



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
Civil Case 832 of 1990

1. MUTHUI MWAI

2. JOSEPH ODIYO

3. JOE KIMATHI..... PLAINTIFFS

VERSUS

1. THE STANDARD NEWSPAPERS LTD

2. HON JAMES NJIRU

3. BENARD KATHANGA DEFENDANTS

J U D G M E N T

1. This is a very old case, having been filed in February 1990. The action is in defamation. The 2nd Plaintiff is said to have died in the course of proceedings; so, his cause of action did not survive him.

2. The case of the 1st and 3rd Plaintiff's (the Plaintiffs) as pleaded is that on 10th October 1989 the 2nd and 3rd Defendants made defamatory statements against the Plaintiffs which were maliciously published in the "*The Standard*" newspaper of 11th October 1989 owned by the 1st Defendant. The actual alleged defamatory words are pleaded and the publication was produced in evidence. The Plaintiffs therefore seek general damages, costs and interest.

3. The Defendants entered appearance and filed defence. The 1st Defendant's statement of defence is dated 9th April 1990. It admits publication of the words complained of but denies that they were defamatory of the Plaintiffs. In the alternative it pleaded that the words complained of consist of a fair and accurate report of the proceedings of a lawful public meeting.

4. The 1st Defendant also claimed indemnity against the 2nd and 3rd Defendants upon grounds stated in its statement of defence. But this claim was not pursued at the trial.

5. The 2nd and 3rd Defendants' joint statement of defence was filed on 22nd November 1991. The

2nd Defendant admitted uttering some of the words complained of and denied the others. He also pleaded some innocent words that he said he uttered.

6. The 3rd Defendant denied that he uttered the words complained of. He similarly pleaded innocent words he said he uttered.

7. The 2nd and 3rd Defendants pleaded that the 1st Defendant reported some of their words out of context. They also pleaded various alternative defences.

8. The 1st and 3rd Plaintiffs testified for themselves. They did not call any other witness.

9. For the 1st Defendant, **Munene Kamau (DW1)** testified. He was the author of the words complained of. The 3rd Defendant testified on his own behalf.

10. The 2nd Defendant did not testify or call any witness.

11. I have considered the testimonies of all the witnesses. I have also considered the written submissions filed on behalf of the parties including the cases cited. Those of the Plaintiffs were filed on 24th April 2012. The 2nd and 3rd Defendants' submissions were filed on 18th May 2012 while those of the 1st Defendant were filed on 29th July 2012.

12. The Plaintiffs (including the now deceased 2nd Plaintiff) were journalists working for various media houses at the time the cause of action arose. They had been detailed to attend and report on two public meetings held at Kerugoya on 8th and 10th October 1989. DW1 was also a journalist in the employment of the 1st Defendant and had similarly been detailed to attend and report on both meetings. The Plaintiffs' and DW1's reports were carried by their respective newspapers on 9th and 11th October 1989.

13. The 2nd Defendant attended and addressed both meetings. He was a prominent politician both locally and nationally and a Cabinet Minister. The 3rd Defendant attended only the meeting of 10th December 1989. He was a well-known local politician of the then ruling party.

14. I accept the testimonies of the 1st and 3rd Plaintiffs as well as that of DW1 that after the meeting of 8th December 1989 the 2nd Defendant had tried to persuade the Plaintiffs and DW1 not to report that he had publicly sought forgiveness from a well-known church person, **Bishop Gitari**, with whom he had apparently differed strongly over the local and national politics of the day. The journalists had declined the request.

15. Reports filed by the four journalists of the meeting of 8th October 1989 mentioned the fact that the 2nd Defendant had sought forgiveness from Bishop Gitari. This appeared to have annoyed the 2nd Defendant and on the following day, 10th October 1989, when addressing a meeting celebrating the then national day called **Moi Day** he hit out at the Plaintiff and DW1 in the words complained of, which were then reported by DW1 and published by his employer, the 1st Defendant, on 11th October 1989.

16. The 2nd Defendant was supported in this attack by the 3rd Defendant who also addressed the crowd. I do not accept that words uttered by the 2nd or 3rd Defendant referred to journalists generally and not to the Plaintiffs and DW1 specifically. The reports that they (the 2nd and 3rd Defendants) were complaining about were carried by the papers just the previous day. They knew the reporters (the Plaintiffs and DW1) well and the 2nd Defendant had met and talked to them after the meeting of 8th October 1989. In any event, their reports in their various newspapers carried their by-lines (i.e., names).

17. So, quite clearly, when the 2nd and 3rd Defendants referred to journalists in the words

complained of as reported by DW1 and published by the 1st Defendant on 11th October 1989, they were referring to the Plaintiffs and DW1.

