



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 228 of 2005

JULIUS NJIRE MURAYA.....1ST PLAINTIFF

DAVID KAMAU WACHIRA

T/A MURAYA & WACHIRA ADVOCATES.....2ND PLAINTIFF

VERSUS

ROYAL MEDIA SERVICES LIMITED.....1ST DEFENDANT

BENSON AMUKOWA.....2ND DEFENDANT

JUDGMENT

By a suit filed by the plaintiffs against the defendants, the plaintiffs sought for the following orders:

- a) *A declaration that the said publication was false and malicious and hence defamatory of the plaintiffs.*
- b) *Punitive and aggravated damages.*
- c) *General damages for defamation occasioned by each of the broadcasts severally.*
- d) *An order that the defendant do publish unqualified apology within the same programme in the words acceptable to the plaintiffs.*
- e) *Costs.*
- f) *Interest at court rates till payment in full.*
- g) *Any other or further relief that this honourable court may deem fit and just to grant.”*

The defendants denied liability, by their written statement of defence; they pleaded justification for the publication complained about by the plaintiffs. The plaintiffs who are advocates of the High Court of Kenya practicing under the name and style of Muraya & Wachira Advocates gave evidence in support of their claim. They also relied on the evidence of three other witnesses.

According to the plaintiffs, they used to practice law in Nakuru and Nyahururu. In 1997 they decided to relocate their offices to Mombasa where they opened an office under the same firm name and style of

Wachira Muraya. They left the Nakuru office under the care of Mr. Joseph Nyoike Mutonyi also an advocate of the High Court of Kenya.

While practicing as such, the plaintiffs were instructed by a client by the name Benson Amukowa to pursue a personal injury claim in a Civil Matter. They filed a suit being Nakuru CMCC No. 2895 of 1998. However they relocated before the suit was finalised. Mr. Mutonyi testified that he prosecuted the matter and judgment was entered in favour of the said Benson Amukowa on 6th June 2000 wherein he was awarded damages of Kshs 250,000/=. However the plaintiffs' firm was unable to execute the decree and the sum of Kshs 250,000/- was never paid to the Law Firm.

Benson Amukowa lodged a complaint with the Law Society and with the Advocates Complaints Commission. The complaints by Benson Amukowa were forwarded to the plaintiffs' law firm. They wrote a detailed response denying that the sum of Kshs 250,000/= was paid to them or that they received any cheques in settlement of the said claim from Messrs Stallion Insurance Company. Stallion Insurance Company was by then, under official liquidation. The plaintiffs wrote to the statutory manager Stallion Insurance Company requesting them to confirm whether the seven cheques as per the photocopies were cashed. The interim liquidator of Stallion Insurance Limited in turn wrote to their bank Messrs Kenya Commercial Bank from whose account the said cheques were purportedly issued from, to confirm whether such cheques were ever cleared.

By a letter dated 3rd December 2005, Messrs Kenya Commercial Bank replied that the said cheques were never reflected in the account from which the cheques were allegedly issued. David Langat who worked with the Kenya Commercial Bank, in-charge of current accounts testified that he went through the statements of Stallion Insurance and the cheques allegedly issued to the plaintiffs were never paid out of the Stallion Insurance Company account.

The plaintiffs further testified that on 10th June 2005, at around 6.45 a.m. the 1st defendant through their programme entitled 'Wembe wa Citizen' which was aired through the defendant's radio station namely Citizen Radio falsely and maliciously broadcast or caused to be broadcast of and concerning the plaintiffs and their profession as lawyers the following words in Kiswahili:-

“Wakili Muraya Wachira wa Nakuru an Mombasa unaulizwa pesa ya Benson Amukowa Shilingi Elfu Mia Mbili na hamsini zilienda wapi? Haya basi, huenda wakili Muraya umemshau Benson. Wacha tukukumbushe. Benson Amukowa ni mteja wako ambaye aliamini sana kuwa ungemsaidia ili aweze kulipwa fidia baada ya kuhusika katika ajali. Akachukua mkopo na kulipa bill ya hospitali baada yako wewe wakili Muraya Wachira, kumhakikishia kuwa ungemlipa pesa zake kwa sababu ulikuwa ushalipwa. Walakini, tunajulishwa ya kwamba badala yako wakili Muraya Wachira kumlipa Benson pesa zake, wewe ulipululiza hadi Mombasa ambako unadaiwa ya kwamba ulifungua ofisi katika Bima Towers. Olofa ya Nane, Digo Road, Mombasa na kumwacha Benson pamoja na wateja wako wengine kwa masaa. Kwa sasa hatuna mengi ya kukueleza wakili Muraya Wachira ila kwanza kuwatahadhalisha watu wa pwani dhidi ya kujipata mashakani kama alivyojipata Benson na wengine mjini Nakuru.”

