



CHARLES DAVY KIPNGETICH ARAP KIRUI.....:PLAINTIFF

VERSUS

WANGETHI MWANGI & ANOTHER.....DEFENDANTS

JUDGMENT

The plaintiff Charles Davy Kipngetich Arap Kirui moved to the seat of justice and filed this suit against the defendants Wangethi Mwangi as Editor of the Daily Nation, a National Newspaper with a very large and influential circulation within and beyond the jurisdiction of the court, the Nation Media Group Limited, the proprietor and Publisher of the said Daily Nation Newspapers. The source of the plaintiffs grievance arises from the fact that on the 21st day of November, 2002 and 23rd day of November, 2002 the defendants in their said News paper falsely, maliciously contemptuously and disparagingly printed, published and or caused to be published and of concerning the plaintiff the statements set out in paragraph 4 of the plaint. The plaintiff goes further to contend that the publications were false, malicious and defamatory as well as being contemptuous, disparaging and ill motivated. It is also the plaintiffs' contention that the defendants in undertaking the said publication were actuated by extreme malice, contempt, spite and were calculated to injure, discredit, intimidate and destroy the plaintiff's career. The plaintiff is greatly aggrieved because the defendants never bothered to find out the truth, never bothered to write or publish the truth, before publication.

By reason of the above, it is the plaintiffs contention that the statements were intended to inflict the greatest possible harm, damage, injury, embarrassment, ridicule, contempt and hatred on the plaintiff both in his own personal capacity and also in his own political image, reputation, standing as a politician in the eyes of the plaintiffs support on constituents and general public. In addition, these statements were meant to ruin the plaintiff's political career in the general elections held in December, 2002. In doing so the defendants were motivated by extreme malice and other ulterior motives and that is why although they knew where to find the plaintiff and hear his side of the story they chose not to. The said actions were committed by the defendants well knowing that they were likely to ruin the plaintiffs bid for re-election as a member of parliament in Belgut Constituency.

It is further the plaintiff's contention that the defendants knew or had reason to know and believe that the plaintiff could not take his sister from the matrimonial home merely because her husband was the plaintiff's political rival. It is his contention that the publication was a creation of the defendants and the same did not constitute factual and/or truthful reporting. The intended message to the addressees was to portray the plaintiff as an immoral, ruthless and corrupt politician who has no Ethics or moral standing; portrayed as a family breaker to the whole world and country. By use of their own images and false story demonstrated to the whole world and especially the members of Belgut Constituency that the plaintiff was a black mailer, a cheat, fraudulent, dishonest, heartless and immoral, well knowing that the plaintiff had not done anything un ethical, heartless and or immoral towards his brother in law Charles Keter and his family.

It is further the plaintiff's contention that the defendants ought to have known that matters published were not of general public interest and there was no need to publish them save for purposes of peddling false hoods, malice, spites and hatreds towards the plaintiff by inviting the constituents of Belgut Constituency against the plaintiff. The deliberate, malicious and colous employment of use of false facts, innuendos

and use of strong emotive language was calculated to maximize the injury to the plaintiff thus making sure he lost the nominations as a candidate for Belgut constituency parliamentary seat.

Turning to the implications of the publication, the plaintiff goes on to aver in paragraph 6 of the plaint that the words complained of were meant and were understood by the reading public to mean inter alia that the plaintiff had forced his married sister to leave her husband; had forcefully kidnapped the children of his brother in law; he is a family breaker; he should be shunned and voided by right thinking members of the society; he was not worthy to be a member of parliament for Belgut constituency; he has no regard for Kalenjin traditions and customs and he was guilty of committing a taboo of the highest order.

It is the plaintiffs further contention that by reason of matters complained of, the plaintiffs reputation, integrity, personality and credibility both personally as a politician who was previously a senior member of the government as an Assistant Minister for Finance had been seriously and irreparably injured and had suffered considerable distress, humiliation, agony, mental torture and extreme embarrassment and he has also been brought to the public scandal, hatred, contempt, suspicion and odium.

