



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**CIVIL SUIT NO. 697 OF 2009**

**PHINEHAS NYAGAH..... PLAINTIFF**

**VERSUS**

**HON. GITOBU IMANYARA..... DEFENDANT**

**JUDGEMENT**

1. By a plaint dated 22<sup>nd</sup> December 2009 and filed in this Court on 23<sup>rd</sup> December 2009, the plaintiff herein, **Phinehas Nyagah** has filed this suit against the defendant herein seeking the following orders:
    1. **(a) Damages for defamation**
    - (b) Compensatory damages**
    - (c) Exemplary damages**
    - (d) Costs of the Suit**
    - (e) Interest on (a), (b) and (c) above at court's rate.**
    - (f) Aggravated damages and interest thereon at court rate**
  2. **A declaration that the plaintiff is entitled to a retraction of the defamatory words and a suitably worded apology published in two of the widely circulated local newspaper.**
  3. **An order of an injunction to restrain the Defendant from further uttering or causing to be uttered the words referred to in paragraph (3) hereinabove or any similar words defamatory to the plaintiff.**
  4. **Such other relief as this Honourable court may deem fit to grant.**
2. The plaintiff's cause of action is contained in paragraph 3 of the plaint. The said paragraph states as follows:

On 25/09/2009 the Defendant called a press conference and falsely, maliciously and with intent to injure the plaintiff's reputation uttered the following defamatory words of or concerning the Plaintiff:-

**That one of the men the Defendant wants investigated over last week's raid at his Libyan hotel room is an elder from Mbeere.**

**That the Defendant has fingered Nyaga as the man sent by former Siakago MP Justin Muturi to do him harm.**

**That the Plaintiff had been sent to "finish him" and said he should be investigated for his 'dodgy behaviour' while in Tripoli.**

**That apart from the Plaintiff, the Defendant's life was also threatened by yet another man armed with a spray can containing an unknown substance who broke into his Bab 1 Bahar hotel.**

**That the Defendant tried to talk to the Plaintiff but he was dodgy, he told the Defendant and others that he had been sent to Tripoli by former MP Justin Muturi.**

**Further, the Defendant dismissed the Plaintiff's explanation of his presence in Libya as 'pure lies' and said he should be thoroughly investigated.**

**That the Plaintiff should explain how it is he checked out of the hotel at 4 am, the exact time when the Defendant's hotel room was allegedly was being raided and further added: "If he is a genuine elder as he claimed, why didn't he stay with the elders' delegation at their hotel and participate in the events organised for them? Why did the organisers for the MPs delegation have to tell him on several occasions to stop misrepresenting himself as an MP and to stay with the elders' delegation/ Was it mere coincidence that he and the two men who raided my room checked out at the same time?"**

**That the Defendant challenged the Plaintiff to present himself to the CID for questioning if he was telling the truth.**

3. In the plaintiff's view the said words were uttered with the knowledge that they were slanderous or with reckless disregard as to whether or not they were slanderous and having established that the prospect of their political advantage to himself by reason of their publication outweighed the prospect of material loss. It is therefore pleaded that the plaintiff has in consequence been seriously injured in his character, esteem, credibility as an elder, social and religious standing, his record as a law abiding citizen of the Republic of Kenya, his social standing both locally and internationally, credit and reputation and has been brought into public scandal, odium, ridicule and contempt causing him enormous anxiety, mental agony, distress, pain, considerable loss and damage.
4. In support of his case, the plaintiff who testified as PW1 relied on his statement filed herein on 30<sup>th</sup> January 2012 whose contents were adopted as part of the examination in chief. According to the plaintiff, he is a businessman and a proprietor of Zebstrich Enterprises dealing in Stationary Supplies and Office and General Supplies and is one of the Mbeere opinion leaders and Mbeere elder. He also occupied political party positions in KANU before moving to TNA. On or about 25<sup>th</sup> September 2009, the Defendant herein called a press conference and maliciously uttered defamatory words concerning him which words were published in the Star Newspaper on 26<sup>th</sup> September 2009 on the first page thereof and entitled "***Imanyara Hitman a Mbeere Elder***". In the said article it was reported that the defendant wanted him investigated over the previous week's raid at his Libya Hotel Room and that the plaintiff had been sent by former Siakago MP **Justin Muturi** to "finish him" and further that the plaintiff should be investigated for his dodgy behaviour while in Tripoli.
5. According to the plaintiff the said allegation was false, malicious and meant to defame him by insinuating that he was a killer. According to him, he was to travel to Tripoli Libya on the 5<sup>th</sup> September 2009 as part of delegation of about twenty (20) elders from Kenya following an invitation by the former Libyan **President Muarmar Gadhafi**. He, however missed his flight due to traffic jam along Mombasa Road hence his colleagues left without him and was forced to take a

