



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 995 OF 2002

CHRISTOPHER MUDI1ST PLAINTIFF

JOHN KIMANI2ND PLAINTIFF

SIMON KERAI3RD PLAINTIFF

VERSUS

NATION MEDIADEFENDANT

JUDGMENT

1. The 1st, 2nd and 3rd plaintiffs via their plaint dated 11/4/2002 claim as against the defendant general and exemplary damages for defamation and a permanent injunction restraining the defendant, its agents and or servants from entering publishing and distributing malicious, libelous and false articles in any edition of its Taifa Leo newspapers and/or in any other manner whatsoever defaming the plaintiffs herein cost and interest of the suit.

2. The plaintiffs claim that on or about the 11th August 2001, 26th August, 2001 and 10th September, 2001, the defendant entered, published and distributed or caused to be distributed during the said days respectively articles in its “Taifa Leo” Edition relating to registration of form 4 students for Kenya Certificate of Secondary Education and/or issues concerning Kahuho Uhuru High School entitled:-

“WANAFUNZI KUKHOSA MTIHANI WA KCSE” (Students miss their KCSE examination)

“HOFU YA WAZAZI KUHUSU WANA WAO” (Parents worry about their children)

“USAJILI WA WATAHINIWA WAZUSHA ZOGO SHULENI” (Registration of examinations candidates’ causes an uproar in school)

The plaintiffs aver that the said publication and distribution of the said articles by the defendant was actuated by malice, false, nonexistent, unfounded and devoid of truth whatsoever; that the said articles injured the reputation , character and good image of the plaintiffs before the eyes of right thinking members of society exposing the plaintiffs to hate scorn and ridicule.

3. The defendant in its defence dated 22nd July 2002 denied the averments in the plaint and particularly pleaded defence of justification and fair comment and defence of public interest and categorically alleged the defamatory articles complained about were matters of public interest.

4. In reply to the defendants defence inferred that the defendant’s publication was actuated by malice but

did not give any facts or particulars thereof contrary to the provisions of the Civil Procedure Act specifically Order 2 rule 7(3) which provides, “Where in an action for libel or slander the plaintiff alleges that the defendant maliciously published the words or matters complained of, he need not in his plaint give particulars of the facts on which he relies in support of the allegation of malice; but if the defendant pleads that any of those words or matters are fair comment on a matter of public interest or were published upon a privileged occasion and the plaintiff intends to allege that the defendant was actuated by express malice, he shall file a reply giving particulars of the facts and matters from which the malice is to be inferred”.

As such the defendant argues that the suit is a non-starter as the cause of action has not been disclosed and it is not enough for the plaintiff to highlight the defamatory articles but it is trite law in libel that the alleged defamatory words be set out verbatim failure to do so renders the suit defective. Defendant relied on the case of **Francis Oyatsi –vs- wachira Waruru & The Standard Limited, HCCC No. 1225 of 1996.**

EVIDENCE

5. PW1, Christopher Mudi, the former Principal of Kahuhu High School in Kikuyu Division he resigned on 31/8/2007 at the age of 50 years. He testified that he was defamed by the articles published by the defendants in that the articles claimed that he had received registration fees for registration of the students from the parents which was not true; that the articles also allege that he together with other students were demonstrating walked for 15 kilometers which was not the case.; that the paper that they were holding was a plain paper and it not receipts of payment as stated in the articles; further on the 2nd article of 26/8/2001 he denied keeping the parents for 7 hours which was not true and that in the 3rd article of 10/9/2001 no teacher demonstrated against him and denied there was any demonstration if at all; that he was termed as a non-performer which was not true as Kahuhu High School was selected as model High School in Kikuyu Division; that on reading the 1st article they registered a complained stating the true facts. He further stated that he was traumatized and tortured mentally for fear of being sacked for things that he had not done; that when the writer went to school before 26/8/2001 he did not talk to him; that he was under pressure and was summoned by the Chief Inspector of Schools Districts Education seeking an explanation of the articles despite having been a Secretary of Mwalimu Sacco for 8 years he was removed from his position as his image was tainted by the publication of the said articles.

