



HON. JAKOYO MIDIWO PLAINTIFF

VERSUS

NATION MEDIA GROUP LIMITED DEFENDANT

JUDGMENT

The Plaintiff sued the Defendant as a result of a story aired by the Defendant during its 7. p. m. and 9.p.m evening news on its television network on the 13th of February, 2003. The words uttered were accompanied by images the Plaintiff considered defamatory. In the plaint dated 16th of April, 2004 the Plaintiff stated that the Defendant caused to be aired, published or broadcast the following words:-

“..... Gem Member of Parliament *Jakoyo Midiwo* in a bar brawl with patrons. Valentines Day started on a rather disturbing note for Gem member of Parliament *Jakoyo Midiwo*. He was arrested along with 2 of his body guards last night and their guns confiscated, they were later set free ... trouble started at 10.00p.m. when the legislator entered the bar in the company of the guard, his driver and a lady when immediately upon being spotted by a group of drunk revelers shouts of Koinange street, K street rent the air as the Legislator settled down for a drink..”

The Plaintiff contends in his plaint that the above quoted words in their natural and ordinary meaning were meant to be understood to be mean:-

- (a) That he had in his company a woman
- (b) The woman was not his wife
- (c) The woman must have been a prostitute
- (d) The drunk revelers must have known the woman's identity
- (e) The drunk revelers started shouting Koinange Street, K. Street because the Plaintiff was in the company of a prostitute
- (f) He had planned to spend valentine day with the said woman and not his wife.
- (g) His clandestine plans were disturbed by the people who identified the woman he was with not to be his wife.
- (h) He is shameless enough to appear even in public with women of questionable characters such as prostitutes.
- (i) He is a philanderer who engages in questionable nocturnal activities.
- (j) He is guilty of adultery as he is a married man

- (k) He is guilty of professional misconduct in which case he is unfit to hold the public position he holds as member of Parliament in the Society.**
- (l) He is guilty of loose morals as to engage in solicitation of sex from prostitutes**
- (m) He is guilty of aiding and abetting the Commission of Criminal Offences punishable under the penal code by imprisonment for which he should be punished.**
- (n) He is not fit and proper person to be elected as a member of parliament.**
- (o) He is not a fit and proper person to continue to serve as a member of parliament**
- (p) He is an immense contributor to the promotion of sex trade**
- (q) He engages in violence when people question his moral turpitude.**
- (r) He is not a role model for all the people at National and Constituency level.**

The Plaintiff told the court that he is married with 2 children. He is an accountant by profession, and a computer system Engineer. He is a Member of Parliament for Gem Constituency and a Coalition Chief Whip. His duties include marshalling and mobilizing members of Parliament to vote on important motions in the house. He is also a member of the International Body of members of Parliament against Corruption.

In his evidence the Plaintiff stated that there was no brawl as alleged nor was he in the company of any woman. He gave an account of the 13th of February, 2004 as follows:-

That he had driven from Nairobi arriving in Kisumu at night at around 10. p. m. and in the company of 6 other men, he went to Mamba Hotel for a meal. The manager **Mr. Charles Billy Oduor P.W.2** ushered them to a private room in the Restaurant. In the said room, they found other people already seated. While in the room a person approached him requesting him to join them (members of his constituency) he decline the request as he was already with company. From there three people who appeared drunk started talking aloud questioning what typed of an MP he was, as he did not buy them alcohol, they asked him to go back to Koinange Street. The said persons continued shouting which irritated the other patrons. The Hotel security and the Plaintiff's body guards removed the said people from the hotel. The Plaintiff left shortly there after having been in the said hotel for barely 45 minute. From the hotel he went to report the matter to the Central Police Station.

The Plaintiff contended further that the version aired by the Defendant was reckless and deliberate. He found the same offensive as people listening to the words perceived that he was in the company of a prostitute, that he is a discredited person and not capable of leading.

The Plaintiff called as a witness PW2 **Mr. Charles Billy Oduor** a Manager at Mamba Hotel. The witness told the court that he had worked at the hotel for 2 years as an assistant manager, and had known the Plaintiff as a patron for sometime. He confirmed that the Plaintiff was at the hotel on the 13th of February, 2003 in the company of about 6 -7 men. He stated further that there was noise, exchange of words and shouts of Koinange, and , as a result he alerted the hotel security who tried to stop those shouting and on failing they forced the drunkards out of the hotel. He disputed the story that the Defendant aired.

The Defendant filed a statement of defence on the 25th of May, 2004 whereupon it admitted publication of the words and images referred to in the plaint. The Defendant however denied that the words and images complained of bore any of the defamatory meaning attributed to them by the Plaintiff. The Defendant further stated that in so far as the words consisted of allegation of facts, they were true in substance, and consists of expression of opinion and fair comment.

Apart from filing its statement of defence the Defendant did not call evidence. The version of the incident of the 13th February, 2003 available to the court is that of the Plaintiff and his witness. The evidence of the Plaintiff therefore remains uncontroverted.

S.107 & 108 of the Evidence Act is clear that he who asserts or pleads must support the same by way of evidence.

In **EDWARD MARIGA vs. NATHANIEL DAVID SCHULTER & ANOTHER C.A. Case No. 23 of 1997** the Court of Appeal had this to say regarding pleadings:-

“The Respondents did not give evidence and so the only explanation as to how the accident happened was the version put forward by the appellant and his brother ...”

