



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 1225 of 1999

FRANCIS OYATSIPLAINTIFF

V E R S U S

1. WACHIRA WARURU

2. THE STANDARD LIMITEDDEFENDANTS

J U D G M E N T

There has been considerable delay in the preparation and delivery of this judgement occasioned by pressure of work. The same is regretted.

The Plaintiff herein has sought **general and aggravated or exemplary damages** for libel. He has also sought damages for malicious falsehoods. There is also a claim for **special damages of KShs. 30,000/00** which was not pursued at the hearing. Finally the Plaintiff has sought a permanent injunction to restrain the Defendants from “further publishing or causing or authorizing the publication of the same or similar malicious falsehoods of the Plaintiff”.

The Plaintiff’s cause of action, as set out in the amended plaint dated 20th July, 2006 is founded upon a series of articles published by the Defendants in their newspaper then called the *East African Standard* on 2nd, 3rd, 4th, 6th, 8th and 10th December 1998, and a cartoon published in the same newspaper on 6th December 1998. Apart from the article published on 4th December 1998, there was also an editorial of the same date.

The offending articles have been pleaded verbatim at paragraph 5 of the amended plaint. The newspaper articles

themselves were produced in evidence.

The Plaintiff's case is that all the articles and the cartoon defamed him by portraying him as an abuser of his office, a thief and part of a cartel that had fleeced KShs. 1 billion from a public corporation.

At the trial only the Plaintiff testified. The Defendants did not lead or call any evidence. Various documents were admitted in evidence by consent and marked as follows: -

Exhibit P1 – the documents in the Plaintiff's list and bundle of documents dated and filed on 16th June, 2006.

Exhibit P2 – the documents in the Plaintiff's further list and bundle of documents dated 18th and filed on 21st May, 2007.

Exhibit P3 – nine issues of the *East Africa Standard* in a box file containing the offending articles.

Exhibit P4 – external auditors report to management on **Mumias Sugar Company Limited** for the year ended 30th June, 1998.

Exhibit P5 – further bundle of documents.

At the time the offending articles were published, the Plaintiff was the **Deputy General Manager (Finance)** of Mumias Sugar Company Limited, a public corporation and the main sugar producer in the country. The articles concerned allegations that the company had sold un-invoiced sugar worth KShs. 1 billion to unidentified customers, and thereby lost that amount as the sugar was never paid for.

The Defendants filed joint defence and denied liability. In their amended defence dated and filed on 30th May, 2007 they denied that the published words were defamatory of the Plaintiff as alleged. The Defendants also gave particulars under **Order 6, rule 6A** of the **Civil Procedure Rules** (the **Rules**).

It turns out from the evidence on record that Mumias Sugar Company Limited had, in the period July to December 1997, sold sugar worth nearly KShs. 1 billion without issuing invoices, cash sales or other supporting documents. This was as a consequence of an internal management decision, and was a means of trying to beat sugar importers (by not disclosing its sale prices) who were importing sugar and selling it at prices that were undercutting the sugar producer and threatening its viability. It would appear that a query was raised by the **Kenya Sugar Authority** or some other person regarding those un-invoiced sales. A subsequent investigation by an external auditor exonerated the company and its management, having found that the company and the Government lost no revenue as a result of the un-invoiced sales.

The burden of proof is of course upon the Plaintiff to establish on a balance of probability the following:-

- 1. That the offending articles were false.**

2. **That the articles were defamatory of and concerning the Plaintiff; that is, that they were calculated to lower him in the estimation of right-thinking people, or cause him to be shunned or avoided, or expose him to hatred, contempt or ridicule, or to convey an imputation disparaging or injurious to him in his office, profession, calling, trade or business.**

I have closely read all the offending articles. I have also considered the testimony of the Plaintiff who was the only witness. Finally, I have considered the written submissions filed on behalf of the parties, including the authorities cited.

Publication of the offending articles is admitted by the Defendants.

