



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NO. 542 OF 1997

MONG'ARE GEKONG'A & ANOTHER.....PLAINTIFFS

VERSUS

STANDARD LTD.....DEFENDANT

JUDGMENT

The plaintiffs in this case are advocates of the High Court of Kenya. They trade or practice in the style name of Gekong'a and Momanyi Advocates. The defendant is the Standard Ltd. They are publishers of a local daily known as East African Standard. In the East African Standard issue of 17th November, 1997, at p 9 the following report appeared:-

“Ex- Workers Caution Lawyer.

Former employees of the liquidated Elliots Bakery Limited have threatened to lynch a Nakuru lawyer for reportedly refusing to handover Shs 1 million awarded to them by a local Court as terminal benefits.

The workers in a brief press statement further vowed to set on fire an office belonging to Gekong'a and Momanyi Advocates of Nakuru if the lawyer fails to give them their money within 14 days.

Early this year a Nakuru Resident Magistrate, Nicholas Ombongi ordered Elliots Bakery, in liquidation to pay its former workers a total of Kshs 20,000/- each as general damages for unlawful lock-out. Efforts to get the lawyer's comments were fruitless as his telephone went unanswered.

The workers numbering 64 were represented by Gekong'a & Momanyi, Advocates during the hearing of the suit early this year. They alleged that the lawyer had already received the money from the defendants but had delayed in releasing it.”

The news item as it were was brought to the attention of PW1, Mr Mong'are Gekong'a advocate by his landlord who feared that his premises where the plaintiff's chambers in Nakuru were based would be set on fire or damaged. It is then that PW1 bought a copy of the newspaper and read the article.

The defendants were contacted and told that the story was not true as it should. It offered to make an apology and correct the story. But no apology was offered and the format or correction sent to the defendant was not reported as a news article but was relegated to a column reserved for letters to the

editor. It was headed “the facts” and set out briefly, as the plaintiff’s format was edited, what the plaintiffs were saying about the news item I set out at the beginning of this judgment.

There was no agreement between the parties and on 1st December, 1997, the plaintiffs filed the case now before me. In their paragraph 5 of the plaint, the plaintiffs set out particulars of what they thought was the ordinary meaning portrayed and meant by the article complained of. They therefore pleaded that these words complained of had severely injured their character, credit, reputation, and occupation and business of the plaintiffs. They pleaded that the newspaper article had brought them into public scandal, odium and contempt and had suffered damage. Consequently, they claimed for general damages for defamation, costs and interest.

The plaintiffs were represented by Nyoike Mutonyi, an advocate of this Court. The defendants were represented by M/S Mohamed Muigai Mboya Advocates of this Court.

In its defence the defendant denied most of the allegations in the plaint. In paragraphs 7 and 8 of the defence the defendants sought to justify the report as follows:-

“7. Further and in the alternative the words complained of were fair comment made in good faith without any malice and without gross negligence.

8. Further in so far as the words consist of fact, they are true infact, and in so far as they consist of expressions of opinions, they are a fair comment made in good faith and without gross negligence. (particulars under order VI r 6A(2) of Civil Procedure Rules are given).”

The two plaintiffs testified in support of their case. In brief, their case was that they acted for 64 former employees of Elliots Bakery Ltd, which was under liquidation at the material time. The plaintiffs filed Nakuru Chief Magistrate’s Civil Suit No 955/95 on behalf of the said former employees of Elliots Bakery.

A resident magistrate heard the case, (it is doubtful whether he had jurisdiction) and gave judgment for the said former employees in the total sum of over Shs 1 million. PW1 who was handling the case said that he kept the said former employees well informed of all what was happening in their case. Because of the numbers involved a few of his clients had been appointed to be getting information from PW1.

According to PW1 his clients were kept informed of what was happening to their case.

Before the decree of the judgment of the Resident Magistrate was executed, Elliots Bakery Ltd, challenged the same and the former employees’ case was dismissed on 28th October, 1997.

It is therefore the plaintiff’s case that had the defendant’s reporter taken trouble to check with the plaintiffs or the court record it would have unearthed the truth. There was no money paid to the plaintiffs as the judgment in favour of their clients had been set aside and their case dismissed.

Three witnesses were called for the defendant. The first one Stephen Mukamale was the reporter who filed the contentious report. He told the Court that on 14th November, 1997, he was in his office in Nakuru. Ten former workers of Elliots Bakery approached him in the office. They told him that they had filed a case against their former employer and they were successful. They said that their advocate had however, swindled them of the money. He asked for evidence and was given a decree drawn by the Court. The decree in Nakuru CMCC No 955 of 1995 was produced and marked exhibit A.

