



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 474 of 2009

PATRICK NYOIKE.....PLAINTIFF

VERSUS

THE PEOPLE LIMITED.....DEFENDANT

JUDGEMENT

This suit arose after the defendant; The People Limited published an article on 5th August 2009 in the publication known as “Pyramid scheme owners revealed “This article was published at page 5 of the People Daily newspaper.

The plaintiff, a Permanent Secretary in the Ministry of Energy alleges that the publication were false malicious and defamatory and as a result greatly injured his reputation credit, professional integrity and status. The plaintiff contends that the defendant was actuated by malice in the publication of the said article with the following defamatory words:

“A Permanent Secretary, a former envoy and a former Member of Parliament are among owners or directors of pyramid schemes that fleeced Kenyans billions of Shillings.

In a report tabled by co-operative Development Minister Joseph Nyaga, energy permanent secretary Patrick Nyoike are listed among the key architects of the pyramid scheme in which unsuspecting Kenya lost over Kshs 8.1 Billion. Nyoike has been mentioned as one of the directors of Jitegemee Sacco which also operated under the name Mont BlanqAfriqueLtd.Jitegemee Sacco is alleged to have received over Kshs 494 Million from 3,828 Kenyans .A total of 774 Kenyans invested over Kshs 82 Million in Mont BlaqaAfrique Ltd”.

The plaintiff claims that this in the natural and ordinary sense and natural meaning, was understood to mean that he was a conman, a fraudster, a crook, a thief, a criminal and a person who misused his position and influence to defraud Kenyans their money through the so called pyramid scheme; that he cannot be trusted with public affairs and is not fit to hold public office of permanent secretary or any public office and has breached the Public Officers Ethics Act 2003.

The plaintiff stated in his plaint at paragraph 6 that by issuing the said false defamatory statements, the Defendant intended the same to be consumed by the public and knew or ought to have known that the same would be consumed by government officials, members of parliament the plaintiff’s family, friends and professional colleagues who it did as a matter of fact. The plaintiff states he read malice in the publication because the defendant caused the article to be published when he knew or ought to have known that the same were false ,defamatory and injurious to the plaintiff. That the defendant published the words and purported to rely on the report of the Taskforce on pyramid schemes as their basis of false information which report does not name the plaintiff as a mastermind of the pyramid scheme or at all.

That the published words were designed to make its readers believe that the defamatory words were extracted from the Taskforce on pyramid Schemes when it knew that they were not and that the words were consumed by the public at large, government officials, Members of Parliament ,the plaintiff's family ,friends and professional colleagues.

The plaintiff further contends that the defendant made no effort to verify or ascertain the truth of the statements from him which words were taken with the intention of creating a sensation, with eye for profit and without any regard to the plaintiff's reputation. This according to the plaintiff has caused him to suffer substantial loss and damage both to his professional and private life and he seeks compensation from the defendant in damages. The plaintiff avers that the defendant acknowledged liability by publishing a correction on 16th August 2009 in "The people" daily where it was admitted that the publication made on 5th August 2009 was inaccurate and that indeed the plaintiff's name was never mentioned in the report.

There is no defence although the defendant entered appearance on 30th September 2009.

The plaintiff filed his witness statement and bundle of documents .On the 21st February 2013, the plaintiff Patrick Nyoike appeared in court testified as follows that he is a Permanent Secretary in the Ministry of Energy and has held that position since 2003. That an article was published in which it was stated that he together with other people were suspected to be directors of a pyramid scheme that fleeced Kenyans of billions of shillings. That he was mentioned as a director of Jitegemee Sacco which operated under the name of Mont BlanqAfrique Ltd which publication was not accurate and that his name was not named in the Report of pyramid schemes. He sought to be paid damages because the defendant despite the admission has failed to do so.