Were the offending articles false? The report to management by the external auditors (**Exhibit P4**) shows clearly that Mumias Sugar Company Limited did not suffer any loss as a consequence of the un-invoiced sugar sales. No money was stolen from it by the Plaintiff, or by any other person, as a consequence of those sales. The Defendants themselves acknowledged this and published a correction to that effect.

There cannot be any doubt at all that the substance of the offending articles, that is, that Mumias Sugar Company Limited had lost nearly KShs. 1 billion as a result of un-invoiced sales of sugar was false. However, the fact that the Plaintiff had been sent on compulsory leave pending investigations into to un-invoiced sugar sales was not false as indeed he had been so sent. He was in fact sent on that compulsory leave before the offending articles were published.

Was the Plaintiff defamed by the offending articles? The articles implied that the Plaintiff, as the one in charge of finance, failed in his duty to Mumias Sugar Company Limited by permitting un-invoiced sales of it sugar, or being involved in the cartel that sold the company's sugar to the tune of KShs. 1 billion without any invoices or supporting documents, thereby leading to the loss by the company of that sum. The Plaintiff was mentioned by name in the articles of 3rd, 4th and 6th December, 1998. He was not mentioned by name in any of the other articles. However, having been so named, any reasonable person reading the articles in which he was not named would find no difficulty at all in associating them with him.

There could not be any doubt in the mind of any reasonable person reading the articles that the Plaintiff, along with the rest of the management of the company, was being blamed for the loss allegedly suffered by the company.

The Defendants themselves acknowledged the defamation of the Plaintiff in the articles in their correction published under the heading **"Report on Mumias Corrected"**. That admission was in the following words:-

"The implication in the above publication was that Oytasi had failed in his duties to the company as a result of which the company had lost KShs. 1 billion, and worse still, that he had been involved in the embezzlement of the said funds and had thereby engaged himself in corrupt and fraudulent activities against the company and the country."

That article also contained an apology by the Defendants in the words:-

“We apologise unreservedly for our reports published of Francis Oytasi and for any embarrassment caused to him by the said report.”

As already seen, the un-invoiced sugar sales took place from July to December, 1997, not from July to December, 1998 as the publications stated.

On liability therefore I find for the Plaintiff. The offending publications were libellous of him. I have no doubt that his character and the reputation were lowered in the estimation of right-thinking members of the society generally. His character and reputation suffered as a result. The libel no doubt exposed him to public hatred, contempt and ridicule. That is why he was advised by his superiors to stay in Nairobi away from Mumias where the company and the farmers supplying it with sugar-cane were located.

I will now consider what damages to award the Plaintiff. A successful litigant in a defamation action is entitled to general compensatory damages. Such damages will assuage him for the damage to his reputation, and hopefully also vindicate his good name. In assessing such damages, the court will take into account the distress, hurt and humiliation which the defamatory publication has caused the plaintiff. The court will consider 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 the libel is likely to be. See the case of **Johns –vs- MGN Limited [1996] All E.R 34**. It was further stated in this case as follows:-

“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. A successful plaintiff may properly look to an award of damages to vindicate his reputation; but the significance of this is much greater in a case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libellous publication took place. It is well established that compensatory damages may and should compensate for additional injury caused to the Plaintiff's feelings by the defendant's conduct of the action, as when he persists in an unfounded assertion that the publication was true, or refuses to apologise, or cross-examines the plaintiff in a wounding or insulting way.”

The extent of the publication will also include any repetitions. On 3rd December, 1998 the Plaintiff personally took to the Defendants a letter written by his advocates which contained the true and correct facts regarding the subject sugar sales with a request that the said correction be published in the next issue of the Defendants' newspaper. Those correct facts, as subsequently verified by external auditors were:-

1. Mumias Sugar Company Limited did not lose any money out of the un-invoiced sugar sales.
2. All the duties and taxes due to the Government were paid upon those sales.
3. The decision not to raise invoices for the said sugar sales was a business decision of the

management taken to deal with unfair competition from sugar importers. It was not a unilateral decision of the Plaintiff.