The direct English translation of the above words is as follows:-

“Advocate Muraya Wachira of Nakuru and Mombasa you are being asked money belonging to Benson Amukowa Shillings Two Hundred and Fifty Thousand where is it? Now, Advocate Muraya may have forgotten Benson. Let us remind him. Benson Amukowa is your client who so much believed you would assist him claim damages after being involved in an accident. He took a loan and paid his hospital bill after you, Advocate Muraya Wachira, gave him an assurance that you will pay him his money which you had already received. However, we are informed that instead of you, Advocate Muraya Wachira paying Benson his money, you sneaked to Mombasa where it is alleged that you opened an office at Bima Towers, 8th floor, Digo road, Mombasa leaving Benson and your other clients in suspense. For now we do not have much to tell you, Advocate Muraya Wachira but first to warn people at the coast rest they find themselves in similar trouble as Benson and others in Nakuru Town.”

The same broadcast was repeated on 10th and 11th June 2005. It was also aired in Kikuyu vernacular on 28th June 2005, through the defendants programme titled 'Ndurika'.

The plaintiffs contended that the words contained in the said broadcast, in their natural and ordinary meaning were meant and understood to mean that:

- a) The plaintiffs are advocates of low ethical and moral integrity.
- b) The plaintiffs as advocates are thieves.
- c) The plaintiffs are advocates of immoral character.
- d) The plaintiffs as advocates are unprofessional and unethical and should not be trusted as advocates with clients' money.
- e) That the plaintiffs as advocates should not be trusted by potential clients in Mombasa region as they would risk losing their monies to the plaintiffs.

The plaintiffs testified that after the second broadcast they called the defendants offices and they were directed to go to the Mombasa office. Julius Njiri Muraya PW1 testified that he visited the offices of the defendants in Mombasa and left them with copies of documents to show that the money was never paid and that the broadcast was malicious and injurious to their firm of advocates. The defendants however went on to air another programme and it was also repeated in vernacular. The plaintiffs testified that their character and reputation as lawyers was injured by the broadcast.

PW1 received calls from his mother-in-law and brother-in-law who expressed shock after listening to the programme. The plaintiff's professional colleagues also started teasing them about the radio broadcast. The plaintiffs said that they were humiliated, traumatised and embarrassed. They had to explain to their spouses and also face members of the public who when walking around the corridors where their offices are situated would comment that '*these are the lawyers who steal clients money*'.

Joseph Mwangi Kariuki testified that he knew the plaintiffs from 1987. He listened to the radio programme on 28th June 2005 which was broadcast through the Inoro Radio in vernacular. He understood the words broadcast about the plaintiffs to mean that the plaintiffs had embezzled client's money. That is the reason they fled and closed their practice in Nakuru and moved to Mombasa. He understood that the plaintiffs had refused to pay Benson Amukowa Kshs 250,000/= being compensation as a result of personal injuries. He had trusted the plaintiffs as upright lawyers with whom he had dealings for many years, after the broadcast his trust was shaken.

Benson Omukowa gave evidence on behalf of the defendants. He testified that he instructed the firm of the plaintiffs in 1994 to pursue a claim of personal injuries arising from a road traffic accident. Eventually the plaintiffs filed a suit in 1998 and judgment was delivered in his favour on 6th June 2000 where he was awarded Kshs 250,000/= as damages. Mr. Mutonyi advised him to wait for two weeks. After two weeks Mr. Mutonyi advised him to look for the subject vehicle. After that he advised him that it is Mr. Wachira who was responsible for his case. DW1 testified that he made very many visits to the offices of Mr. Mutonyi and after failing to get assistance he reported the matter to the police who promised to carry out investigations but nothing was forthcoming.

Somebody assisted him to get photocopies of the cheques which he alleged were paid to the plaintiffs. He wrote complaints to the Law Society of Kenya. After failing to get any help he went to radio citizen and gave them the information. Reuben Robi works with the 1st defendant as the correspondent in Rift Valley. He testified that he received the information from Benson Amukowa. After getting the complaint he called the offices of the plaintiffs but the secretary promised to get back to him. He also visited the offices of Messrs Stallion Insurance Company in a bid to verify the information. They promised to get back to him. Since nobody got back to him and verified the information from the

documents he sent the documents to Nairobi for broadcast.