By reason of matters afore said the plaintiff seeks aggravated, exemplary and general damages against the defendants because the plaintiffs credit, reputation and status as a politician of long standing irreparably injured and his political career had been adversely effected and secondly because the publications complained of were actuated by extreme malice, contempt, spite and hatred and were calculated to give the plaintiff extremely unfair adverse publicity so that he could lose the nominations as the Belgut candidate on a KANU ticket in addition to general elections. Thirdly because the defendants reporters never bothered to find out the truth of the matter which they ought to have done before making the afore said complained of defamatory statements about the plaintiff. They never contacted the plaintiff to find out his side of the story. The publication was done in a sensational manner and given the widest possible prominence and publicity to the detriment of the plaintiff. Fourthly because the defendants arrogantly refused to apologize and or carry out any correction as demanded by the plaintiff. Fifthly, because the defendants deliberately and maliciously, callously employed false reports and used strong emotive language calculated to maximize injury to the plaintiff. Sixthly it is because the defendants' motive of making of the said publication was motivated by financial profits for their said news paper known as Daily Nation to the extreme detriment of the plaintiff. Seventhly it is because the defendants were deliberately, and extremely reckless, malicious and irresponsible in publishing and or causing to be published the said publication when they knew or ought to have known that the same would subject the plaintiff to grave suffering, embarrassment, mental torture and anguish and loss of income as the reading members of society and the electorate would shun the plaintiff as a politician who could not effectively represent them as honourable member of parliament.

In consequence thereof the plaintiff seeks:-

(a) An order that the defendants do make a full and an un qualified apology, make amends and withdrawal of the said complained of remarks and statements and such apology, amends and withdrawal to be given the widest possible prominence and circulation similar to the complained of statements and publication, and to be repeated three(3) times in the said defendants news papers known as the Daily Nation, the text and substance thereof to be approved by the plaintiffs, aggravated and general exemplary damages for defarmentation and libel, the quantum thereof to be determined by this Honourable Court.

(b)General, aggravated and exemplary damages for defamation and libel, the quantum theeof to be determined by this Honourable Court.

(c) Costs of his suit.

(d)Interests on (b) here above at court rates from the date of filing this suit herein.

(e)Such other and further relief as this Honourable court might deem fit and just to grant in the unique circumstances of this matter.

The defendant filed a defence dated and filed on the 30th day of June, 2003 admitting paragraph 2,3 and 13; denied the contents of paragraph 4, 5(i) 5(xx),6(i) 6(v), 7,8,10(a) to 10(g) of the plaint and put the plaintiff to strict proof without prejudice to the foregoing averred that the plaintiffs had failed to exercise his right under section 7A of the defamation Act cap 36(1992), failed to mitigate his alleged loss under section 7A and 16A of the deformation Act cap 36(1992). Pleaded defence of justification and or fair comment to plaintiff's allegation and thereby prayed for the suit to be dismissed with costs.

The plaintiff called four witnesses inclusive of himself namely (PW1) Charles Davy Kipngetch, (PW2) Josea Kipngetch Kirui, (PW3) Cheruiyot Kirui, (PW4) Joel Kipkemoi Korir. The sum total of their evidence is that the source of grievance are two publication made by the defendants with one appearing on the 21st day of November, 2002 and 23rd day of November,2002. The publications carried a story that the plaintiff had taken his sister away from her husband Charles Keter. The publications appeared at a time when PW1 the plaintiff who was the then area Member of Parliament was preparing to offer himself for reelection. The nomination for candidates offering themselves for election/reelection were on and were due on the day the first publication appeared of 21st day of November,2002. Indeed the content reads that "**PW1 and his brothers took away their sister and her children from the husband's home**". It so happened that the brother in law Charles Keter was also in the race in opposition to PW1. PW1 and PW2 denied the allegations saying that these were false. PW3 and PW4 who participated in the nomination exercise as voters confirmed seeing the publication of 21st day of November, 2002 cuttings pasted all over at the polling station they had gone to cast their votes. The two, PW3 and PW4 confirmed that as reported it is a taboo amongst the Kipsigis of the Kalenjin community for an in law to take away his daughter. They were firm that the publication cost PW1 votes which were swayed in favour of the oponent Charles Keter. They confirm PW1 lost the nominations.