4. There was no fraud committed by the Plaintiff, nor any intention to commit such fraud.
5. There was no scandal or scam involving KShs 1 billion at Mumias Sugar Company Limited as stated by the Defendants in the offending publications.

The Defendants did not publish the correction as requested by the Plaintiff until much later. In the meantime there were repeated publications of the story, and much damage done to the character and reputation of the Plaintiff.

The repetitive and inciting nature of the publications also tends to establish malice on the part of the Defendants. It has been stated that the basis of an action for libel is that the defendant has falsely and maliciously published defamatory matter concerning the plaintiff. The fact of publication of the false and defamatory matter concerning a person will itself be evidence of malice. Evidence to show that the defendant did not in fact have any spiteful feeling in his mind towards the plaintiff will not rebut that presumption. A person must be taken to intend the natural consequences of his own act in publishing the libel. See the case of **Vizetelly –vs- Mudies Select Library Limited [1900] 1QB 178**.

In the present case the truth was given to the Defendants by the Plaintiff. They did not publish it immediately as they should have. They sat on it for many days and continued to repeat publication of the falsehoods that they had initially published.

In assessing damages in defamation cases, it must be remembered that unduly high awards are not desirable in this day and age. The public's right to information and freedom of expression must not be threatened or put in jeopardy. More importantly, it should not be the business of the courts to unduly enrich people from defamation litigation. This can only encourage more and more defamation litigation and have the effect of curbing press freedom.

The Plaintiff herein is a professional person. He is an accountant of high standing, both locally and internationally. He has worked in various high positions in companies of repute. But there was no evidence tendered that, in tangible terms, his professional standing was so damaged as to threaten his career or even adversely affect it. The Plaintiff did not call any of his professional colleagues, or anyone else for that matter, to state how the offending publications may have affected his standing in their eyes. There is also no evidence that his job prospects were compromised or otherwise adversely affected as a direct result of the offending publications. As a matter of fact, at the time he testified he was the Managing Director of **Nzoia Sugar Company Limited**, another major sugar manufacturing company in the country. All these factors will have a bearing on the quantum of damages.

The libel in this case was serious. The imputation was that the Plaintiff had stolen, or was part of a cartel that stole, a very large sum of money (KShs. 1 billion) from a public company. There was imputation of commission of the

offences of **abuse of office, corruption and stealing by servant**. The libel was repeated a number of times in the offending publications. The Defendants delayed publication of correction and apology.

I have looked at the various cases cited in the written submissions filed on behalf of the parties. As has often been stated, damages in defamation cases are *at large*. No case is exactly like another. No person's reputation and character will be exactly the same as those of another, and no libel will be exactly like another.

Having taken into account all that I should, and doing the best that I can, I will award the Plaintiff **compensatory damages of KShs. 2.5 million**. I have also found malice against the Defendants on account of the repetitive nature of the libel and failure to publish as soon as they could have done a correction and apology. I will award **aggravated damages of KShs. 1 million**.

No case has been made out for exemplary damages. There is no evidence that the Defendants' conduct in repeating the publications was calculated to make a profit that would exceed the compensation that might be awarded to the Plaintiff. I do not find evidence of any "*cold, cynical calculation of profit*". There was a sufficient public interest in the whole story which drove the Defendants to the repeatable publications, albeit with malice as already found.

Having found for the Plaintiff on libel, he is not entitled to any damages for malicious falsehoods as those malicious falsehoods constitute the libel.

The story constituting the libel is also now "*cold turkey*". It is now more than nine years since the offending articles were published. A permanent injunction as is sought is not necessary, and I refuse to grant it.

In the result there will be judgment for the Plaintiff for the total sum of **KShs. 3.5 million**. There will be interest at court rates of this sum from the date of judgment until payment in full. The Plaintiff shall also have costs of the suit. Those will be the orders of the court.

DATED, SIGNED AND PRONOUNCED AT NAIROBI .THIS 5TH DAY OF FEBRUARY, 2010

H. P. G. WAWERU

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