



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURT)
CIVIL CASE 58 OF 2005

MOHAMMED SWABIR.....PLAINTIFF

VERSUS

EAST AFRICAN MAGAZINES LTD.....1ST DEFENDANT

JULIUS MAINA.....2ND DEFENDANT

J U D G M E N T

1. The Plaintiff herein, Mohammed Swabir commenced his claim against the Defendants by way of plaint which was filed in court on 20/01/2005. The 1st Defendant is sued in its capacity as the publisher and distributor of the **Drum East Africa** Magazines (the Drum) while the 2nd Defendant is sued in his capacity as the Editor of the said magazine. The Plaintiff alleged that at all times material to this suit he was a music artist and performer using the stage name "**Redsan**" for his production and performance. He also averred that on page 7 of the September 2004 issue of the Drum, the Defendants falsely and maliciously printed and published of and concerning the Plaintiff the following words that is to say

"Going up, Going down. The caption "Going Down" had the following words beneath it –

- (i) *Redsan;*
- (ii) *Bling Bling;*
- (iii) *Living in an extension of an SQ (just because it is gisty)*
- (iv) *Getting drunk;*
- (v) *Small expensive phones".*

2. The Plaintiff said that the said words were understood to refer to the Plaintiff by using the Plaintiff's stage name "**Redsan**" beneath the caption "**Going Down**", and that in their natural and ordinary meaning the words meant and were understood to mean:-

- (a) *That the Plaintiff is going down as an artist*
- (b) *That the Plaintiff lives in an extension or an SQ;*

(c) ***That the Plaintiff drinks alcohol***

3. The Plaintiff pleaded further and in the alternative that the said words meant and were understood to mean:-

(i) ***That the Plaintiff's music career is on the decline***

(ii) ***That the Plaintiff is "past it", burnt out and no longer popular;***

(iii) ***That the Plaintiff is alcoholic.***

4. The Plaintiff averred that the statements published of and concerning him were grossly inaccurate libelous and malicious for reasons that –

(i) ***The Plaintiff is not on the decline past it burnt it out or no longer popular;***

(ii) ***The Plaintiff does not reside in an SQ;***

(iii) ***The Plaintiff does not drink alcoholic beverages.***

The Plaintiff further averred that the said words were calculated to disparage the Plaintiff both professionally and socially and that as a result thereof the Plaintiff has been greatly injured in his credit and reputation and in the way of his profession as a music artist and has been brought into hatred, ridicule and contempt.

5. The Plaintiff has also averred that the article complained of was published in a sensational manner; that the Defendants went ahead with the publication when they knew that the words were libelous of the Plaintiff and that they did so in a reckless manner without any regard as whether or not the words were libelous and that they did so with the prospect of making material advantage therefrom. The Plaintiff claims that since the Defendants refused, failed and or neglected to publish an apology and/or retraction of the offensive words, he prays for judgment against the Defendants both jointly and severally for

(i) ***A printed retraction and public apology in the Drum East Africa Magazine in wording satisfactory to the Plaintiff;***

(ii) ***General damages;***

(iii) ***Exemplary damages;***

(iv) ***Costs of the suit***

(v) ***Any other or further relief that this Honourable Court may deem fit to grant.***

6. The Defendants filed their Statement of Defence on 18/02/2005 and while admitting publication of the words complained of they deny that the words were published either falsely or maliciously. The Defendants also deny that the words complained of can in their natural meaning be understood to mean any of the meanings alluded to by the Plaintiff and aver that the words "***going down***" in the article complained of refers to "***not being popular***" or no longer in vogue and that none of the other items listed thereunder referred to Redsan. The Defendants also aver that the publication, in so far as it consisted of statements of fact, was true in substance and in fact and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest without malice. The Defendants pleaded that it was a fact that Redsan is not as popular a musician as he used to be, and that in the circumstances, it was not true, as alleged by the Plaintiff, that the Plaintiff had suffered any loss or damage nor that the Plaintiff had suffered in his credit and reputation nor that he had been injured in his profession and brought into hatred, ridicule and contempt as alleged.