6. On cross examination by Mr. Wesonga he stated that he applied for promotion to Job group N but failed the interview which he attributes to the alleged defamatory articles. He further stated that the writer was a teacher previously before becoming a writer. He sought to clarify that though the 2nd article was not defamatory the same was contradictory; that though summoned by the Chief Inspector of Schools Districts Education he was not fired.

7. PW2, John Kimani testified that he was one of the three parents who went to seek help from the Minister of Education at Jogoo House. They went twice but the Minister was not there and decided to seek help from the media; that on 4th August 2001 together with 2 other parents and 5 children went to the media. On arrival Mr. Muya Gesa and Mr. Kimaru informed the media people that they had needy children they wanted to be registered for national examinations but they did not have money for registration fees and wanted the Minister of Education to have mercy on them; that they were asked to pose for a photograph and later on 11/8/2001 the article was published. He denied that there were teachers that had accompanied them to the media house but clarified that they had only teamed up with the principal but denied having been present when the principal went to the media with one board of governor; that the 2nd article was published on 26/8/2001 and that later a parents meeting was held with 10 parents present. That the DEO urged the parents to let their children repeat the following year; that they made no tribal remarks to the Nation Media and only brought the action against the Nation media for calling them demonstrators and alleging that they had paid the registration fees but the monies had been diverted by the head teacher to other use denying the children to do the exams which statement he claimed was false. On the 3rd article the Nation media referred to the 1st and 2nd articles; that he felt the articles were defamatory and opted to resign from his job as a member of the board of governors at

Kayeri Girls School; and that at the Tribunal he was earning Kshs. 600/-; that the journalist Mr. Kimaru twisted the story and as a result of the publication of the said articles he was forced to sell his pick up and move from his farm to Olerunguri which he argued was a small place. In addition he claims that he lost his green grocer shop.

8. On cross examination PW2 reiterated his examination in chief and added that he had a 5 acres piece of land where he practiced horticultural farming where he earned between Kshs. 15,000/- to Kshs.20,000/- and was able to cater and raise his 6 children and 5 of his late brothers children. From the Tribunal he alleged that he got Kshs. 600/ per sitting and Kshs. 500/- when he was elected as a NAK secretary and resigned in 2001; that at the time he had a girl in form four and she was not registered as he did not have money. He testified that he had not been mentioned in the 2nd and 3rd articles of 01/9/2001. He testified that he lost income due to the publication of the said articles.

9. PW3 Kiari Karei reiterated the averments of PW2. He however alleged that he did not know the name of the Paper that published the said defamatory articles against him. He identified the people in the said photograph used in the article as Mzee Njoroge, Goi Tui. He like the other 2 plaintiffs alleged that the articles were misleading and as a result he and the other plaintiffs were defamed. As a result his business of buying timber and burn charcoal was affected as he was seen as a liar and this also affected his chances of becoming a village elder and cannot get another job.

SUBMISSIONS

10. The plaintiffs defined defamation as the publication of a false material and concerning a person who ex-poses him/her to hatred, ridicule, contempt and cause him to be lowered in the estimation of others or causes him to be him or her to be shunned and avoided by an appreciable members of the general public or community. That as such the legal elements to be proved in a defamation suit are: Publication, identification, of and concerning, the plaintiff the person with a claim and to whom did the words have an effect on; that it is not disputed that the defamatory articles dated 11th August 2011; 26th August 2001 and 10th September 2001 were published by the defendants and that it is not in doubt that TAIFA LEO is widely circulated national wide and in the East African Region; that it is clear that the paragraph reading ***“The angry parents claimed that they had paid registration fees in time”*** denotes high rude note yet the 2nd and 3rd plaintiff did not raise their voices as they were begging for money and since the parents had not paid fees the said statement depicted them as liars and persons with no integrity; that the paragraph reading, ***“Parents showing exam registration receipts outside Nation House Center”*** implied that the 1st plaintiff had received the money but had misappropriated misused or unaccounted for the money said to have been paid by the 2nd and 3rd plaintiffs, also portrays him as corrupt; that the statement reading, ***“parents of more than 10 students”, “recently teachers, who accompanied them from Kahuko High School I Kiambu District walked for more than 15KM to nation/Taifa offices in Nairobi”, “recently when the parents to unregistered students demonstrated.”*** That the above statements in their ordinary and natural meaning insinuated that the plaintiffs are demonstrators, persons of low morality and liars and this affected their reputation and tainted their image. Counsel for the plaintiff submitted that he had ably proved publication and that the defendants breached the plaintiff duty of care by maliciously publishing the said articles.