- rescheduled flight on 6<sup>th</sup> September 2009 in the afternoon which flight went through Cairo from where he reconnected to Tripoli arriving there on 7<sup>th</sup> September 2009. From there he boarded one of the three buses reserved for the guests and was taken to **Al Baab Hotel** where he was booked where he also found **Hon. Musa Sirma** and the Defendant. He was only able to get in touch with his delegation on 9<sup>th</sup> September 2009 while attending State Dinner.
6. According to the plaintiff his trip to Tripoli Libya was by the invitation of the Libyan President and the allegation by the Defendant that he was sent there by **Hon. Justin Muturi** to kill him was malicious and false.
  7. On 13<sup>th</sup> September 2009 he returned back home and on 26<sup>th</sup> September 2009 received a phone call from his friend who told him his photograph had been seen in the said Newspaper with the aforesaid allegation after which he sent for a copy of the said Newspaper. Similarly he received several calls from his friends inquiring about the issue. Thereafter he instructed his advocates to issue a demand notice which however did not yield any fruits.
  8. It is therefore his position that he has been seriously injured in his character, credibility and social standing both locally and internationally which has caused him enormous anxiety, mental agony, distress, financial loss and damage. According to him he lost his relationship with his people as a leader as well as his relationship with his church, ACK which stopped him from taking holy communion. Previously he held several posts such as Regional Co-ordinator of KANU, Central and Eastern. His business also suffered as he could not supply the institutions such as KEMRI, KBC and Kanyambara Secondary School among others.
  9. In support of his case the plaintiff produced a bundle of photographs, the Newspaper adverts, Local Purchase Orders, Registration Certificate and demand notice.
  10. He therefore sought compensation for defamation in form of general damages, defamation to the community and church taking into account the fact that the matter is with the Interpol which means he risks being arrested any time. He also sought damages for loss of business and the costs of the suit. According to him, his reputation has been tarnished countrywide, nationally and internationally.
  11. In cross-examination by **Mr Kouna**, the plaintiff reiterated that the Defendant tarnished his name through the "Star Newspaper". He, however, conceded that he was not in attendance of the press conference. According to him he was called by the CID to record a statement which he did to clear his name. Referred to the Newspaper report of 24<sup>th</sup> September 2009, he stated that the one in which his name was tarnished was the one of 26<sup>th</sup> September 2009 headed "Hitman a Mbeere Elder". According to him the report had his photograph taken while he was still in Tripoli, Libya. He however states that he did not intend to call any person from the said Newspaper since the story itself tells the story and is not hearsay because it is something visible. He stated that he was staying in the same Hotel with the defendant while awaiting to find out where his team was and that he was invited by the Libyan Government. He later caught up with the said team on the third day. Asked about his documents, he said that some of them got lost while he was relocating from Nairobi following the closure of his business hence he was unable to obtain any documents prior to 2009.
  12. In re-examination the plaintiff reiterated that he is Mbeere leader and the paper stated so.
  13. At the close of the plaintiff's case the defence opted not to call any evidence and the parties filed their respective submissions.
  14. According to the plaintiff the plaintiff has proved that he was defamed by the defendant and that has established that there exists without a shadow of doubt defamation that maliciously and falsely slanders and libels the plaintiff arising from the statements made by the Defendant at a press conference on the 25<sup>th</sup> September 2009. Relying on **Kipyator Nicholas Kiprono Kibiwott vs. Clays Limited and 5 Others [2000] KLR** as well as **Nicholas Biwott vs. Mbuguss and Another Nbi hccc No. 1067 of 1999**, the plaintiff sought an award of Kshs 10,000,000.00 in compensatory and aggravated damages.
  15. However, before determining the above issues it is important to set out the various principles of the law of defamation. Under article 32(1) of the Constitution every person has the right to freedom of conscience, religion, thought, belief and opinion and provides that the freedom to express one's opinion is a fundamental freedom. Article 33(1) (a) provides that every person has the right to freedom of expression, which includes freedom to seek, receive or impart information

or ideas. However, clause (3) provides that in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others. This, in my view, is the constitutional fulcrum of the law of defamation. Accordingly, the law of defamation is not just anchored on a statutory enactment but has been given a constitutional underpinning as well. In a tort for defamation the Court is therefore under a duty to balance the public interest with respect to information concerning the manner in which its affairs are being administered with the right to protect the dignity and reputation of individuals.