7. The Plaintiff testified and told the court that he is a resident of Nairobi South B, aged 26 years, single and has been an artist for 14 years and a professional music artist for 10 years. He said that he was the most respected musician in the whole of the East African region and that it is him who introduced the Reggea Dance Hall and he was the most celebrated Reggea Dance Hall in Kenya for which he has received accolades. He also said that because of that growth he had performed with the biggest Dance Halls in the world. The Plaintiff testified further that in view of his achievements, the article complained of defamed him by depicting him as one whose music career was on the decline; as one who lived in an SQ (Servants' Quarters); that he drunk alcohol and that all that he could boast of were small expenses mobile telephones. He told the court that he has never tasted alcohol in all his life; mainly, because of his religious beliefs and the positive influence of his family. The Plaintiff also stated that the Drum is a widely read magazine in East Africa and beyond, with circulation in Kenya, Tanzania, Uganda and Rwanda. The Plaintiff also testified that apart from the article complained of the Defendant published other subsequent articles that were defamatory of him. This piece of evidence was however disallowed by the court since it was not pleaded in the plaint.

8. It was also the Plaintiff's case that after the publication of the article complained of, he had to out short his tour of the USA in addition to a significant drop in his ratings in East Africa though his international ratings did not drop. He also said that contracts for his concerts in East Africa reduced. The Plaintiff also said that he suffered emotional stress as a result of the publication and particularly so because of the allegation that he consumed alcohol when his Moslem faith forbids him to do such a thing. He said that he was the son of an Imam and that Moslems who drink are seen in a negative light by others. With specific reference to the offending article he said that his competitor by the name "**NAMELESS**" and whose photograph appears on the same page was said to be going up and that the combined inference he could draw from this caption was that "**NAMELESS**" was being promoted by the publisher while the Plaintiff was being brought down.

The Plaintiff also stated that he was affected financially because his albums did not sell as much after the defamatory publication.

9. During cross examination the Plaintiff stated that by all standards, he was a successful artist, having released three albums-

- ***Seasons of the San in 2003***
- ***Redsan in 2004***
- ***The Pioneer in 2006***

and that for all the three, he got awards, especially from the second album and that the third album was the highest selling of all the three. The Plaintiff explained that when an artist's album sells more, it means that the artiste is rated highly and vice versa and also that the high sales may be due to high promotional efforts. He also said that sales can drop when the public has lost faith in the producer and when the public has negative knowledge about the producer.

10. At the close of the Plaintiff's case, the Defendant opted not to give any oral evidence but made detailed written submissions. I shall first consider the written submission of the Plaintiff filed in court on 7/07/2008. The Plaintiff submitted through his advocates, M/s **ARIMI KIMATHI & COMPANY** that when placed side by side with the artist known as "**NAMELESS**", the Plaintiff was portrayed to be on the decline while "**NAMELESS**" was on the upward trend and that since the Defendant did not call any oral evidence to rebut the Plaintiff's evidence, the court should find that the Plaintiff had proved that the publication was malicious and that the same was published in bad faith. The Plaintiff relied on three authorities:-

- (i) ***Nairobi Civil Appeal No. 13 of 1970 – East African Standard –vs- Gitau [1970] EA 678***
- (ii) ***Nairobi HCCC No. 1099 of 2004 Richard Otieno Kwach –vs- The Standard Limited &***

Another (unreported)

(iii) Halsbury Laws of England, Vol 24.

11. In the Gitau case, the appellant published in a newspaper the photograph of a motor car which had been in an accident and which was unidentifiable over an incorrect statement that the driver thereof was nowhere to be seen, no one had reported the accident and no-one had been admitted to hospital. The Respondent sued for damages for libel and produced as witnesses persons who had seen the car and knew it to be his. The Judge found the statement defamatory and awarded damages. The appellant appealed, claiming that the statement was not capable of having a defamatory meaning and was not defamatory and that the damages awarded (Shs.24,000/=) were excessive. It was held, at page 681 of the judgment (SPRY, Ag P) that –

“The test of what is defamatory is whether the words complained of would tend to lower the reputation of the Plaintiff in the opinion of right-thinking persons. I do not think this is a case where the words used should be analysed too closely. I think one should look at the general impression they are likely to create in the minds of reasonable persons. I think such a person might reasonably feel that the caption inferred that the driver of the car had tried to conceal his identity and that there was something sinister about it. I do not think that is the inevitable or only interpretation but I think it is a possible and reasonable one. The fact that the imputation may be vague in character does not, in my opinion, prevent it being defamatory. I would therefore hold that the caption was capable of bearing a defamatory meaning.”