The plaintiff filed his submissions on 27th February 2013. In his submissions he reiterated the contents of his plaint and claims general and aggravated damages for defamation. He is also seeking injunction restraining the defendant by himself, his servants, and his agents or howsoever from making any further defamatory statements of and concerning the plaintiff. It is further submitted by the plaintiff that the publication was made in reference to him by virtue of the fact that the article made reference to "*Energy Permanent Secretary, Patrick Nyoike*". This he says made direct reference to the plaintiff's name and the position he held at the time of the publication and no defence has been put up denying the publication referred to the plaintiff. On whether the words set out in the said publication were defamatory the plaintiff submitted that the words were not only untrue but also highly defamatory of him. The article imputed him as a man of criminal conduct, untrustworthy and one guilty of abusing his position to defraud Kenyans. His submissions are that he has been a career civil servant who has risen over the ranks over the years and has been entrusted with discharging important public affairs because of his upright conduct and utmost integrity whose character is above moral impropriety; a trait that was cast in doubt by the said publication. That the publication implied that the plaintiff is not suitable to hold public office and cannot be trusted by the Kenyan people as he used his position and influence to defraud them of billions.

On the issue of malicious imputation, the plaintiff submitted that the defendant published the offensive words when it ought to have known the same to be false. The defendant did not seek clarification from the plaintiff neither did it consult the Report of the taskforce on pyramid schemes. However the defendant published the words in a manner designed to make its readers believe that the defamatory words were extracted from the said report. It is the plaintiff's submission further that it is clear that the defendant being motivated by financial gains published the said words recklessly and in a disparaging manner without due regard to the plaintiff's reputation which he submits that the publication was not only false and defamatory but also published maliciously.

On the issue of substantial loss and damage as a result of the publication the plaintiff submitted that the reputation of the plaintiff in the estimation of right thinking members of the society was lowered as a result of the publication. That it cast doubt on the plaintiff's character and more so to his professional integrity as a permanent secretary and his ability to discharge public affairs.

On the issue of quantum, the plaintiff submitted that a successful plaintiff in defamation case is entitled to general compensatory damages which must compensate him for the damage done to his reputation, vindicate his own good name, taking into account the distress, hurt and humiliation which the defamatory publication has caused. He was of the opinion that in determining quantum the court should be guided by the reputation and status of the plaintiff, the nature of the publication, gravity of the libel and degree of dissemination.

Issues for Determination

I have carefully read and considered the pleadings, evidence and submissions by the plaintiff since this suit is undefended. I have also analysed their authorities.

The case of **Joseph Kudwoli -V- Eureka Educational and Teaching Consultants & 2 Others HCCC No. 126 of 1990**, sets out the issues a plaintiff in a suit founded on defamation be it libel or slander must prove:

- a. That the matter of which he complains was published by the defendant;
- b. That it was published of and concerning him;
- c. That it is defamatory in character;
- d. That it was published maliciously and;
- e. In slander, subject to certain exceptions, that he has thereby suffered special damage.

Having looked at the five guidelines above the issues for determination in this suit can be summed up as follows;

- a) Did the defendant act recklessly and without any justification causing the plaintiff to be treated as a suspect of a criminal offence exposing him to humiliation, ridicule odium and contempt by right thinking members of the society and injury to his recognition and reputation?
- b) Did the defendant publish the said libellous words maliciously?
- c) Is the plaintiff entitled to the damages claimed?

Did the defendant act recklessly and without any justification causing the plaintiff to be treated as a suspect of a criminal offence exposing him of ridicule?

The plaintiff contends that the statements published were actuated by extreme malice and spite against him which to him were meant to make the public understand to mean that the plaintiff was one of the masterminds of the pyramid schemes that fleeced Kenyans billions of shillings. The plaintiff wondered why the defendant did not make an effort to approach the taskforce on pyramid schemes to ascertain the contents of the report. The plaintiff being a public officer further stated that the defendant should have ascertained the truth of the statements from him first before publishing the same.

In the case of Kudwoli (supra) the court stated that :

“When a man is falsely accused of conduct which tends to lower him in the estimation of a substantial number of persons, there can be no doubt that the door has been opened to business or social injury, or both; it will not wait for right-thinking members of society generally.”

Accordingly, in the circumstances the court has no otherwise but to believe the plaintiff and hold that the defendant’s actions were reckless, unjustified and defamatory.

Was the publication actuated by malice?

In all these circumstances, in my view it was necessary for the defendant to check the veracity of the story for which purpose the obvious reference point was the plaintiff himself, if he was unavailable members of his staff all of whom knew the plaintiff would be able to confirm or deny in answer to the most simple inquiry whether or not the plaintiff was named in the pyramid scheme taskforce report.

