



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

Civil Case 1230 of 2004

FRANCIS XAVIER OLE KAPARO. PLAINTIFF
VERSUS
THE STANDARD LIMITED. 1ST DEFENDANT
ATHMAN AMRAN. 2ND DEFENDANT
MURIITHI MUTIGA..... 3RD DEFENDANT
DAVID MAKALI. 4TH DEFENDANT

J U D G M E N T

The Plaintiff, Francis Xavier Ole Kaparo, by a plaint dated the 11th November, 2004 filed in this court the same day, claimed for order of injunction against further publication and distribution of defamatory words and statements, general damages, punitive and exemplary damages, interests, costs and an order compelling the defendants to publish an acceptable apology in the East African Standard and Sunday Standard.

The Plaintiff's claim was that the Defendants jointly and severally and in conspiracy, on 7th April 2004, falsely, wrongly and maliciously and with intent to injure the reputation and character of the Plaintiff, conspired together to write, publish, print and distribute or cause to be distributed, of and concerning the Plaintiff false and defamatory words and statements.

Averring that the words published which he quoted, in the plaint, were published in a sensational, and reckless manner concerning the truth, Plaintiff further stated that the words in their natural and ordinary meaning, by imputation and/or by way of innuendo or otherwise, meant and were understood to mean of the Plaintiff that

- (a) he was a corrupt and dishonest person who was not fit for the office of the Speaker of the National Assembly.
- (b) he had intended to and had obstructed, derailed and frustrated the course of justice in the Committee of Inquiry into the death of the Late Dr. Robert Ouko.
- (c) he had intended to and coached, interfered with and tampered with, the witnesses giving evidence before the said Committee.

(d) he had conspired to, concealed information and evidence before the said Committee, as well as failed to facilitate the work of the said Committee.

The Plaintiff further averred that on 24th October, 2004 the Defendants similarly, falsely, wrongfully, maliciously and with intent to injure the reputation and character of the plaintiff, conspired together to write, publish, print and distribute of and concerning the Plaintiff, false and defamatory words and statements which in their natural and ordinary meaning, by implication and/or by way of innuendo or otherwise, meant and were understood to mean of the Plaintiff that: -

(a) he was a corrupt and dishonest person who was involved in the misappropriation of Parliamentary funds.

(b) he was not fit to be Speaker, of and has lowered the dignity of the National Assembly and was accordingly fit for impeachment.

(c) he was corruptly involved in the controversial purchase of Continental House and other related land deals.

(d) he was involved in various suspect National Assembly work and deals which had put the integrity of the House into question.

(e) he had a corrupt personal interest in the proposed renovation of Parliament.

(f) he was an incompetent and non effective speaker who was incapable of competently carrying out his office's duties and was a person of many faults.

The plaintiff also averred that on the 24th October, 2004 the defendants jointly or in conspiracy and/or severally falsely, wrongfully and maliciously and with intent to injure the character and reputation of the Plaintiff, wrote, printed, published and distributed of and concerning the Plaintiff further false and defamatory words and statements which in their natural and ordinary meaning, by implication and/or by way of innuendo or otherwise, meant and were understood to mean that the Plaintiff was not impartial in, had abrogated his duty as the Speaker of the National Assembly concerning, and had conspired to derail the process in respect to the Constitutional Review Process.

The Plaintiff further averred that the alleged false, wrongful and malicious words and statements aforesaid, have exposed him in his personal and professional standing and character, to public scandal, ridicule, contempt and embarrassment and continue to cause him to suffer enormous loss and damage, anxiety and disrepute.

The Plaintiff further averred that the Defendants wrote the said libelous defamatory words and statements in the knowledge that they were libelous or with reckless disregard as to whether or not they were libelous, in order to cast improper aspersions on, or damage to the Plaintiff's name, character and reputation. Further that they had at the same time established that the prospect of material advantage to themselves by reason of the sales and profits of their publications, outweighed the prospect of material loss, thus being actuated by malice.

The Defendants filed a joint Defence on 20th December, 2004. They admitted the publication and the distribution of the alleged words and statements except the alleged circulation of the Newspapers in East Africa and the world through internet. They further denied that they wrote, printed and/or circulated the newspaper wrongfully, falsely, maliciously or with intent to injure the reputation and/denied that they circulated the Newspaper wrongfully, falsely, maliciously or with intent to injure the reputation and/or character of the Plaintiff. They denied any conspiracy in writing, printing and distributing. They also denied that the alleged words and statements were defamatory of the Plaintiff as averred. They further denied that the alleged words and/or statements bore or were understood to bear the meaning which the Plaintiff gave them.