During cross-examination, Reuben said that he could not recall the telephone number he used to call the offices of the plaintiffs. He also said he could not remember the building where the offices of Stallion Insurance Company were situated nor did he find out who was the receiver manager. He confirmed that the story he sent to Nairobi was a true reflection of the story he compiled.

Both parties filed written submissions. Mr. Gacharu for the defendant submitted that the court should be guided by the decisions in the case of Reynolds vs. Times Newspapers Limited discussed in the text book by Gatley on Libel and Slander, 13th Edition page 380. Counsel for the defendant also submitted that under Section 17 of Defamation Act a defence of justification should stand for reasons that the statement which was aired was true and there is no way truth could have injured the reputation of the plaintiffs. The defendants contend that the evidence given by all the parties confirmed that the plaintiffs acted for the 2nd defendant who was awarded Kshs 250,000/=. The plaintiffs left the offices in Nakuru and moved to Mombasa and therefore the defence of justification should hold.

Further counsel submitted that under Section 79 of the Constitution of Kenya freedom of expression is guaranteed and the Constitution being the highest law of the land any other law that is inconsistent is null and void to extent of the inconsistency. He made reference to the case of New York Times vs. Sullivan 376 US 254 (1964) which upheld the first amendment of the US Constitution which is equivalent to Section 79 of the Constitution. The public has a right to know and to have information that disturbs conscience concerning public figures in positions of authority.

On the issue of damages, counsel submitted that the court should be guided by the recent trends where the High Court is moving away from awarding hefty awards in defamation suits. In the case of Chirau Ali Makwere vs. Royal Media Services HCCC No. 57 of 2004 the plaintiff was awarded Kshs 3 million. Counsel urged the court to balance the two competing rights *i.e.* the right to impact information which is guaranteed under the Constitution and the injury suffered by the plaintiffs if any.

As regards aggravated damages, counsel submitted that since the suit was filed, the defendants have not done anything to aggravate the situation. He submitted that although a demand letter was written to the defendants there was no evidence adduced to show that the letter was received. He submitted that if the plaintiff should be awarded any damages the same should be nominal.

Counsel for the plaintiffs countered the above submissions. He urged the court to find that the plaintiffs were able to prove that the broadcast by the defendants was defamatory of them. They suffered injuries and they should be compensated. Counsel invited the court to find that under paragraph 4 and 5 of the defence the defendants did not deny that they broadcasted the offending programme they only pleaded justification. The defence of justification cannot hold because there was no truth in the matter. It was established that the cheques were never received by the plaintiffs. They were never cashed and they were never paid from the account of Stallion Insurance Company. This information was presented to the defendants but they went on with the broadcast. Counsel urged the court to award Kshs 5.5 million for each of the plaintiff on each of the broadcast thus each plaintiff should be awarded 30 million. He relied on several decisions by the High Court among them Daniel Musinga t/a Musinga & Company Advocates Mombasa HCCC No. 102 of 2002 where the plaintiffs were awarded Kshs 10 million in a similar suit for defamation. The case of Biwott vs. Mbuggus & Anor. reported in [2002] KLR 321, Machira vs. Mwangi & Another [2001] KLR 532.

The issue for determination is whether the words broadcast about the plaintiffs were defamatory of the plaintiffs. Whether those words referred to the plaintiffs and whether the publication was done maliciously. Those issues will be considered alongside the defence of justification. Whether the defendants were within their duty of impacting public information and whether the broadcast was carried out in the public interest to inform the members of public of corrupt and dishonest people.

Drawing from the plaintiffs evidence, it is clear that they acted for Benson Amukowa and judgment was entered in his favour for Kshs 250,000/=. It is also clear that that money was never paid to the plaintiffs.

Benson Amukowa reported the plaintiffs to the law society both at Nakuru, Nairobi and at the Advocates Complaints Commission. He also reported the matter to the CID, he testified when no action was taken he reported the matter to the 1st defendant. Going by the defendants evidence, little or no efforts were made to establish whether the sum of Kshs 250,000/= was paid to the plaintiffs before the story was broadcast. If the 1st defendants were diligent in their duties, they should have properly interviewed the complainant, and taken time to verify the information before airing the programme that had far reaching implications on the professional careers of the plaintiffs.

