



REPUBLIC OF KENYA
-
IN THE HIGH COURT OF KENYA AT NAIROBI
-
CIVILSUIT NO. 509 OF 2008

CLEMENT MUTURI KIGANO PLAINTIFF

VERSUS

HON JOSEPH NYAGAHDEFENDANT

Coram : Mwera J.
Anyoka for Plaintiff/applicant
Munyalo for Defendant/respondent
Njoroge court clerk

JUDGEMENT

In a plaint filed here on 13.11.08 the claimant, Clement Muturi Kigano, sued the defendant to recover damages following the words uttered by the latter on 30.12.07. It was pleaded that the plaintiff was an advocate of the High Court of Kenya and a member of the Electoral Commission of Kenya (ECK) which directed and supervised the general elections held in Kenya on 27.12.07. That at that time the defendant was a senior member of a political party – Orange Democratic Movement (ODM) which presented one Hon. Raila Odinga as a presidential candidate in the said elections. The plaintiff was one of the commissioner’s assigned duties at the E.C.K communication centre at Kenyatta International Conference Centre (KICC) where the election results were being announced. Then on 30.12.07 the defendant addressed a press conference at that centre attended by media houses thus:

“The press has the results which have come straight from the polling stations, each party and I know our party does, we’ve results from the ground but ECK and we even now (sic) when documents left the Constituency Level to come to Nairobi. When they arrive in Nairobi ECK is only addressing announcing the results of the parliamentarians’ elections (sic), they are refusing to announce the results of the presidential elections. They’re in their offices. They are in Mr/Commissioner Kihara’s and Commissioner this gentleman who has just left Mr. Kigano’s office. They are controlling it, they are releasing only parliamentarians, when they think we’re making noise then they release the two, they are waiting for ours to come in full. When they have received all ours, then they will doctor the results as has happened in African country and we are trying to save ECK, the country from possible chaos if what happens. We know for a fact that they’re withholding certain because this is manipulation going on and that is basically what we’re trying to help them with and don’t want to be helped with and it is very unfortunate. I would ask the President himself with his advisors to step in now and clam the temperatures in the country and explain to the country why he is just watching. This is not time for watching. We know they are saying that if it happened in Nigeria That Nigeria stole results and went to court and President won. We know they’re saying from Statehouse (sic) that President Bush stole results. This is not America, this is not Nigeria, this is Kenya.”

Although the statement reproduced above, as constituting the one complained of would have done with a great deal of a grammatical comb, if such an article existed to be applied, the plaintiff maintained that he was defamed and would produce the broadcast clips and subsequent broadcasts at the hearing, to bring out the full effect, meaning and tenor of the words complained of. None was produced, though. It was further pleaded that the said interview/address by the defendant was covered by various national and international radio and television stations on the day and on several subsequent occasions where newspapers also picked up and published the libelous statements. The plaintiff promised to produce such newspaper statements at the hearing and again he did not do so. He however pleaded that the utterances complained of were defamatory of the plaintiff's reputation and character and were actionable *per se*. They were malicious scandalous, etc and remained factually wrong. They demeaned the plaintiff and disparaged him greatly, by their natural meaning, imputation and even innuendo. Nine meanings were attached to the said words in that the plaintiff was portrayed as a partial commissioner of the ECK who did not honour the oath of office; he engaged in a conspiracy to subvert and corrupt the presidential election in a fraudulent manner executing electoral practices intended for reelection of President Kibaki. Further, that the words tended to show that the plaintiff aided and abetted in the rigging of the presidential election, all exposing him to probable prosecution for treason, abuse of office, fraud etc under the Anti – Corruption & Economic Offences Act, the Penal Code, the Public officers Ethics Act and the Election offences Act. The words also were said to have portrayed the plaintiff as an irresponsible and dishonest advocate of the High Court unfit to be practicing as such or as a Commissioner with the ECK.

It was further averred that those unfounded and untrue broadcasts greatly embarrassed the plaintiff and distressed him also. His esteem in the estimation of fellow Kenyans and commissioners was much lowered by the defendant's utterances. The defendants had no regard for the consequences of his words against the plaintiff. He knew that the words were false and would affect the plaintiff's character and reputation as an advocate of the High Court of Kenya and a commissioner with ECK. Therefore the plaintiff prayed this court to award him general damages for libel, exemplary and punitive damages for defiance not to apologise or otherwise admit liability after a demand and notice had been duly tendered. The plaintiff also sought to be awarded costs and interest.