On the contrary, the Defendants stated that the alleged words and statements were published as fair information on matters of public interest, bona fide and without malice, in the honest belief that they were true and therefore privileged

The Defendants also denied specifically that the Plaintiff had suffered any public scandal, ridicule, contempt, embarrassment, loss or damage, anxiety or disrepute as alleged. They further accordingly denied that there was any basis for awarding the Plaintiff any general damages, punitive or exemplary damages as compensation or for an order of injunction or apology as demanded.

Finally the Defendants traversed every averment by the Plaintiff which had not been specifically denied or traversed and put the Plaintiff to strict proof of his case.

The Plaintiff filed a Reply to the Defendants Defence. He denied that the Defendants published words and statements were published in the honest belief that they were true, or that the occasions were privileged. He re-asserted that they were actuated by malice. He also reasserted that the words and statements were untrue to the Defendants' knowledge or belief, hence their attempt of apology in the East African Standard Newspaper on 7th April, 2004. That the Defendants published the defamatory words and statements without first attempting to verify the truthfulness thereof or without honest belief in their substantiation or truth.

The Plaintiff further replied that the averred defamatory words were not fair information, justified in a matter of public interest bona fide or published in the honest belief that they were true or on occasion of privilege, but that they were actuated by express malice. The Plaintiff then sought that the joint Defence be truck out and judgment on liability be entered in favour of the Plaintiff against the Defendants jointly and severally.

The file record before me confirms that after the main pleadings were closed, the parties proceeded to prepare for the hearing of the suit. They filed and exchanged documents, gave discovery and inspection and finally fixed the suit for hearing on 10th and 11th of July, 2006 when it could not proceed. Similarly, the hearing could not proceed on 15th November, 2006, 12th March, 2007, 20th June 2007, 12th November, 2007, 2nd July, 2008 and 23rd October, 2008.

On 6th July, 2009 the hearing started before me when the Plaintiff testified in the presence of counsel for both parties. He also testified on 7th July, 2009 and 9th July, 2009 when he was cross-examined by the counsel for the defendants, Mrs. Dar. On the same day the Plaintiff's only witness gave evidence and his cross-examination was postponed to 14th July, 2009.

On 14th July, 2009 aforementioned, the Defendant's counsel offered entry of judgment on liability which was promptly entered by the consent of both sides, with the plaintiff being represented by Kilonzo Jnr. The liability recorded was joint and several against each defendant, for the Plaintiff with costs and interests.

The parties were then granted liberty to negotiate quantum of damages under the headings: - General Damages, Punitive Damages, Exemplary Damages and Appropriate apology to be published by the Defendants.

On 16th September, 2009 the parties agreed and recorded that the court should consider and award the damages as the parties had failed to agree on quantum. The parties agreed to file written submissions by 25th September 2009. This was done and judgment was reserved.

The irresistible conclusions that the above facts and sequence of events invite and lead this court to make are that the Defendants in agreeing to enter judgment against themselves and for the Plaintiff, admitted all the Plaintiff's averments in his plaint dated 11th November, 2004. That they also admitted as true, all the testimony of the Plaintiff and his witness in court which was based on the said Plaint. Since the Plaintiff's and his witness evidence simply confirmed the averments in the plaint I hold that the Plaintiff has proved his case in the manner it is pleaded on the balance of probability. I now turn to the issue of damages and its assessment.

As stated in **“Carter Ruck on Libel and Slander”**, 4th Edition at p. 166 and as it was stated in **Joshua Kulei v Kalamaka Limited**, Nairobi HCCC No. 375 of 1997: -

“An action for defamation is essentially an action to compensate a person for the harm done to his reputation. In all actions for libel and in some actions for slander the law presumes that the Plaintiff has suffered harm and these action, usually described as being actionable per se the actual sum to be awarded – the damages – are said to be ‘at large’. Although a person’s reputation has no actual cash value, the court is free to form its own estimate of harm in the light of all the circumstances.”

The same proposition was put by Lord Hailsham of Marylebone, L.C in **Cassel & Co. Ltd. V Broome and Another** (1972) 1 ALL ER, 810 at P. 825 as follows: -

“.... The whole process of assessing damages where they are “at large” is essentially a matter of impression and not addition the damages are awarded to the plaintiff to vindicate him to the public and to console him for the wrong done.”