They gave him a list of grievances and also threatened to lynch the advocate. Their main concern was money which had not been released to them.

The witness said that he called the lawyer on Friday but did not get him as the phone went unanswered. On Saturday he got him and told him what he had heard. The advocate PW1 hung up. He tried in the afternoon of the same day and since the phone was not answered, he filed his story.

DW2 and DW3 are former employees of Elliots Bakery. They were among the 64 employees who instructed the plaintiffs to file case on their behalf against Elliots Bakery. Nakuru CMCC No 955/95 was filed. They had appointed committees. DW1 was member of the committee that was communicating with the advocate (plaintiffs).

After the decree was passed, in CMCC No 955/95, PW1 started dodging his clients. He did not communicate with them further and they had to go hunting for him. They confronted him outside Nakuru Law Courts. He told them that he had left their case.

PW1's conduct made his clients draw wrong conclusions. They concluded that PW1 had been paid their claim but was avoiding to pay them. He had not told them that the judgment had been set aside. They felt frustrated and thought that if their grievances were reported in newspapers they would be rescued by the authorities.

I believe DW1 and DW2. PW1 gave a copy of the decree to his clients in CMCC No 955/95. But when the decree was set aside he did not advise his clients in writing or serve them with a copy of the new decree. He knew that he was dealing with a crowd of frustrated employees who needed careful handling. When PW1 lost the case, he lost interest in his clients.

His clients drew the obvious conclusion because of the manner in which some advocates have dealt with their client's money.

They ended up in the defendant's office to genuinely air their grievances. They had a decree as evidence. The reporter tried to countercheck the story with the plaintiff's offices but was also frustrated.

The report complained of does not state that it is true. The opening words read as follows:-

“Former employees of the liquidated Elliots Bakery Limited have threatened to lynch a Nakuru lawyer for reportedly refusing to hand over Shs 1 million awarded them by a local Court as terminal benefits.”

The key word here is “reportedly”. The reporter or the defendant does not state the story to be a fact. They are saying that was what was reported to them. It could be true or not true. But the Court cannot lose sight of the newspaper readership in Kenya. They read news, they don't study and analyse news.

Salmond on the Law of Torts 14th edition p 195, defines the wrong of defamation as follows:-

“The wrong of defamation consists in the publication of a false and defamatory statement concerning another person without lawful justification.”

At p 197 of the same text, the author has this to say at paragraph 54:

“A defamatory statement is one which has tendency to injure the reputation of the person to whom it refers; which tends, that is to say, to lower him in the estimation of right thinking members of society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike, or esteem.”

From the foregoing it can be rightly said that the words complained of are defamatory on the face of it.

But as I said earlier the defendant pleads that the words complained of are a fair comment and are true in fact. To some extent the words complained of are true in fact. But there are additional facts which made the words as reported not to be true. The decree shown to the defendant's reporter had been set aside. Consequently, no money had been paid to the plaintiffs .

The plaintiffs blame the defendant's reporter for not doing enough to get these additional facts which changed the whole scenario. The plaintiffs say that had the reporter gone to check and read the court file

he would have unearthed the truth. The defendant in its defence blame the plaintiffs for making it impossible for the true position of the facts to be known.

The defendant's reporter called the plaintiff's office and when he eventually found PW1 and told him about the allegations against the firm PW I was not as amused and hung up.

The plaintiff's clients who gave information to the defendant's reporter said that the plaintiffs grudged them information on their case leading to them using the material they had against the plaintiffs.

The defendant's reporter did his best to obtain evidence on the matter he wished to report. He had before him a court decree which was signed and sealed. I do not see why he should have been required to go to Court to do further research. He was reporting what was being said by other people. He counter-checked the facts with the plaintiffs but there was no cooperation probably confirming the story in the reporter's hands.

I think the plaintiffs are to blame for what was reported. They are the authors of their own misfortune. The defendant's reporter filed the report without malice. At least none has been shown. It was published as filed.

I have considered the relevant material placed before me and the written submissions by the advocates for the parties and I am satisfied that the defence case must succeed.

The plaintiffs have failed to prove their case on the required standard. Their case must fail. The plaintiffs' case is dismissed with costs to the defendant.

Dated and Delivered at Nakuru this 4th day of February 2000.

D.M.RIMITA

JUDGE