16. 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 and typical examples are an attack upon the moral character of the plaintiff attributing to him any form of disgraceful conduct such as crime, dishonesty, cruelty and so on. Publication is the communication of the words to at least one other person other than the person defamed. Publication to the plaintiff alone is not enough because defamation is an injury to one's reputation and reputation is what other people think of a man and not his own opinion of himself. An action for defamation is essentially an action to compensate a person for the harm done to his reputation. Defamation is not about publication of falsehoods against a person; it is necessary to show that the published falsehood disparaged the reputation of the plaintiff or tended to lower him in the estimation of right thinking members of society generally. An injurious falsehood may not necessarily be an attack on the plaintiff's reputation. The words must be maliciously published and malice can be inferred from a deliberate or reckless or even negligently ignoring of facts. See **J P Machira Vs. Wangethi Mwangi and Nation Newspapers Civil Appeal No. 179 of 1997.**
17. As opposed to slander, libel is punishable *per se* without proof of damage and the actual sum to be awarded is "at large" and although a person's reputation has no actual cash value, the Court is free to form its own estimate of the harm taking into account all the circumstances.
18. The elements of the tort of defamation are that the words must be defamatory in that they must tend to lower the plaintiff's reputation in the estimation of right-minded persons, or must tend to cause him to be shunned or avoided. Whereas mere abusive words may not be defamatory, the speaker of the words must take the risk of his audience construing them as defamatory and not simply abusive, and the burden of proof is upon him to show that a reasonable man would not have understood them in the former sense. However, in libel, the words cannot be protected as mere abuse since it is presumed that the defendant had time for reflection before he wrote them. Secondly, the words must refer to the plaintiff. Thirdly, the words must be malicious. 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. Malice may also be inferred from the relations between the parties before or after publication or in the conduct of the defendant in the course of the proceedings. Malice can be founded in the publication itself if the language used is utterly beyond the facts. 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. See **Godwin Wachira vs. Okoth [1977] KLR 24; J P Machira vs. Wangethi Mwangi** (supra).
19. Having considered the material that was published in "*the Star*" newspaper of Saturday September 26, 2009, I am of the view and I do find that the words published were ordinarily "defamatory" as they meant that the plaintiff was a "hit man", a killer. That the said defamatory material was published was not in doubt since the same was published in newspaper.
20. That, however, is not the end of the matter. The defamatory material must be shown to have been published by the defendant. In this case, no attempt at all has been made to prove that the material was in actual fact published by the defendant herein. In fact one of the issues as drafted by the plaintiff was whether the defendant called a press conference on 25<sup>th</sup> September 2009 and made the false and malicious defamatory words against the plaintiff. This issue was a reflection of

paragraph 3 of the statement of defence wherein it was pleaded that “the defendant denies the contents of paragraph 3 of the plaint and specifically denies that he called a press conference and uttered any defamatory words with intent to injure the plaintiff’s reputation”. By this express denial the plaintiff was put on notice that he had to prove that the publication was done by the defendant and this was recognised in the draft issues filed on his behalf. As was held by **Ringera, J** (as he then was) in **Gandhi Brothers Vs. H K Njage T/A H K Enterprises Nairobi (Milimani) HCCC No. 1330 of 2001** enumerated the principles guiding the setting aside of ex parte judgements as follows:

**“In those circumstances the Court is constrained to decide the matter on the basis of fundamental rule of evidence, which is codified in Section 3 of the Evidence Act Cap. 80 Laws of Kenya that a fact is not proved if it is neither proved nor disproved. It is therefore not proved”.**

21. In this case, the plaintiff admitted that he was not present at the time of the release of the said press statement. The plaintiff chose not to call anyone from “*the Star*” publication to shed light on where the offending story emanated. In the absence of evidence attributing the statement to the defendant the mere fact that the same was published by the Star newspaper does not meet the threshold of proof on a balance of probabilities that the publication was in actual fact done at the behest of the defendant.
22. In my view the defendant had no obligation to adduce evidence if the evidence adduced did not point to him as the person who authored the offending material. In my view the plaintiff ought to have called the reporter to shed light on the source of the publication since the plaintiff could not positively aver that the alleged press conference in actual fact took place.
23. Having so found, it is my view and I so hold that the plaintiff has failed to prove all the ingredients of the tort of defamation on a balance of probabilities. It follows that this suit fails and is dismissed with no order as to costs in light of the failure by the defendant to adduce evidence.
24. The law, however, requires me to assess damages I would have awarded had the plaintiff succeeded. Section 16A of the ***Defamation Act*** Cap 36 Laws of Kenya provides:

***In any action for libel, the court shall assess the amount of damages payable in such amount as it may deem just:***

***Provided that where the libel is in respect of an offence punishable by death the amount assessed shall not be less than one million shillings, and where the libel is in respect of an offence punishable by imprisonment for a term of not less than three years the amount assessed shall not be less than four hundred thousand shillings.***

25. In my view taking into account the fact that no witness was called to give evidence as to whether or not the defamation injured the plaintiff and as there was no proof that the alleged losses were occasioned by the said publication, I would have awarded the plaintiff Kshs 3,000,000.00 in general damages had he succeeded.

**Dated at Nairobi this 2<sup>nd</sup> day of August 2013**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of Mr. Munene Muruiki for the Plaintiff and Ms Ngeresa for Mr. Kouna for the Defendant.***