It seems to me therefore that damages in defamation cases will vary from person to person. The court must take into account the extent to which pain and suffering is aggravated or reduced by the defendants’ subsequent conduct. The sum the court awards must therefore compensate the plaintiff for the damage to his reputation; vindicate his good name; take account of the distress, hurt and humiliation which the defamatory publication has caused.

In the above cited case of **Cassel & Co. Ltd V Broome & another**, Lord Hailsham further stated: -

“... in actions of defamation and in any other action where damages for loss of reputation are involved, the principle of restitution inter gram has necessarily an even more highly subjective element; such actions involve a money award which may put the Plaintiff in a purely financial sense in as much stronger position than he was before the wrong. Not merely can he rediscover the estimated sum of his past and future losses, but in the case of libel, driven underground, emerges from its lurking place at some future date; he must be able to point at a sum awarded by the jury sufficient to convince a bystander of the baselessness of the charge.”

Put differently, the Plaintiff must be awarded a sum to which he can refer to convince those who knew of his defamation that he was wrongfully accused. He must beat and appear to beat the defendant, if we can put it so. This means that the award of damages must cover the injured feelings, the anxiety and uncertainty undergone in the litigation, in the absence of apology or reaffirmation of the truth of the matters complained of or the malice of the defendant.

At home here the above proposition was put as follows in **Ochieng & Others V Standard Limited**, 1(2004) KLR, 225: -

“Compensatory damages in a case in which they are at large, may include not only actual pecuniary loss and anticipated pecuniary loss or social disadvantages which may result or may be thought likely to result from the wrong which has been done, they may also include the natural injury to his feelings – natural grief and distress which he may have felt at having been spoken of in defamatory terms, and if there has been any kind of high handed, oppressive, insulting or contumelious behavior by the defendant which

increases the mental pain and suffering by the defamation and may constitute injury to the Plaintiff's pride and self confidence, those are proper elements to be taken into account in a case where the damages are at large."

From the cited cases before me therefore, it appears to me that the whole conduct of both the Plaintiff and the Defendant will affect the level of general damages. In assessing damages in **Kipyator Nicholas Biwott Vs Clay Ltd & 3 others** and also **Kipyator Nicholas Biwott Vs Dr. Ian West & Another**, Nairobi HCCC No. 41068 of 1997, the court stated that the whole conduct of the Plaintiff and the Defendant from the time of publication until the time of judgment must be looked at. The conduct before action, after action and in court during trial will be relevant and will affect the level of general damages downwards or upwards.

Malicious and/or insulting conduct on the part of the defendant will aggravate the damages to be awarded. The aggravated damages (*distinguished from exemplary damages*) are meant to compensate the Plaintiff for the additional injury going beyond that which would have flowed from the defamatory words or statements above, caused by the presence of the aggravating factors. The Plaintiff, who behaves badly, as for example by provoking the defendant or defaming him in retaliation, will be viewed less favourably; a defendant who behaved well e.g. by properly apologizing, will be treated with favour. Damages will be aggravated by Defendant's improper motive i.e. where it is actuated by malice. Repetition of the libel; failure to contradict it; insistence on a flimsy defence of justification; and a non-apologetic cross-examination are matters that will aggravate damages (see **Mc Carey V Associated Newspapers Ltd**, (1964) 3 All ER 947; 2 QB 86)

In **Kayla & another V Standard Ltd & 2 others** (2002)2 KLR, 665 an apology tendered too late in the circumstances was held to have no effect on the damage to the plaintiff's reputation. So was an apology tucked away in a nondescript corner of the Standard newspaper in **Ojiambo Vs Standard Limited & 2 Others** (2004) 2 KLR, 496 which the court held as insufficient. In both cases above the court was of the view that no apology had been tendered in considering whether or not the original publication was with malice.

The court will also consider the manner and extent of circulation of the publication. It limited the aggravation in damages in **Oyaro V Alwaka T/A Weekly Citizen & 2 others**, (2003)KLR 571 because publication was limited mainly to Nairobi and Mombasa cities. Where circulation was wide due to geographical area covered, as in **Kipyator Nicholas Biwott VsDr. Ian West & Another**, aforesaid, it lead to higher damages. In the same case, the court awarded exemplary damages because it was satisfied that the defendant's conduct was calculated to make the defendant some profits which may well exceed the compensation payable to the Plaintiff and the defendant knew that the publication would be tortuous, or was reckless as to whether or not it would be, but nevertheless, went ahead and published the words complained of on the basis that the perspective profits outweigh the likely compensatory damages. I now turn to apply the propositions and principles in the forecited cases to this suit before me. It is important however to know who Francis Xavier Ole Kaparo the Plaintiff was at the material time and the facts that this court accepts and will apply.