11. Identification the plaintiffs submit that they have been identified both by words and pictorials used. One Mr. John k. Ngutoi is quoted saying that he did not understand what was happening as student had also not been registered in the previous year. The article dated 26th August 2001 and 10th September 2001 had a photo and names of Mzee Samuel Kirai; that the names and pictures clearly identify the plaintiffs; that the defamatory words complained of unmistakably concerned the plaintiffs and are understood to refer to each one of them, and all persons so defamed could bring an action against the publisher.

12. That the said defamatory statements had an effect on the right thinking members of society, ordinary members of the community or the general public and an applicable and reputable section of the community as the plaintiff were not re-elected in elective positions 1st plaintiff not trusted to be a secretary at Mwalimu Sacco and he was termed as a nonperformer which traumatized him and exposed

the 1st plaintiff to hatred, ridicule and contempt.

DAMAGES

13. Plaintiffs submitted that they were both socially and professionally embarrassed and people avoided them after the publication of the 3 articles. The 2nd plaintiff even had to shift to Molo in Rift Valley, nobody wanted to work with him and his business collapsed. The 1st plaintiff was forced to retire 10 years earlier instead at the retirement age of 60 years. The 3rd plaintiff lost the opportunity to be elected as an elder. The relied on the case of **Nicholas R.O Ombija –vs- Kenya Commercial Bank HCCC 547 of 2008**, the Court in assessing damages noted that “judges do take steps to protect their character. They are professional men and women and they earn their living by upholding good character honesty and uprightness.”

The court in awarded Kshs. 2.5 million as damages.

HCCC 1067/99 Kipyator Nicholas Biwott –vs- Clay Ltd, the Court awarded Kshs. 15 million

HCCC 10709/1996 J.P.Macharia –v-s Wangethi Mwangi, the Court awarded Kshs. 10,000,000/-

CA 314/2000 Evans Gicheru vs Andrew Morton, the Court awarded Kshs. 6,000,000/-.

14. Factoring the award made in the above cases and the aspect of inflation the plaintiffs proposed general damages for the 1st plaintiff as Kshs.12,000,000/-, 2nd Plaintiff Kshs.8,000,000/- and 3rd Plaintiff Kshs. 6,000,000/- and aggravated damages of Kshs.1,000,000/- for each plaintiff. In conclusion plaintiffs’ counsel submitted that the defendants did not adduce any evidence and therefore the plaintiffs’ evidence goes unchallenged.

DEFENDANT’S SUBMISSIONS

15. The defendant admitted that that the 3 articles that’s complained of were published on 11th August 2001, 26th August 2001 and 10th September, 2001; that the said articles pertained to registration of KCSE and therefore touched on public and national interests and the same did not bear any defamatory meaning at all but were fair, just and bona fide comments on public interests.

16. It was submitted that the plaintiffs filed their reply without giving particulars of the facts of the matter which malice could be inferred contrary to Order 2 rule 2(3) of the Civil Procedure Rules and this they argued renders the suit as a non-starter; that mandatory rule relating to pleadings in libel requires that the offending articles to be set out verbatim failure to do so renders the suit defective. On this ground the defendants claim the plaintiffs claim should fail. On this the defendants relied on the case of **Francis Otyatsi –v- Wachira Waruru & The Standard Limited, HCCC 1225 of 1999**, it was held that, “particulars in defamation actions is meant to cure the “mischief” of the parties

17. In their response to the 1st plaintiff’s testimony they submitted that Kahuko Uhuru High School where the 1st plaintiff’s was a principal was not performing well as alleged by him and no student had qualified from there had qualified for admission into a public university and this was a clear indication that the 1st plaintiff was a non-performer. They relied on the examination results in the plaintiffs list of document dated 4th May 2006; that the 1st plaintiff only resigned from teaching on 31st August 2007 almost 6 years after the publication of the alleged defamatory articles; that he had not proved his earnings of Kshs.100,000/- as salary allowances nor Kshs. 20,000/- he was earnings as a secretary of Mwalimu Sacco nor adduced any document to support his claim of Kshs. 50,000/- from assorted clubs and his having obtained a Master’s degree was not a guarantee that he would be successful; that in all the said articles the writer used the term “allegations” and it was clear that there were problems in the school headed by the 1st plaintiff on non-registration of students for examination due to allegations that the 1st plaintiff had not paid fees.