What the defendant did was to publish the story for the sake of making a deal for the day through profits because of the obvious reason that the plaintiff being a public officer is always at the scrutiny of the public.

Is the plaintiff entitled to the damages claimed?

The court is entitled to award substantial damages for injury to reputation even though the claimant is unable to prove any financial loss or even distress. Damages act as vindication rather than merely as compensation in the ordinary sense and they also serve as an effective deterrent. In an action of defamation the claimant's aim is to vindicate his reputation, to clear his name considering that reputation has value, once tainted by unfounded allegations in a newspaper, a reputation can be damaged forever especially if there is no opportunity to vindicate one's reputation. This was held so in the case of **Daniel Musinga T/A Musinga & Co. Advocates –V- Nation Newspapers Ltd HCCC No. 102 of 2000** which stated that:

“The success for a plaintiff in a defamation action is entitled to recover as general compensatory damages such sum as will compensate him for the wrong he has suffered. That sum must compensate him for damages to his reputation, vindicate his good name, and take account of the distress, hurt and humiliation which the defamatory publication has caused.”

On the claim of aggravated damages, when assessing damages, the court is entitled to look at the whole conduct of the defendant from the time libel or slander was published down to the time the verdict is given. That is, what the conduct has been before action, after action and in court during the trial. Even though the defendant did not file his defence, he entered appearance. It is clearly stated by the plaintiff both in his pleadings and submissions that the defendant put up a correction. The tone of rather the wording on the newspaper of 6th August 2009, a day after the defamation article was published was apologetic. The purpose of this apology to my understanding is to appease the injured feelings of the plaintiff and to undo the harm to the reputation in consequence of the publication. This apology was given a similar publicity to the original words used against the plaintiff as the apology is published on the 1st page of the newspaper with the intention of catching the attention of those who wrote the libellous article.

It is trite that an award of damages should not enrich a party but restore him to the position he was in before the injury. In the case of **John –vs-MGN Ltd [1997] QB 586** the court held *“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. The extent of publication is also very relevant; a libel published to millions has a greater potential to cause damage than a libel published to a handful of people”*

Further, awards in past decisions are mere guides and each case should depend on its own circumstances. I also appreciate the authorities cited by the plaintiff, being **Nation Newspaper Ltd –vs- Daniel Musinga t/a Musinga & Company Advocates Civil Appeal No.120 of 2008** where the appellant an advocate was awarded Kshs 4 Million, **Nation Newspapers Limited –vs- Omondi Mbago Civil Appeal No.30 of 2012** where the appellant a senior civil servant was awarded Kshs 4 Million and **Johnson Evan Gicheru –vs- Andrew Morton & Another [2005]eKlr** where the appellant the former Chief Justice was awarded Kshs. 6 Million. One common aspect about the cited cases is the fact that just like the plaintiff, the appellants in the above 3 cases were public officials. In arriving at the award in this matter I have considered the following;

- i. On the fact that the plaintiff being a Permanent Secretary in the Ministry of Energy, has the imputation lowered the plaintiff in the estimation of the right thinking members of the society generally?
- ii. Would the imputation tend to cause others to shun or avoid the claimant?
- iii. Would the words tend to expose the claimant to hatred, contempt or ridicule among the general population?
- iv.. The fact that the defendant put up a correction in the paper

Accordingly, judgement is hereby entered for the plaintiff in the sum of Kenya shillings four million (**Kshs.4,000,000/-**) general damages and Kenya shillings one hundred thousand **Kshs.100,000/-** as aggravated damages with interest at court rates from the date of this judgement till payment in full and costs.

The plaintiff also asked for a permanent injunction restraining the defendant by himself, his servant, agents or howsoever from making any or any other defamatory statements of and concerning the plaintiff .An injunction order is a discretionary remedy and is only exercised along settled principles. An injunction is meant to preserve and keep or to restore things in the desired peaceable stated condition and would injure the person seeking the injunction in such a manner that other relief would not be adequate. In the present circumstance the order to restrain the defendant from making any further defamatory statements of or concerning the plaintiff cannot be granted .The basis for this refusal is because the newspaper had already been circulated and for that matter an order for injunction if granted would be in vain.

Orders accordingly.

Dated, signed and delivered this 19th day of April 2013

R. OUGO

JUDGE

In the presence of:

.....Plaintiff
Defendant
Court Cler