18. Were the words complained of defamatory of the Plaintiffs? Those words were (and I accept as correct the translation provided) –

“Journalists should take care. So they are the one who are destroying the Government. That I, Njiru son of the daughter of Njiru, had gone to seek forgiveness from somebody.”

19. The further words complained of were –

“Mr Kathanga, who is the KANU sub-branch vice-chairman, claimed that they had information to the effect that the journalists representing the three dailies last Sunday were all bought.

“During the Sunday function Muthi Mwai and Joseph Odiyo represented the *Nation*, Joe Kimathi the *Kenya Times* while Munene Kamau represented *The Standard*.”

20. Viewed at in the context of the circumstances of the time when the country was a one-party state ruled viciously by a click of politicians who brooked no dissent, it was a very charge to allege that anyone (let alone journalists) were “destroying” the Government. The one-man, one-party rule was then at its repressive highest, and such a charge could have grave consequences for a person and his family. Unless true, such charge was clearly defamatory.

21. The charge that anyone had been “bought” (that is, bribed) unless true, would also equally be defamatory.

22. I therefore hold that the words uttered by the 2nd and 3rd Defendants as reported by DW1 and published by the 1st Defendant, were defamatory of the Plaintiffs unless they were true. No plea of such justification was put forward by the Defendants.

23. The 1st Defendant put forward the defence of qualified privilege under **section 7(1)** of the **Defamation Act, Cap 36** as read with **paragraph 6** of **part II** of the **Schedule** thereto.

24. Section 7(1) aforesaid provides –

“7. (i) Subject to the provisions of this section, the publication in a newspaper of any such report or other matter as is mentioned in the Schedule to this Act shall be privileged unless the publication is proved to be made with malice.”

And paragraph 6 in part II of the Schedule (which sets out statements privileged subject to explanation or contradiction) states –

“6. A fair and accurate report of the proceedings of any public meeting in Kenya *bona fide* and lawful held for a lawful purpose and for the furtherance or discussion of any matter of public concern, whether the admission to the meeting is general or restricted.”

25. This defence of qualified privilege will not be available in any action for libel if it is proved that the defendant has been requested by the Plaintiff to publish, in the newspaper in which the original publication was made, a reasonable letter or statement by way of explanation or contradiction, and has refused or neglected to do so, or has done so in a manner not adequate or not reasonable, having regard to all the circumstances (**sub-section (2) of section 7**). Nor will qualified privilege protect the publication of any matter the publication of which is prohibited by law, or any matter which is not of public concern and the publication of which is not for public benefit (**subsection (3)**).

26. The words complained of were part of a report by DW1 of the proceedings of a publicly

celebrated national day. The meeting, by its very nature, was held *bona fide* and lawfully for a lawful purpose. It was no doubt, as all such meetings normally are, for furtherance of national cohesion and unity, a matter always of public concern.

27. I accept that the report by DW1 and published by the 1st Defendant was fair and accurate. I make this finding upon the testimonies of DW1 and the 1st and 3rd Plaintiffs.

28. Both surviving Plaintiffs testified that on reading the offending reports they sought through the editor of the newspaper an apology and correction, and that none were availed by the 1st Defendant. The 1st Defendant tendered no evidence to the contrary. Its witness (DW1) stated that he did not know if the Plaintiffs demanded an apology. That being the case the defence of qualified privilege is not available to the 1st Defendant. But I do not accept that the publication was made with malice. I have already found that the report as prepared by DW1 was fair and accurate. DW1 himself was, with the Plaintiffs, also at the receiving end of the defamatory words uttered by the 2nd and 3rd Defendants.

29. In the event I find for both surviving Plaintiffs on liability.

30. Regarding damages, the Plaintiffs have sought general damages which are entirely at the discretion of the court (they are **at large**). Libel is of course actionable *per se*, that is, that the Plaintiff need not prove actual harm to his character and reputation to be entitled to damages. But the **quantum** of such damages will depend on various factors, including evidence of actual loss, financial or otherwise, occasioned to the Plaintiff by the libel. In the present case there is no such evidence in respect of either the 1st or 3rd Plaintiff.

31. I have considered the personal circumstances of the Plaintiffs, including their stations in life at the time the cause of action arose. Doing the best that I can I will award each of them general damages of KShs 400,000/00. I will enter judgment accordingly against the Defendants jointly and severally plus costs and interests. Interest on damages will be from the date of judgment. There will be orders accordingly.

DATED, SIGNED AND PRONOUNCED IN OPEN COURT THIS 21ST DAY OF SEPTEMBER 2012.

H.P.G. WAWERU
JUDGE