18. It was further submitted that it was not logical that the 2nd and 3rd defendants visited the nation Media center to seek financial assistance accompanied by their children; that fee payment is given timelines and extension of the same is usually communicated to the school heads as a matter of policy. They pointed out contradiction between the testimony of the 2nd and 3rd defendant. The 3rd defendant's testimony that the paper that they were holding in the picture contained their grievances while the 2nd defendant stated that they were holding a blank paper. It was their submissions that the 2nd plaintiff's testimony was not probable.

19. Response to 2nd plaintiff testimony a former teacher, and parent at Kahuho secondary school and board of governor of Kanjeru Girls High School was that a report that someone has walked for so many kilometers or referring them as demonstrators does not lower their reputation or character more so the word demonstrators was not used in any of the articles. It is further submitted that the 2nd plaintiff was being untruthful in stating that he lost appointive positions because of the alleged defamatory publications as he was appointed as a panel of elders in the Land dispute Tribunal Kiambu vide Legal notice dated 11th December 2003, a board of governors of Kanjeru Girls High school on 12th February 2003 where he served for 3 years and this was a clear indication that he was never exposed to any ridicule or contempt and was not lowered in the estimation of others neither was he shunned or avoided; that with the said public appointments and earnings from Horticulture farming it cannot be true that the 2nd plaintiff was unable to pay registration fee for his daughter. It is not logical that casual laborers could have abandoned their work and risk losing their wages because of the articles. On the allegation that he was forced to move from Kiambu to Molo it was submitted it is a lie and the same was a personal choice.

20. In response to the 3rd plaintiff's testimony and submissions. The plaintiff had stated that in the photograph appearing in the said articles they were holding a paper containing their grievances and it was evident that the 3rd plaintiff was sad and in deep thought; that the plaintiff gave contradictory evidence in that he claimed that he was a chief tribunal elder earning Kshs.2,000/- but on cross-examination indicated that he was earning Kshs. 300-400/- and never adduced any evidence to prove the said earnings nor that he was getting Kshs. 10,000/- from his charcoal business. Further that his appointment as an elder was hindered by the letter dated 17th march 2009; that his claim to have resigned from being a chief elder was from his position as an elder due to the said articles this the defendant argues was untrue and exaggerated and it was almost impossible for someone who is shunned by the society to be elected as a village elder for 8 years.

21. On the question of malice it was submitted that the 1st plaintiff alleged that a Mr. Nyongesa and Mr. Kimaru ganged up to finish him, while the 2nd plaintiff only claimed to know the two after the 1st plaintiff's testimony and claimed to know of the acrimony between the two gentlemen and the plaintiff and though there was an alleged issue of non-paid pension this was inadmissible. In conclusion the defendants submitted that the plaintiffs had failed to their case on a balance of probability and as such urged the Court to dismiss the suit with costs.

22. The plaintiffs in their filed reply to the defendant's submissions they reiterated their pleadings and submissions.

DETERMINATION

23. Having analyzed the pleadings and the plaintiff's witness testimony and exhibit evidence. I find as follows; a libel is a defamatory statement made in writing or printing or some other permanent form". The elements of the tort of defamation are that the words must be defamatory, the words must refer to the plaintiff and the words must be malicious. The words must be defamatory in that they must tend to lower the plaintiff's reputation in the eyes of right-minded persons, or must tend to cause him to be shunned or avoided. The burden of proof is upon the person alleging that the said words to be defamatory to show that a reasonable man would have understood them as such.

