



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil Suit 167 of 2007

HON. JOSEPH KORIR.....PLAINTIFF

VERSUS

TIMES NEWS SERVICES LTD.....DEFENDANT

JUDGMENT

The plaintiff in this case was the Member of Parliament for Mogotio Constituency of the Rift Valley between the years 2002 and 2007. He was also the Chairman of the CDF (*Constituencies Development Fund*) for his constituency. He claims compensation for libel against the defendants as follows:-

- a) *General damages for defamation.*
- b) *Punitive damages.*
- c) *Costs of the suit.*
- d) *Interest on (a) (b) and (c) above at court rates*
- and e) *Any other or further relief as this court would deem fit or just to grant.*

He is aggrieved by a headline article published in the defendants' publication, The Saturday Times Edition of 17th March, 2007 titled "**HOW FRAUD IS BLEEDING CDF**" part of which included the plaintiff's picture and an accompanying caption to the effect that he "**CONVERTED HIS PREMISES INTO CDF OFFICES**". The headline story was continued at page 4 of the same publication where the defendants further published, concerning the plaintiff, the words:-

"In another case the Mogotio MP Joseph Korir was accused of converting his personal premises into a CDF office thereby benefiting irregularly from the Fund but was not investigated."

The plaintiff claims that the above words in their natural and ordinary meaning were meant and understood to mean that;

1. ***The plaintiff was a thief and an embezzler of public funds.***
2. ***That the plaintiff is a corrupt person.***
3. ***That the plaintiff is a fraudster and dishonest person.***

4. ***That the plaintiff is not fit to hold the office of a member of parliament.***
5. ***That the plaintiff is not accountable to his constituents.***
6. ***That the plaintiff is in his office of member of parliament a person of low or no morals at all.***
7. ***That the public generally and Mogotio constituency members (in particular) are warned to shun the plaintiff.***

The plaintiff contends that despite the defendants having been given the opportunity to apologize to him for the publication they declined to do so.

In defence of the action the defendants filed a defence dated 6th September, 2007 in which they denied having published the words complained of or that the words or publication thereof (*if any*) was false or malicious or that the words were understood or capable of being understood or of bearing the meaning attributed to them by the plaintiff. The defendants have put the plaintiff to strict proof of his allegations.

The plaintiff filed and served the defendants with a statement of proposed issues which the defendants in their written submissions adopted and accepted as representing the issues for determination herein. The said issues are as follows:-

1. ***Whether the defendants published the words complained of.***
2. ***Whether the words complained of or the publication thereof were false and malicious.***
3. ***Whether the words complained of were understood or capable of being understood or bearing the meaning attributed to them under paragraphs 6(a) - (g) of the plaint.***
4. ***Whether the plaintiff has been injured in his credit and reputation, whether he has been exposed to public ridicule and contempt and whether his character has been disparaged and brought to disrepute by reason of the publication of the words complained of.***
5. ***Was the publication of the words complained of, if any a fair comment on a matter of public interest?***
6. ***Is there a cause of action disclosed by the plaintiff herein?***

In the written submissions filed by his advocates the plaintiff has consolidated the above issues as follows:-

1. ***Whether the defendants falsely and maliciously caused to be printed and published in the Saturday Times Edition issue No.341967 the words complained of in paragraph 5 of the Plaint of and concerning the plaintiff;***
2. ***Did the words complained of in paragraph 5 of the Plaint bear or were they understood to bear the meanings ascribed to them in paragraphs 6(a) – (g) of the plaint or any meaning defamatory of the plaintiff?***
3. ***Was the plaintiff in any way injured in his credit and reputation by the alleged defamatory words as stated in paragraph 7 of the plaint?***

I am of the view that the above summary accurately sets down the issues for determination but do hereby add a fourth issue as follows:-

4. ***Whether the plaintiff is entitled to the relief sought in the plaint and if so, what is the quantum of the damages to be awarded, if any?"***

The plaintiff testified under oath and produced the original copy of the Saturday Times Newspaper Edition, Issue No. 341967 of 17th March, 2007 in which the story complained of was printed at pages 1 and 4. He also produced, in evidence, a lease agreement over Plot No. LEMBUS/CHEMOGECH 257, executed on 1st July, 2004 between Daudi Kimining Cheptarus (*landlord*) and Charles K. A. Chobosi Koske (*member for Mogotio CDF*), a copy of a Title Deed (*P.Ex.3*) and a certificate of official search (*P.Ex.4*), both showing that the said plot, housing Mogotio Constituency's CDF offices was owned by the said Daudi Kimining Cheptarus and not by the plaintiff. The plaintiff also produced his advocate's demand letter dated 20th March, 2007 which, inter alia, requested the defendants to publish an apology but which was ignored. To demonstrate his good reputation and illustrious career progression the plaintiff produced a copy of his curriculum vitae as P.Ex.6. The plaintiff testified that the story, which went against his record both as a public officer and a chairman of the CDF, Mogotio Constituency projected him as a thief, criminal, fraudster and a dishonest person. He stated that the same affected him negatively, more so politically, as it was used by his political opponents to campaign against him in the 2007 general elections, causing him to be rejected by voters. The plaintiff admitted that the management of CDF was a national issue but his complaint is that the part of the story involving Mogotio Constituency and its perceived problems referred directly to him. The plaintiff has questioned the motive behind the publication given the facts, and reads malice in the same, especially since the report said to have been quoted stated that he had not been investigated. He contends that the defendant ought to have ascertained the facts before publishing the story.