It is the stand of PW1 and PW2, that PW1 was known to the reporter, he was readily available for comment to confirm the correct position on the facts and their failure to counter check the correct position from him was out of spite. By reason of the matters complained of the plaintiff has a cause of action against the defendants as outlined in the pleadings for which he seeks compensation.

The defence tendered no evidence and filed no submission. Learned counsel for the plaintiff filed written submissions urging the court to find for the plaintiff because:

(i) Since the defence offered no evidence and submission the court to find that the plaintiff's case was unchallenged.

(ii) The plaintiffs through himself and his witnesses PW2, 3 and 4 has proved that the publication was false, it was damaging as the plaintiff was portrayed as a dishonourable member of the society; that by reason of this false allegation the plaintiff suffered damage as pleaded and is entitled to redress.

In the assessment of damages, the plaintiff counsel has urged the court to take into consideration the following:-

(i) Good resume of the plaintiff as outlined by the plaintiff both in the pleadings and evidence.

(ii) The conduct of the defendant in failing to counter check the information before publishing the same.

(iii) The gravity of the content of the publication as well as its timing and the target group who were members of a community who believed strongly that it was taboo to take an in-laws wife's away from her home.

(iv) The timing of the publication which was on the nomination date and infer that the same was intended to sway the votes in favour of the opponent and they did sway the votes in favour of the opponent.

(v) The court is invited to believe the testimony of the plaintiff that he suffered the injury complained of in the plaint.

(vi) The court to take into consideration the fact that even after PW2 had informed the defendants that the publication was false; they took no steps to make amends by offering and publishing an apology.

On case law the court was referred to the case of **JOHN PATRICK MACHIRA VERSUS NATION NEWS PAPERS NAIROBI HCCC NO. 170 OF 1996** decided by Kasanga Mulwa K as he then was on the 7th day of September, 2001.

This court has given due consideration to the rival pleadings, sole evidence of the plaintiff and his witnesses, sole submissions of the plaintiff and the principles of case law cited to court and the court proceeds to make the following findings in the determination of these proceedings.

1. The publication is not denied and has been proved by the admission of the defendants that they were indeed published in the first instance. In the second instance by production of the news paper cuttings concerned as exhibit 1 and 2.
2. The falsehood of the publication has been proved by the unchallenged testimony of the plaintiff and PW2 that PW1 the plaintiff never took away his sister from the home of her husband.
3. The intended action of the content and its timings has been proved by the undisputed fact that these were purposely published on the day of the nomination and the possibility that these swayed the votes cannot be ruled out.
4. The meaning and innuendos attributed to the words by the plaintiffs averments have not been challenged by the defence in their defence save by way of mere denials.
5. It is not disputed that the plaintiff was a person of standing in society and his reputation suffered evidenced by the loss in the nomination exercise.
6. Sufficient ground has been given for the plaintiff seeking redress. The plaintiff is therefore entitled to damages.

On assessment of damages, the court wishes to associate itself with the principles in the cases cited in the cited case namely:-

(a) Cassel & Co. Limited versus Broone and another (1972) IALL ER 801 “that assessment of damages where they are at large is a matter of impression and addition”

(b) John versus MGN Limited (1996) IALLER 35 that a successful litigant in a defamation case is entitled to recover compensation damages for the wrong he has suffered as damages for his reputation, vindicate his name and take account of the distress, hurt and humiliation which the defamation publication has caused.

(c) The case of Joshua Kulei versus Kalamka limited HCCC NO. 375 of 1997 (UR) wherein it was held that an action for defamation is an action to compensate a person for the harm done to his reputation. The law presumes the plaintiff has suffered harm and although a person’s harm has no actual cash value, the court is free to form its estimate of the harm suffered.