The Plaintiff was at the material time the Speaker of the National Assembly of Kenya. He was first so elected in 1993 and re-elected in 1998, and again in 2003. Before 1993, he was a Member of Parliament and a Minister of Industry since 1988. He was an advocate of the High court in private practice since 1977 when he was elected to parliament by the people of Laikipia West until he was elected to Parliament. The Plaintiff's and his witness testified that by any standards the Plaintiff was one of the most respected and reputable leaders in this country. The claim was in my view confirmed by the fact that after being appointed a Minister of the Kenya Government, he was still later, not only to be elected the Speaker of the National Assembly but again to be re-elected twice respectively thereafter. The Plaintiff also claimed that he was in addition the Chairman of various Community and National Conservancies which made him to be recognized nationally and internationally, particularly when he went to places to appeal for funds to run the conservancies or to defend the usage of the funds earlier donated by the national and International funding institutions. These claims were either admitted or not

contradicted by the Defendants, making the claims stand as true facts.

The court accordingly comes to the conclusion that the two publications by the Defendants on 7th April, 2004, and 24th October, 2004 were false, malicious, wrongful and defamatory of the Plaintiff and that they exposed the Plaintiff in his personal, professional standing and character to public scandal, ridicule, contempt and embarrassment and continue to cause him to suffer enormous loss and damage, anxiety and disrepute.

In the absence of any controversion of the Plaintiff's evidence it is the court's further finding that the Defendants published the said defamatory words and statements on 7th April, 2004, and on 24th October 2004 in the knowledge that they were libelous or did so with reckless disregard as to whether or not they were libelous in order to cast improper aspersions on, or damage to the Plaintiff's good name, having established that the prospect of material advantage to themselves by reason of the probable sales and profits of their publications outweighed the prospect of material loss. In the court's view, the fact that the Defendants at all published an apology the next day is a sign that they realized their folly. However, the fact that the apology was too small, innocuous and hidden in some corner of the paper suggests that they did so either to cover themselves against future litigation or merely to cover their malicious intention.

That the Defendants meant little in publishing the apology is in my view confirmed by the fact on 24th October, 2004, they went ahead to publish another scathing, false and malicious article against and concerning the Plaintiff. It is in evidence that the Plaintiff wrote a rebuttal article intended to put the correct facts in the domain of the readers of the newspaper, the East African Standard. The defendants did not deny refusing to publish it, confirming the fact that they did not want the public to know any other truth, if theirs was the truth.

It is also in evidence that the truth was available to the Defendants from the whole start. They could seek a counter- interview with Plaintiff before publishing. They could seek related documents explaining the correct position from the Clerk of the National Assembly, or interview him to establish the correct position. However, the Defendants chose to do it their head-on way. This position they are taken to have admitted.

Finally, not only did the Defendants enter defence, but proceeded to encourage or push the Plaintiff to proceed to a hearing of the suit. They subjected the Plaintiff to the rigorous process of the court such as discovery, inspection and filing of all relevant documents required for a hearing in such a complicated suit. Nor did they stop there; they went ahead to subject the Plaintiff to testify, and to stand full cross-examination, just to remind him of the public scandal, ridicule, contempt and embarrassment he has undergone in the last five to six years; only to suddenly capitulate and concede to all the evidence placed on record against them without placing themselves in the dock to also undergo the rigorous process undergone by the Plaintiff.

I hold that the Defendants' above conduct before, during and after the trial of the case, is one which will aggravate the damages to be awarded. It also clearly, invites the court to award exemplary and/or punitive damages.

On the other hand, the Plaintiff, in trying to convince the defendants to publish the correct version of the facts they had wrongfully published and in seeking a publication of a prominent and appropriate apology from the beginning, was trying to minimize damage on his name. His conduct throughout has been very reasonable despite the embarrassment of being falsely called a thief and/or a corrupt person unfit to be Speaker of the National Assembly of Kenya.

As can be recalled the false, wrongfully and malicious words published by the Defendants in April and October, 2004 in their natural or ordinary meaning or by imputation and/or innuendo, portrayed the Plaintiff as a thief, a dishonest, corrupt, incompetent in his office of Speaker, unfit to be Speaker, a person of low integrity, amoral, and partial in the process of Constitutional Review. The Plaintiff on the contrary, has proved that he is none of any of the above descriptions and that the Defendants' publications on and concerning him are wrongful, false and malicious, and that he deserves being awarded compensatory

damages.