The hearing of this suit was by way of formal proof. It was demonstrated to the court that on 20.4.09 the defendant was served at his Ministry of Cooperative Development offices with a summons to enter appearance plus a copy of the plaint. He received them personally and acknowledged by signing on the summons. But he did not enter appearance or follow that with a defence. So on 21.10.09 a default judgment was entered against him followed by the formal proof. The plaintiff himself with 3 witnesses were heard.

The plaintiff started by telling the court that he was an advocate for about 40 years and at the time of the 2007 election he was a commissioner at ECK. He was also a chancellor with the Anglican Church of Kenya, (ACK), a horticultural farmer and supplier and serving on several boards of governors in schools in Muranga. He was once a director of Kenya Ports Authority, a former chairman of a political party called SAFINA and also once chairman of the then Union Bank.

On 30.12.07 the defendant gave a press conference in presence of local and international press – TV radio and newspapers, e.g. KBC, CITIZEN, KTN, BBC which media carried the interview content as set out above. In essence the defendant said that the plaintiff had, with others rigged the presidential election in favor of the current holder of that office. That all that was untrue. Then after that interview/conference complained of, the plaintiff met the defendant in the washrooms at the same KICC and asked him why the latter had uttered such things. The court heard that the defendant responded that he had done so to attract the attention of the head of ODM, Hon. Raila Odinga so that he could get nominated to Parliament, because he had lost his seat. And that true indeed he was nominated to Parliament and even appointed a minister.

The plaintiff got his lawyers to write a notice and letter of demand to apologise which was served and acknowledged by the defendant (Exh P1) but no response was received. That such allegations as were directed to the plaintiff could and did place the plaintiff in a security predicament considering the charged political atmosphere then, over the presidential election particularly, whose result has been delayed. He

got personal and property (homes) security in the circumstances. The plaintiff claimed following the utterances complained of he was alienated socially. Friends deserted him and people asked him whether he did rig presidential election. His church superiors, colleagues and family members also asked the plaintiff about the remarks. All made him depressed and despondent. That the defendant did not file a defence to the plaint herein and thus this court should grant the remedies sought.

Paul Wamatheri Wamae (PW2), a practicing advocate and a long time friend and acquaintance of the plaintiff, testified next. He heard the words complained of uttered by the defendant on KTN News channel and was alarmed because the political environment then was so volatile that such allegations could lead to serious consequences. The defendant had claimed that the plaintiff and a Mr. Kihara had rigged the presidential election results and that was why they had delayed in being announced. PW2 did not think that the plaintiff could do such a thing. The plaintiff had been cast in a negative light and PW2 kept away from him for a while.

And for Yusuf Mwangi Kiguthara (PW3), a property manager/businessman, he knew the plaintiff for over 30 years – as an honest and upright person. They were friends. So when he watched one TV channel on 30.12.07 and heard the defendant claiming that the plaintiff had rigged the presidential election, the witness did not think or believe the remarks. PW3 had once escorted the plaintiff on his way to a pilgrimage in Jerusalem being a good Christian so he himself, a deputy chairman of what he described as a National Moslem Leaders Forum, concerning itself with political affairs, concluded that the defendants' remarks were meant to injure the plaintiff.

Then Joel Waweru Mwangi (PW4), a pastor and minister with ACK testified. He grew up in the same village with the plaintiff who, with others, PW4 took for role models. They went to the same church and the plaintiff performed his legal duties there, as a chancellor very well including conducting elections. So he was much taken aback with the utterances of the defendant on 30.12.07 which PW4 watched on Citizen TV. The defendant alleged that the plaintiff with others had doctored the election outcome. This was a very sensitive time; PW4 did not think that the plaintiff did such a thing yet such remarks could end with the plaintiff being attacked by mobs. To PW4, the plaintiff was not a vote thief.

With the foregoing Mr. Saende, closed the plaintiff's case, repeating that the defendant was duly served but did not enter appearance and a default judgement was entered against him on 21.10.09. The plaintiff had proved his case and with authorities tendered he should get Ksh. 7m for general damages, Ksh. 1.5m for exemplary damages and Ksh. 1.5m for punitive damages, costs and interest.

As recorded above, the trial herein went on by way of formal proof, the defendant having been served with due process but having failed to enter appearance.

The plaintiff prayed that he wanted an award in general damages for libel. It is borne out in the plaint.

“ 11. The plaintiff avers that unfounded and untrue as they were, the said broadcasts have caused the plaintiff a high degree of embarrassment, disparagement and distress. The plaintiff further avers that as a result of the said libelous broadcasts his public esteem, character and reputation have been seriously assaulted, besmirched, affronted, scandalized and ridiculed and had been exposed to public hate and odour (sic).”