24. It is not in dispute that there were publications on 11th August 2001, 26th August 2001 and 10th

September, 2001 by the defendant but they allege the same was fair comment. It is trite law in a libel claim that the alleged defamatory words must be set out verbatim as appearing in the offending article/s. In this regard I am guided by East African Court of Appeal in *Nkalubo vs. Kibirige [1973] EA 102* where it was held:

“In all suits for libel the actual words complained of must be set out in the pleadings. In libel and slander the very words complained of are the facts on which the action is grounded. It is not the fact of the defendant having used defamatory expressions, but the fact of his having used those defamatory expressions alleged, which is the fact on which the case depends.... This is not a mere technicality, because justice can only be done if the defendant knows exactly what words were complained of, so that he can prepare his defence. In this case the letter having been written in Luganda, the particular words complained of should have appeared in the pleadings in that language, followed by a literal translation into English... Whereas it is true that relief not founded on the pleadings will not be given but a court may allow evidence to be called, and may base its decision, on an unpleaded issue, the court does not think that it can be invoked to allow the introduction of what amounts to a new cause of action... The essence of a defamation suit is that certain specific words used by the defendant were defamatory of the plaintiff. Where one is dealing with spoken words, it may, of course, transpire in the course of the evidence that the words used were not exactly what the plaintiff believed them to have been, but if they are to the same effect, he can still recover, although an application for leave to amend would be prudent. If, however, a suit were founded on an allegation that certain words were used and then, without any amendment of the pleadings, the plaintiff were awarded damages on evidence that substantially different words were used, no defendant would know how to prepare his case and injustice rather than justice would result... Although the actual defamatory words allegedly spoken must be specifically pleaded, so that the defendant knows exactly what case he has to meet,”

In the pleadings dated 11th April 2002 the plaintiff pleads the following at paragraph 5.

“on or about the 11th August 2001, 26th August, 2001 and 10th September, 2001, the defendant entered, published and distributed or caused to be distributed during the said days respectively articles in its “Taifa Leo” Edition relating to registration of form 4 students for Kenya Certificate of Secondary Education and/or issues concerning Kahuhu Uhuru High School entitled:-

“WANAFUNZI KUKHOSA MTHANI WA KCSE” (Students miss their KCSE examination)

“HOFU YA WAZAZI KUHUSU WANA WAO” (Parents worry about their children)

“USAJILI WA WATAHINIWA WAZUSHA ZOGO SHULENI” (Registration of examinations candidates’ causes an uproar in school)”

The details of the publications of 11th and 26th August 2001 and 10th September 2001 were not set out verbatim in the pleadings. The plaintiff has annexed the said articles in the plaintiff bundle of documents at pages 1, 2 and 3 and the translations at page 37 (a) 37 (b) and 38 to 41. Guided by the East African Court of Appeal case of *Nkalubo vs. Kibirige (supra)* that in libel and slander cases the very words complained of are the facts on which the action is grounded must be set out in the pleadings and the words set out in the pleadings at paragraph 5 in my view I find that what was pleaded or set out were the headings of the 3 articles. Paragraph 6 and 7 of the pleadings sets out what the plaintiff alleges was defamatory. To prove their claim on defamation it was important to set out details of the defamatory words. I therefore agree with the defendant's submissions that the plaintiff's case cannot succeed. The headings of the articles as pleaded in the pleadings are not defamatory.

25. Were words published in the said articles malicious?

Odunga J. in *Phinehas Nyagah v Gitobu Imanyara [2013] eKLR*, quoted the case of *Godwin Wachira vs. Okoth [1977] KLR 24*; where it was held that, *“Malice here does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice. Evidence of 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 but the law does not weigh in a hair balance and it does not follow merely because the words are excessive, there is therefore malice.....

Further

...the failure to inquire into the facts is a fact from which inference of malice may properly be drawn. Any evidence, which shows that the defendant knows the statement was false or did not care whether it be true or false will be evidence of malice.”

From the wordings of the said articles as pleaded in paragraph 5 of the plaint I cannot infer any malice on the part of the defendants as such I find that the plaintiffs have failed to prove their claim against the defendant and as such I dismiss the plaintiff’s plaint with costs to the defendant.

Orders accordingly.

Dated, signed and delivered this 31st day of **October** 2014.

R. E. OUGO

JUDGE

In the presence of:-

.....For the Plaintiffs

.....For the Defendant

.....Court Clerk