Taking into account the circumstances of this case as described herein above, I have come to the conclusion and it is my finding that the Plaintiff is entitled not only aggravated compensatory damages but also exemplary or punitive damages.

I am conscious of the fact that damages awarded in such cases are not intended to enrich the Plaintiff; in which case they should not be excessive since I must have proper justification of awarding them. I am aware however, that this court is not prevented from making a reasonably high award in a proper case.

I will in this case take into account the Plaintiff's high standing, honesty and integrity as a person, and in his office as the then Speaker of the National Assembly and leader in several national and Community Conservation Institutions. I will as well take account the proper probable effect of the words and statements published by the Defendant noting that they were mostly effective in Kenya and East Africa but also limitedly spread to the rest of the continent and other continents through the internet. The fact that the apology published by the Defendant was of little effect because it was too small and hidden will be considered. So will the fact that the defendants not only repeated publication of defamatory words and statements, but that they on the second occasion in October, 2004 refused to apologise and deliberately and recklessly subjected the Plaintiff through a long tortuous and apparently aimless court hearing.

The following are awards by the High Court and Court of Appeal in similar cases of defamation concerning important persons in Kenya:-

In **Biwott V Mbuguss**, Nairobi HCCC No. 2143 of 2000, Kshs.10,000,000/- was awarded, with the court advising the press to first properly investigate the information they get before printing. In **Kipyator Nicholas Biwott Vs Clay Ltd & 3 others** consolidated with **Biwott Vs Dr. Ian West & another**, afocited the court awarded 15 million compensatory and 15 million exemplary damages. In **Joshua Kulei V Kalamaka Ltd** afocited the court awarded 10 million.

In **Charles Kariuki T/A Charles Kariuki & Co. Advocates's** case an award of kshs.10,000,000/- was made, the Plaintiff being a prominent advocate. In **Christopher Obure V Tom Oscar Alwao T/A Headline Publishers & Others**, Kshs.15,000,000/- in general damages and 2 million in exemplary damages were awarded. The Plaintiff was and has been a Minister in the Government of Kenya.

And finally, in **Johnson Evan Gicheru v Andrew Morton & another**, Nairobi HCCC No. 214 of 1999 Kshs.2.5 million was awarded. However, on appeal the court of Appeal enhanced it to Kshs. 6 million. The Plaintiff was the Presiding Judge in Court of Appeal later to become the Chief Justice.

The difference and importance of the **Gicheru** case is that the Court of Appeal seized the chance to revise the principles of approach to this kind of cases. It examined several of the cases herein cited and concluded that the awards of damages in the cases were generally too high and lacked a juridical basis. The court cautioned that these cases should not be taken as persuasive or positive precedents in trial courts as the trial judges appear to have ignored basic fundamental principles of awarding damages in libel cases. Indeed, Visram, J (as he then was) in **Richard Otieno Kwach V The Standard Limited and Another** where he awarded damages of Kshs.5,500,000/- tends to suggest that all issues being equal in relation to these kind of cases which concern prominent persons, the sum awarded in **Gicheru** case of Kshs.6,000,000/- was the set maximum limit of damages.

If my interpretation is correct, (and I should be for given if it is not) then trial judges would feel constrained in proper cases requiring higher awards. I would however, believe that the Court of Appeal was not fixing a higher limit of compensatory awards in the **Gicheru** case.

Turning now to this case before me and taking into account the facts and circumstances of this case as well as the principle(s) of law discussed herein as well as doing the best I can, I have decided that the right compensatory damages to the Plaintiff is Kshs.5,000,000/- plus 2,000,000/- exemplary or punitive damages.

ORDERS

1. Judgment is hereby entered in favour of the Plaintiff against the Defendants jointly and severally, for Kshs.7,000,000/-, with costs and interest as prayed.
2. An order that the defendants publish an acceptable apology in the Standard Newspaper and Sunday Standard Newspaper in as a prominent manner as the articles of and concerning the Plaintiff were, is hereby issued to be complied with within 30 days.
3. An injunction restraining the Defendants, their servants or agents or otherwise from further writing, printing and publishing or causing to be printed, published or distributed in East African Standard or Sunday Standard or any other publication or otherwise containing the defamatory words and statements on the subject or any similar words and/or statements or at all of and concerning the Plaintiff, is hereby issued as prayed.

Dated and Delivered at Nairobi this 1st day of February 2010.

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D A ONYANCHA
JUDGE