taught in several schools. At the material time he was the Deputy Head-teacher at St Marys Kibuye Girls Primary school. He testified that during his teaching career he has won many awards for his excellent work and for example that in 1997 he was the best mathematics teacher in the KCPE results in Kisumu Municipality. In 2000, he was the best science teacher in the zone.

6. On the night of 21st February 2006, he travelled from Nairobi to Kisumu. He arrived in Kisumu in the wee hours of the morning. He went to his house and prepared to go to his place of work at around 10:00am on the morning of 22nd February 2006. On arrival to school he was confronted by his colleagues who asked him about the news they had heard the previous evening on radio ramogi. He was not aware what they were talking about. Later that day, his friend Dan Otieno (PW2) visited him in his house seeking to understand how a respected person like him could have done the things he heard on radio ramogi. He testified that the allegations made reflected on his career and the work he had done over the years as a school teacher. It also reflected on his christian walk as he was a staunch member of the Anglican Church.

7. In cross-examination by M/S Gacheru, the plaintiff stated that he did not listen to the broadcast that night as he was travelling but that his friend confirmed that he had the news on radio ramogi. The plaintiff also agreed that he sued Royal Media Group Limited instead of Royal Media services Limited who are the rightful owners of radio ramogi. The plaintiff did not produce to court a recording of the defamatory broadcast.

8. **PW2 DAN OTIENO**, according to him, on the night of 21st February 2006, he was in his house relaxing while listening to the 9:00pm news on radio ramogi. In the course of the bulletin, the presenter stated that there was a teacher who was molesting schools at St Marys and that was mentioned was that of his friend, the plaintiff, who was a teacher in the school. He was shocked and he decided to go to his friends house to confirm what he had just heard.

9. **PW3, REGINALDA MORAA**, testified that at the time, she was a teacher at Kibuye Primary School it is also known as Kibuye Primary School. On 22nd February 2006, she reported to work and after school assembly, he found pupils standing in groups discussing something. On listening to what they were talking about she heard them say that there was news on radio ramogi that the plaintiff was sexually harassing girls in the school. On cross-examination, she stated that she does not listen to radio ramogi as she is not luu.

10. **PW4, JOSEPH RAMOGI OCHOLA** testified that he was member of the team that was sent by the ministry of education to investigate the plaintiff on the allegations of sexual harassment of school girls. He told the court that after carrying out their investigations, the only thing that came up was that he was a strict disciplinarian and that they did not get any truth from the allegations of sexual harassment.

The plaintiff did not file any submissions.

DEFENDANT'S CASE

11. At the close of the plaintiff's case, the Defendant called its witness. Charles Odhiambo was the only defendant witness. According to him he was a journalist with Royal Media Services Limited attached to radio ramogi. He stated that he was the deputy heard of radio. It was his testimony that radio ramogi did not broadcast the said words. He also stated that Royal media services and Royal media group were two different entities. On cross-examination by Mr. Kopot, he admitted that he is not the one who presented the 9 o'clock news on the material day and that he did not have a record of the news bulletin. He insisted that the royal media services limited was the owner of radio ramogi and not royal media group limited.

12. The defendant also filed written submissions. It was submitted the suit was brought under the

wrong name and as such the same ought to be struck out. That suing Royal media group instead of royal media services was fatal.

13. It was further submitted that the act complained of was libel and such the plaintiff bore the burden of production of the libellous material itself in a permanent form. In support of its submission, the defendant relied on **Gatley on Libel and Slander, 10th Edition paragraph 32.5**. It was submitted that in essence, for the plaintiff to succeed in this case, he ought to produce the radio clip containing the words complained about. That he ought to have played it in court to prove that the words complained of were made by radio ramogi and not by any other radio station that broadcasted its content in dholuo. The defendant relied on the case of **PHINEHAS NYAGAH VS. GITOBU IMANYARA NRB HCCC NO. 697 OF 2009** and urged the Court to dismiss the suit with costs.

DETERMINATIONS

PRELIMINARY ISSUE

14. Before entering into an analysis of the substantive issues raised in this suit, it is imperative that I dispose a preliminary issue raised herein. The defendant has argued in its submissions that the suit herein should be struck off because it has been sued under the wrong name. The defendant produced its certificate of incorporation to show that its actual registered name is **ROYAL MEDIA SERVICES LIMITED and not ROYAL MEDIA GROUP LIMITED**.

15. In my view this case is clearly covered by Order 1 rule 10(2) of the Rules. Under Order 1 rule 10(2) of the Civil Procedure Rules, this court has the power, on its own motion, and even without the need for an application by any party to order the addition of any person in any suit, at any stage, whose presence before the court is necessary for the effectual and complete adjudication of the issues involved in the suit. The Court could at any stage of the proceedings, “either upon or without the application of either party,” exercise his discretion and order the substitution of the proper party.

16. The Court of appeal in **JIWA VS- JIWA & ANOTHER [1990] eKLR** emphasised on the Court's discretion and stated as follows:

“The fact that there was no formal application for an order of substitution and/ or that Mr Machira argued that there was nothing wrong with the plaint could not, in the slightest, fetter the exercise of the judge’s discretion. It will be observed that sub-rule (2) of rule 10 negatives emphatically the proposition of the Judge that there are circumstances when it would be unreasonable and injudicious for the court to exercise its discretion without an application of either party.”