(d) The case of Kipyator Nicholas Kiprono Biwott versus Clay Limited and 3 others Nairobi HCCC No. 1067 of 1999 (UR) wherein the court ruled that damages for libel are awarded to compensate the plaintiff for the injury to his reputation and the hurt to his feeling.

On quantum of damages this court wishes to associate itself with the case law cited in the authority cited to this court for guidance namely the case of **Eric Edward Khasa Khala versus Jeremiah Aura and 2 others HCCC No. 1709 of 1987** wherein the plaintiff who had been implicated in murder of a colleague was awarded Kshs.3, 000,000.00 as general damages, Kshs.300, 000.00 for failure to apologize.

The case of **Joshua Kulei versus Kalamka limited HCCC No. 375 of 1979(UR)** wherein the defendant had made publication to the effect that the plaintiff had been implicated in fraud activities with an assortment of persons. The court considered the plaintiffs standing in society and allegation made against the plaintiff and awarded Kshs.10 million.

(c) The case of **ABRAHAM KIPSANG KIPTANUI VERSUS FRANCIS MWANIKI AND 4 OTHERS NAIORBI HCCC NO. 42 OF 1997** where in publication had been made that the plaintiff had been sacked as state house controller because he had leaked state house secrets and having a deal in the village marked saga wherein the court awarded Kshs.3,500,000.00 as general damages, Kshs.15,000,000.00 as aggravated damages.

(d) The case of **Kipyator Nicholas Kiprono Biwott versus Clay Limited and others HCCC Number 1067 of 1979 (UR)** as consolidated with **Kipyator Nicholas Kiprono Biwott versus Dr. Jan West End & another HCCC.NO. 1068 of (1999) UR** wherein a global sum of Kshs.30 million was made for being implicated in the murder of the then Foreign Affairs Minister Doctor Robert Ouko.

(e) The case of **John Evans Gicheru versus Andrew Moton & another Nairobi HCCC NO.214 of (1999) (UR)** wherein Kshs.2.25 million was awarded.

(f) The cited case of **John Patrick Machira versus Wangethi Mwangi & Nation News paper (Supra)** wherein the court awarded Kshs.8,000,000.00 as general damages, Kshs.2,000,000.00 as aggravated damages to vindicate the plaintiff and Kshs.200,000.00 for an apology.

This court has given due consideration to the afore set out principles of case law on the subject , awards in the cited cases and applied them to the facts herein and the court makes observation that the cited decisions are all high court decision.

(ii) It is not clear whether any of them found their way on appeal to the Court of Appeal in order for them to be confirmed or not.

(iii) Most decisions where the awards were high, there was an element of implication in criminal offences.

(iv) There is no doubt they related to personalities of high standing in society with high profiles.

The court has taken into consideration that the plaintiff had a high ranking in society and a high profile considering of him having worked as a Member of Parliament, Assistant Minister and holding high positions in the Accounting profession as well as a successful businessman. The court also takes into consideration the fact that indeed the damaging publication came out on the nomination day and may have contributed to the swaying of the votes against the plaintiff. The court cannot loose sight of matters of public notoriety that it has judicial notice of that vote swings is a normal occurrence. It has also to be noted that the occurrence did not greatly create rifts within the family since the allegations were found to be false. The court therefore proceeds to award Kshs.800, 000.00 as general damages for the injured reputation and hurt feelings. Kshs.500, 000.00 as aggravated damages since the publication was purposefully timed.

(2) The general damages will carry interest at court rates from the date of judgment till payment in full.

(3) The plaintiff will have costs of the suit.

SIGNED AT NAIROBI BY HON. LADY JUSTICE R.N. NAMBUYE- JA.

DATED, READ AND DELIVERED AT NAIROBI BY LENAOLA ON THIS 28TH DAY OF AUGUST, 2012.

JUDGE