Earlier on in the plaint, it had been averred that the plaintiff would produce as exhibits clips of the broadcasts (assumed to be TV or radio clips and tapes) and statements/words contained in subsequent newspaper reports (paras 6, 7 of the plaint). That the statements were libelous and that they injured the plaintiff's reputation and so the same were actionable. Per se (para 8). The said clips and newspaper reports were not exhibited, yet the plaintiff averred that the defendant had libeled him – not slandered.

Halsbury's Law of England 4th edition Vol. 28 on Liberal and Slander etc says of the two types of defamation.

“1. Libel and slander actions. In English law, speaking generally, every man is entitled to his good name and to the esteem in which he is held by others, and has a right to claim that his reputation shall not be disparaged by defamatory statements made about him to a third person or persons without lawful justification or excuse.

If a defamatory statement is made in writing or printing or some other permanent form, the tort of libel is committed and the law presumes damage. If the defamation is oral, or in some other transient form, it constitutes the tort of slander which is not actionable at common law without proof of actual damage, except where the statement is one of a particular character.”

(Underlining added).

Thus by libel generally, one feels defamed if the words complained of are written or printed or appear in some other permanent form. Here damage is presumed in law. However, if the defamation is oral and only passing, it is not actionable at common law unless actual damage is suffered. But then there is actionable slander and for this the same authors say:

“12. A slander for which an action will lie is defamatory statement if made or conveyed by spoken words, sounds, looks, signs, gestures, or some other non-permanent form, published of and concerning the plaintiff to a person other than the plaintiff, by which the plaintiff has suffered actual damage, often referred to as special damage, which he must allege and prove or which is actionable per se.”

Further on the learned authors remark:

“13. Distinctions between libel and slander. There are two chief distinctions in practice between libel and slander, or broadly speaking, between written and spoken defamation.

(1) Every actionable libel can be dealt with by either civil action or criminal proceedings, whereas no slander, even though actionable, is as such a criminal offence unless it contravenes the law as being, for example, obscene, blasphemous or seditious, or a contempt of court.

(2) No special damage need be alleged or proved in an action for libel, whereas, unless the defamatory words complained of are actionable per se, no action of slander will lie if the plaintiff does not both allege and prove that he suffered actual damage.

And more:

“Is. Damages in libel: If a person has been libeled without any lawful justification or excuse, the law presumes that some damage will flow in ordinary course of events from the mere invasion of his right – to his reputation and such damage is known as “general damage.”

Accordingly, the plaintiff in a libel action is not required to prove his reputation, nor to prove that he has suffered any actual loss or damage. However, it is open to a claimant here to plead and prove any special damage he is entitled to in addition to general damages.

And in **Blacks Law Dictionary** 8th Edition libel is:

“1. a defamatory statement expressed in a fixed medium esp. writing but also a picture, sign or electronic broadcast.”

A quotation within the above definition, after all kinds of what can constitute defamation by libel, it is noted:

“From this it has been concluded that libel is that which is communicated by the sense of sight, or perhaps also by touch or smell while slander is that which is conveyed by the sense of hearing:

Now from the pleadings, the evidence and appreciation of the two types of defamation, which one did the plaintiff place before court for determination?

The Defamation Act/Cap 36), one of the authorities cited by the plaintiff has in the preamble:

An Act of parliament to consolidate and amend the statute relating to libel, slander and other malicious falsehoods,”

This Act commenced on 17.6.70. However, it has no definition or description of either libel or slander. Neither does it contain any special or other features to provide for these 2 types of defamation as uniquely and peculiarly Kenyan. In the result that the common law definitions, applications (above) are applicable here.

As already referred to, the plaintiff claimed that he was libeled and so he sought general damages, Fair enough. But did he prove the tort? In short, did the plaintiff lay before court:

“..... defamatory statement Made in writing or printing or some other permanent form,”

to prove his claim even in the absence of a defence? It does not appear so. He pleaded to do so but did not produce in court clips of the broadcasts or copies of newspaper reports containing the utterances of the defendant for this court to see (or even smell) the defamatory words complained of. Will it, nonetheless, be presumed that the plaintiff thus proved his claim? Not quite. He must have definitely been greatly perturbed by the utterances by the defendant and particularly at the time in question. The court was not in doubt about his testimony and that of his witness. But given to prove his claim, the plaintiff did not place before court the requisite evidence to prove the claim and so be awarded general damages.

In the event this case is dismissed. Had the plaintiff proved it, this court could have been minded to award him general damages in the region of Ksh. 1.1m with costs and interest.

Judgement accordingly.

Delivered on 17.3.10

**J. W. MWERA
JUDGE**