The plaintiffs testified before this court and detailed how the broadcast caused them humiliation, embarrassment and anxiety. They had to explain too many callers, among them relatives who were worried about their reputation and integrity as lawyers. This court is of the view that it is more probable than not, that the plaintiffs sought to give information exonerating themselves from blame to the defendants at their offices in Mombasa. On the 11th June 2005, a demand letter by the plaintiff's advocates was also sent to the defendants. This letter was produced as evidence and there was no evidence by the defence in rebuttal. If the letter was not received by the defendants, they should have adduced evidence in that regard.

This court is satisfied that the plaintiffs proved that a demand letter was sent denying the truth of the broadcast and demanding the defendants to publish an apology in the same way they had broadcast the offending programme. The defendants went on to broadcast another programme in Kikuyu vernacular in the same words on 28th June, 2005. It is clear that the defendants either deliberately or recklessly went on to broadcast a programme that defamed the plaintiffs. The publication exposed the plaintiffs as dishonest lawyers who had embezzled their client's money from a personal injury claim. The plaintiffs ran away from their practice in Nakuru and were not to be trusted. Worse still, the plaintiffs were portrayed as lacking in integrity and to have committed a professional misconduct which is also a criminal offence.

I have read the words broadcast in the said programme about the plaintiffs. The tone of the publication is not that of an honest critic and to use strong words to warn the members of the public of the plaintiffs without first establishing the truth of the matter was malicious and reckless of the defendants. Due to these deliberate or reckless acts by the defendants, malice can be inferred. I am satisfied that the words published by the defendants attacked the plaintiff's honour of office as advocates of the High Court. The broadcast is defamatory of the plaintiff and despite a request for an apology none was offered. Several cases have been decided to guide the courts when deciding the range of damages to award in cases of defamation. In the case of Johnson Evan Gicheru vs. Andrew Morton & another Civil Appeal No. 319 of 2000 the Court of Appeal quoted with approval the decision in the case of Broom vs. Cassel & Co. [1972] AC 1027 and held as follows:

“The house of Lords stated that in actions of defamation and in any other suit where damages for loss of reputation are involved, the principle of restitution in integrum has necessarily and even higher subjective element. Such actions involve money award which may put the plaintiff a purely financially sense in a much stronger position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, but, in case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charges”

As Windeyer J, said in Uren V John Fairfax & Sons PTY Ltd, 117 C.L.R 115, 150

“It seems to me that, properly speaking, a man defamed does not get compensated for his damaged reputation that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways – as a vindication of the plaintiff to the public and as consolation to him for a wrong done. Compensation is a solatium rather than a monetary recompense for harm measurable in money.”

Further in the case of Benet and others Vs Canadian Newspapers Limited [1997] EWCA CIV 815

“Compensatory damages in a case in which they are at large, may include several different kinds of

compensation to the injured plaintiff. They may include not only actual pecuniary loss and anticipated pecuniary loss or social disadvantages which may result, or may thought likely to result, from the wrong which has been done. They may also include the natural grief and distress which he may have felt at having been spoken of in defamatory terms ...”

Bearing the above principles in mind, and also the evidence by the plaintiffs, that they commenced their law firm in 1992. The plaintiffs were acting for both individual and corporate clients. The 1st plaintiff was also a member of the Lawyers Christian Association Mombasa Branch and a leader of the youth group in the church. Both plaintiffs are married with children and they testified that the publication was embarrassing to them in their personal and professional capacities. The broadcast was also widely circulated in Kiswahili language. The court has also to look at the whole conduct of the defendants before and after the publication. The sum to be awarded is meant to compensate the plaintiffs for the injuries to their reputation and to vindicate their names and station in life.

I have also taken into account the general trends in the range of the awards by the High Court which are persuasive. Taking all the circumstances into account including the current economic situation prevailing in this country, I award Kshs 4 million to the plaintiffs as general damages to vindicate the loss of their reputation and to compensate them of the injury to their feelings. This suit was instituted by the plaintiffs jointly as they were partners in the same law firm. This court is not persuaded that damages should be awarded to each of the plaintiff separately.

Another aspect to consider is that the defendants did not offer an apology even after facts were presented to them and their flimsy defence of justification merely aggravated the situation. They deserve to be punished for this wrong doing. I award a sum of Kshs 1 million as aggravated damages.

Judgment is entered for the plaintiffs in the following terms:

- a) General damages for defamation occasioned by the broadcast Kshs 4 million,
- b) Punitive and aggravated damages 1 million,
- c) Costs of this suit and interest at court rates.

Judgment read and signed on 1st day of August 2008

M. KOOME

JUDGE