The defendants called the writer of the offensive article M'mbolo Mbulemi, to testify on their behalf. He admitted having written the story, based on a press statement he obtained from a conference held by an organization called CLARION (*Centre for Law and Research International*). He produced as an exhibit, the statement entitled;

“PRESS STATEMENT RELEASE OF THE STATE OF CORRUPTION ISSUE #14. The Constituencies Development Fund: A case of Decentralized corruption?”

The statement was indicated to be for;

“immediate release”

and was issued for the attention of;

“NEWS EDITORS/HEAD OF NEWS”.

DW1 stated that the contents of the statement were of national importance and admitted that the picture of the plaintiff and the words were published as one component. His defence was that he personally had no intention to malign the plaintiff averring that the plaintiff ought to have provided information to counter what had been said about him to enable the defendants publish a “*counter-story*”, stating further that he was not in a position to say whether the contents of the CLARION report, concerning the plaintiff were true or not. DW1 testified that he was not under any obligation to investigate and/or establish the truth of a story before publication saying that the same can be done after the publication had been done. Under cross examination DW1 admitted that the statement in the publication was meant to invite readers to the story and was a complete story which said to the reader that the plaintiff

“converted his premises to CDF offices”.

As earlier stated both the plaintiff and the defendants filed written submissions citing authorities to support their opposing positions. The defendants submitted that the plaintiff has not proved his case in that nothing was laid before court to prove whether the newspaper report was true or false. They contend that the publication, having been based on what transpired at a press conference hosted by a third party, it was highly improbable that the defendants had any time to conceive malice before publishing the article. They claim that the plaintiff's picture was not as prominent as others used and the words referring to him did not constitute the headline. Also that his constituency did not feature prominently and that the use of the words “***was accused of***” and “***not investigated***” demonstrated an objective view of the publication.

According to the defendants' witness, readers are expected to be reasonable readers and cannot be presumed to have understood the story otherwise than implying generosity on the part of the plaintiff. To support this, the defendants cited **Vol. 28 Halsburys Laws of England 4th Ed. 1997 Ed** at paragraph 45 where a reasonable reader is defined as a person;

“.....taken to have read the entire publication”

and stating that;

“It is not permissible to invite the jury to infer that some readers will only have read, for example, the headline to bear a defamatory meaning which it would not have borne if considered in the context of the article as a whole.”

The defendants submitted further that injury to the plaintiff's reputation was not proved in the absence of the evidence of his voters. Their position is that, the words complained of consisted of fair comment on a matter of public interest which, as held in the case of **SILKEN –VS- BEAVERBROOK NEWSPAPER LTD (1958) 1 WLR 743**, confer, upon the public and the newspaper editor the right to express their views honestly and fearlessly on matters of public interest, even though that involves strong criticism of the conduct of public people.

The defendants rightly submitted that the defence of fair comment will be dislodged by the evidence of malice on the part of the publisher. They contend further that the defence of qualified privilege as guaranteed under **section 7 of the Defamation Act, (Chapter 36 of the Laws of Kenya)** operates in their favour in this case, since the information published was gathered at a public forum that the reporter merely attended to cover the proceedings. Regarding quantum, the defendants have submitted that in the event that the court finds that the plaintiff has a case against them, a sum of Kshs. 80,000/= would adequately compensate him.

In his submissions, the plaintiff stated that the defendant admitted in evidence that the name, picture and story published in the offensive article fully identified the plaintiff and referred to him. The false nature of the story was proved by the testimony of both the plaintiff and DW1 and the production of exhibits showing clearly that the Mogotio CDF offices were not housed in the plaintiff's premises. Therefore, the defendants' story was not only false, but also baseless and malicious. The plaintiff submitted further that by DW1's admission that he did not know the plaintiff, never visited the Mogotio CDF offices in the belief that it was unnecessary to do so, coupled with the defendants' decision to publish CLARION's story, nonetheless, clearly proved malice on the defendants' part. He submits, and I accept his submission that when a publication is done without caring to confirm whether the same is true or false the correct presumption is that the publisher probably knew it to be false.