“...The allegation in the defence is not evidence and remains so forever.”

Halibury Laws of England 4th Edition volume 28, Butterworths, London 1997 paragraph 42 defines defamation as:-

“Generally speaking, a statement is defamatory of a person of whom it is published if it tends to lower him in the estimation of high thinking members of society general or it expenses him to public hatred, contempt, or ridicule or if it causes him to be shunned or avoided.”

“A person’s reputation is not confined to his general character and standing but extends to his trades, business or profession”

Guided by the above authority, I will not hesitate to state that the only evidence before me is what the Plaintiff and his witness placed before the court i.e. the Defendant aired a defamatory statement to hurt and ridicule the Plaintiff in the eyes of right thinking members of the society. In the absence of evidence from the Defendant, and based on the Plaintiff’s evidence and for the reasons given above I find that the words aired by the Defendant were defamatory and I shall accordingly proceed to assess damages.

The Parties filed lengthy submissions accompanied by several authorities. Both counsels filed their submissions on the 25th of May, 2009.

The Plaintiff’s counsel in his submission asked the court to find that the Defendant defamed the Plaintiff, that the sole purpose of airing the words complained of was to hurt the Plaintiff, his family and by extension the people he represented in Parliament, that due to the Defendant’s action the Plaintiff’s character, and reputation was destroyed and that the Plaintiff was exposed to hatred, contempt and ridicule. The counsel also urged the court to award aggravated damages.

In quantifying damages the Plaintiff’s counsel relied on several authorities as follows:-

(1) *Biwott vs. Mbuguss & Another (2002) I KLR 321* where the court awarded the Plaintiff Kshs.10,000,000/=.

(2) *Macharia vs. Mwangi & Another (2001) 1 KLR 532* where the Plaintiff was awarded Kshs.8,000,000/=.

(3) *Hon. Christopher M. Obure vs. Tom Oscar Almaka & 3 Others NRB HCCC No.950 of 2003* where the Plaintiff was awarded Kshs.17,00,000/=.

(4) *Johnson Evan Gicheru vs. Andrew Morton C.A No. 314 of 2000* where the Court of Appeal enhanced an awarded by the High Court to Kshs.6,000,000/=.

In its submissions the Defendant urged the court to find that the Plaintiff has not pleaded innuendo as

envisaged by Order VI Rule 6A of the Civil Procedure Rules and therefore the court should not attach any other meaning to the words other than their natural and ordinary meaning. The defence also submitted that there was a brawl involving the Plaintiff and other patrons at the hotel, and urged the court to find that the words complained of did not bear and were not capable of bearing the meaning attributed to them by the Plaintiff.

On the issue of quantum the Defendant submitted that in a defamation suit a Plaintiff is only entitled to general compensatory damages, and that there is no precise mathematical formula to arrive at the same. The defence relied on the following:-

(a) **Hon Jakayo Midiwo vs. Kenya Times Media Trust Ltd HCCC No. 380 of 2004.** Where the Plaintiff therein who is the current Plaintiff was awarded **Kshs.3, 000,000/=**.

(b) **Muriuki Karue Muriuki vs. The Standard Ltd. HCCC No. 28 of 2003 (NKU),** where the Plaintiff was awarded normal damages of **Kshs.100/=**.

On aggravated damages the Defendant submitted that no malice has been proved and as such the Plaintiff ought not to be awarded the same.

I have analyzed the authorities cited by both counsels. The Plaintiff's counsel has cited High Court authorities that are persuasive, save the case of **Johnson Evan Gicheru vs. Andrew Morton** (Supra). The Defendant's counsel also cited High Court authorities and are equally persuasive. I am bound and guided by the Court of Appeal of **Johnson Evan Gicheru vs. Andrew Morton** (Supra). In the said case the Court of Appeal considered the case of **JONES vs. POLLARD (1997) EMLR 233, 234** where a checklist of compensable factors were enumerated as follows:-

- “1. The Objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published and any repetition.**
- 2. The subjective effect on the Plaintiff's feelings not only from prominence itself but from the Defendant's conduct thereafter both up to and including the trial itself.**
- 3. Matters tending to mitigate damages, such as the publication of an apology.**
- 4. Matters tending to reduce damages.**
- 5. Vindication of Plaintiff's reputation past and present.**

Cognizant of the fact that money cannot adequately compensate the injury, and as stated in **Uren v. John Fair fax & Sons Pty Ltd. 117, CL.R. 115, 150** compensation ought to be a vindication of the plaintiff to the public and a consolation to him for a wrong done. It ought to be a solatium rather than a monetary recompense for harm measurable in money. Borrowing from the plaintiff's counsel's submission I will quote Shakespeare in Othello, Act 111 scene 3

“Who steals my purse steals trash;

Tis something, noting;

Twass was mine, 'tis his, and has been slave to thousands;

Robs me of that which not enriches him, good name and makes me poor indeed.”

Guided by the Checklist of compensable factor quoted above and sentiments of the Court of Appeal in the Gicheru Case (Supra) over the huge awards in the cases cited by counsel, having taken into account the status of the Plaintiff and the circumstances surrounding the case including the element of aggravation I am of the view that a total sum of **Kshs. 5,000,000/=** will be fair and reasonable compensation.

Dated and delivered at Nairobi this 23rd of October, 2009.

ALI –ARONI

JUDGE