17. Royal media services limited has always participated in the matter right from the beginning. When the matter was filed, it entered appearance and even filed a defence. It fully participated in the trial and at the end filed submissions. I hold that it will not suffer any prejudice if the defendant is substituted as Royal Media Services Limited as the rightful owner of radio ramogi. Consequently the name of the defendant that is **ROYAL MEDIA GROUP LIMITED** be struck out and the name of **ROYAL MEDIA SERVICES LIMITED** be added in order to enable this Court to effectually and completely adjudicate upon this matter. That said, I now turn to consider the major issues arising.

A CASE FOR DEFAMATION

18. Defamation is a tort defined under **BLACKS LAW DICTIONARY, 9TH ed.** as the act of harming the reputation of another by making a false statement to a third person. A false written or oral statement that damages another's reputation.

19. **ODUNGA J.** in **DORCAS FLORENCE KOMBO V ROYAL MEDIA SERVICES LIMITED [2014] eKLR** defined defamation in the following terms:

“Defamation is a tort and is defined as the publication of a statement which, tends to lower a person in the estimation of right thinking members of the society generally or which tend to make him be shunned or avoided. The defamatory statement is one which has tendency to injure the reputation of the person to whom it refers by lowering him in the estimation of the right thinking members of society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike and disesteem.’

20. For a case of defamation to be made, there must be publication that is communication of the words to at least one other person other than the person defamed. It is also necessary to show that the published words disparaged the reputation of the plaintiff or tended to lower him in the estimation of right thinking members of society generally. The words must be maliciously published and malice can be inferred from a deliberate or reckless or even negligent ignorance of facts. See. **DORCAS FLORENCE KOMBO V ROYAL MEDIA SERVICES LIMITED [2014] eKLR**

21. There are two kinds of defamation; slander and libel. Libel consists of a defamatory statement or representation in permanent form, such as written form, video or programme service while as slander is defamation by word of mouth.

22. From the above definitions, it is apparent that for an action in tort of defamation to succeed, then the following elements must be established.

- a. **That the defamatory statement was made maliciously and were injurious to the reputation of the plaintiff .**
- b. **That there must be a publication of the defamatory statement to a 3rd party.**

WAS THE PLAINTIFF'S REPUTATION INJURED?

23. The words used in the statement were to the effect that the plaintiff was in the habit of molesting school girls to an extent that he had nicknamed them tuzo. Whereas I do not entirely agree with the meaning attributed by the plaintiff to the said words, it cannot be gainsaid that the words were clearly defamatory of the plaintiff. A reasonable person could easily construe the words to mean that the plaintiff was a paedophile who has committed a heinous crime. Obviously such a person would not fit to be trusted with children let alone being left with them in a classroom. I am therefore clear in my mind that the plaintiff’s credibility and reputation must have been injured by the words.

WERE THE WORDS PUBLISHED IN GOOD FAITH?

24. As stated elsewhere in this judgment, malice can be inferred from deliberate or reckless or even negligent ignorance of facts. It is clear that the statement was made whilst investigations were ongoing and no verdict had been reached. No child had complained that the plaintiff had molested her nor were there complaints from parents that their children had been molested. The only complaint was that the plaintiff was a strict disciplinarian. It is therefore clear that the publication was manifestly reckless. The reporter did not bother to countercheck the truthfulness of the information received before airing them same.

PROOF OF PUBLICATION

25. For an action in tort of defamation to succeed, there is also the requirement of publication. It must be proved that the defendant was responsible for the publication. In libel cases, plaintiff must present evidence of the publication by the defendant. Failure to so provide, the allegation of publication is deemed to be no more than bare assertion. See. **GANTLEY ON LIBEL AND SLANDER (SUPRA) AT PARAGRAPH 34.7.**

26. The case before me is one of libel. I say so because, publication of words in the course of any programme included in a broadcasting service is treated as publication in a permanent form.

GANTLEY ON LIBEL AND SLANDER 11TH ED AT PARAGRAPH 3.9, provides as follows:

'for purposes of the law of libel and slander the publication of words in the course of any programme included in a programme service shall be treated as publication in the permanent form'...there is no doubt that the effect of this is to make such broadcasts libel rather than slander.

27. It follows therefore that a duty lies on the plaintiff to produce evidence of such a broadcast. In our present case, the plaintiff did not produce such evidence. I do acknowledge the fact that it might have been difficult to obtain such evidence considering that it was in the hands of the defendant. Even so nothing would have stopped the plaintiff from asking for the Courts assistance to obtain the news clips. As was correctly stated by the defendant, there are other radio stations that broadcast in dholuo. Only PW2 seems to have heard the statement being made, even the plaintiff himself did not hear . There are other stations that air their content in dholuo and there is thus possibility of error and the plaintiff's allegations cannot be deemed to be anything else but mere assertions.

28. Consequently and in light of the above determination in as much as I hold that the words uttered defamed the palintiff, I am however, unable to find that the source was the defendant. The case was not proved on a blance of probabiliies and that the same is dismissed with costs.

Dated, signed and delivered this 23rd day of November, 2015.

H. K. CHEMITEI

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