In sum the plaintiff has submitted and has asked the court to find, firstly, that the defendants' attitude in publishing the offensive article without caring or considering whether what was said of him in CLARION's article was true or false clearly imputes malice on their part. Secondly the plaintiff seeks to persuade the court that the first impression upon a reasonable reader reading the article is that the plaintiff was part and parcel of the fraud that is bleeding the CDF, was abusing his office as a member parliament and chairman of the Mogotio CDF to unjustly enrich himself. In those circumstances the court should find that he has been lowered in estimation by right thinking members of society, exposed to hatred, ridicule and contempt, thereby causing him mental anguish, and causing him to be shunned by others and held suspect by colleagues, members of his family and supporters. For this he asks that he be awarded Kshs.5 million as general damages and Kshs.1 million being punitive damages. To support these figures he cited the following authorities:

1. FATHER SAMWEL WAWERU –VS- SAMWEL MBURU & ANOTHER

NKU H.C.C.C. NO. 208 OF 2002

Where the court awarded the plaintiff Kshs.2.5 million In general damages and Kshs.250,000/= as

punitive damages.

2. HON. CHIRAU ALI MWAKWERE –VS- ROYAL MEDIA SERVICES LTD

NBI H.C.C.C. NO.57 OF 2004

Where the court awarded Kshs.1 million in general damages, Kshs.1 million exemplary damages and a further Kshs.1 million as aggravated damages.

3. DANIEL MUSINGA t/a MUSINGA & CO. ADVOCATES

–VS- NATION NEWSPAPERS LTD. [2005] eKLR

Where damages amounting to Kshs.10 million were awarded.

The publication of the article complained about is not in dispute. It is clear that the defendants did not publish the proceedings of a press conference said to have been organized by CLARION as stated by DW1 in his testimony but excerpts from the Press Statement produced as “*D.Ex.1*”. The Headline of the publication screamed that fraud was bleeding CDF and the bold opening statement of the article referred to CDF as being the most abused Government grant where patronage, corruption and fraud were rampant. The printing of the plaintiff’s picture and the words to the effect that he was accused of converting his personal premises into a CDF office, (*thereby benefiting irregularly from the fund*) against such a headline cannot be taken to bear any other meaning than what is stated in the plaintiff’s plaint and submissions. The words “*but was not investigated*” cannot in my considered view, imply a different meaning to the mind of a reasonable reader, given that the entire article was intended to expose corruption and related mismanagement the CDF kitty by parliamentarians and the laxity and carelessness of those vested with the responsibility of curbing the vice. Clearly, the plaintiff was exposed as one of the culprits who ought to have been dealt with. The words that “*he converted his premises into CDF offices*” could not have carried any positive meaning when they were qualified with the words “*thereby benefiting irregularly from the fund*”. There can be no good interpretation of the same as submitted by the defendants.

I accept the plaintiff’s submission that malice is proved by the defendants’ attitude. I find therefore that in the presence of malice, the defendants’ defence of fair comment is dislodged since fair comment requires that what is printed is fair and accurate. The defendants did not publish a report of the proceedings but the contents of a report which contained allegations against the plaintiff which, in my considered view, they ought to have clarified to ascertain the truth. Under Section 7(2) of the Defamation Act, which the defendants rely on, it is clear that qualified privilege which the defendants also cite as a defence, calls for remedial action when a report proves to be inaccurate and untrue. By standing by their story the defendants clearly show that they did not care whether the report was true or false and they ought to be presumed to have either known or to have reason to believe that the same was probably not true. The defence of qualified privilege is therefore not available to them.

In light of the above, I find that the plaintiff has proved his case against the defendants on the balance of probabilities. The consolidated issues No.s 1 to 3 are answered in the affirmative. Issue number 4 is also answered in the affirmative and I find that the plaintiff is entitled to both the general and punitive damages as stated in his submissions based on the following considerations.

1. *An award in damages must compensate a plaintiff for damages to his reputation, vindicate his good name and take account of his distress, hurt and humiliation which the publication has caused. (JOHN –VS- M.G.N. LTD. [1996]2 All ER 35).*

2. *The defendant’s reputation both in his personal life and in his career as a parliamentarian or otherwise was greatly tarnished by the publication.*

3. *A position in the Kenyan parliament is one that is highly remunerating.*

4. The defendants acted recklessly in publishing the article without investigating to verify the truth or accuracy of what they published concerning the plaintiff.

5. The defendants did not bother to publish an apology even after being asked to do so and have not offered to do so even after their story has been proved untrue by evidence tendered thereafter.

I therefore allow the plaintiff's suit and enter judgment against the defendant in the sum of Kshs.6 million with interest at court rates from the date of the judgment until payment in full. The plaintiff shall have costs of the suit with interest at court rates as prayed.

The delay in the delivery of this judgment which was due to circumstances explained to the parties is greatly regretted. Their patience as well as that of the respective counsel is appreciated.

Dated, signed and delivered at Nakuru this 18th day of September, 2009.

M. G. MUGO

JUDGE