12. In the instant case, the Plaintiff wants this Honourable Court to make a similar inference, that the caption complained of was capable of bearing a defamatory meaning and that it was in fact defamatory of the Plaintiff and to award him damages. I shall return to this issue later. In the **Richard Otieno Kwach** case, (a case with only persuasive authority to me), the Plaintiff was an eminent Judge of the Kenya Court of Appeal who was among 23 judges suspended on 15/10/2003 pending investigations into alleged wrongdoings of corrupt members of the judiciary. The suspension of the 23 judges was reported under a banner headline in the Sunday Standard issue of 19/10/2003 which read –

“Secrets of the Ringera Report”

and the Plaintiff’s picture was published alongside the words complained of and the court (Visram J) held that

“The inclusion of the Plaintiff’s picture together with a caption ----- was to say the least sensational, alongside the various allegations would no doubt instill a belief in the reasonable man reading the paper that the allegations referred to the Plaintiff.”

and quoting from **Gatley on Libel and Slander**, 9th Edn 1988, the judge said that –

“words are defamatory if they involve a reflection upon the personal character or official --- reputation of the Plaintiff.”

In Halsbury’s Laws of England (supra) at page 3 thereof, writing on **Actions of libel and Slander** the authors say –

“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”.

and further at page 9 thereof, on whether or not damage need to be alleged or proved in libel that

“A Plaintiff in an action for libel need not allege or prove that he has suffered damage. If he has been libeled without lawful justification or excuse, the law presumes that the publication of the libel has of

itself a natural tendency to injure the Plaintiff and he is entitled to such general damages as the jury may properly find, though he neither alleges nor proves special damage and in any case to at least nominal damages for the injury to his good name (see Hobbs v Tinling, (1929)2 K.B I, C.A. at p. 17 per SANKEY, LJ)

13. To all the Plaintiff's submissions, the Defendant through the firm of Mohammed Muigai Advocates submitted that, as pleaded in the Statement of Defence, the words complained of did not and could not bear, in their ordinary and natural sense, any of the meanings attributed to them by the Plaintiff; that where such an innuendo is made by the Plaintiff, the court need only look at the statements about **NAMELESS**. Nameless is pictured in a jovial mood singing his heart out. **Nameless** flies to the coast and only drinks moderately. There is no picture of the Plaintiff and thus any reader reading the article would infer that the Plaintiff's picture was not worth including in the Drum. So, as was held in the case of **Charleston v News Group Newspaper Ltd. [1955]2 AC 65; [1955] AII ER 313, HL** (cited to me by the Defendant's Counsel), a reader reading that whole article would reach the conclusion that indeed the Plaintiff was on his way out. In the **Charleston case** (above) it was stated that

“The reasonable reader, including viewers and listeners, is taken to have read the entire publication. It is not permissible to invite a jury to infer that some readers will only have read for example the headline and will have understood that headline to bear a defamatory meaning which it would not have borne if considered in the context of the article as a whole.”

14. In the instant case, the contrast between **Nameless** and the Plaintiff was the placing one above the other and any reader would definitely read both captions and infer that indeed the Plaintiff was going down in his music career. I do not think that it would be a distortion of meaning to give those bullet points the innuendoes that were intended.

15. It is trite law that for any statement to be said to be defamatory of a person, it must tend to lower the reputation of the person about whom it is spoken in the estimation of right thinking members of society. The Defendant contended that merely saying “**Going Down**” does not mean that the Plaintiff was going down in his career on the grounds

- (i) ***That in the music industry, it is normal for the success of an artist to improve or deteriorate***
- (ii) ***That whether an artist is going up or down is a matter of comment and preference and***
- (iii) ***That an artist who makes his work the subject of public interest must accept reasonable public criticism.***

16. Mr. Mogere of **Mohammed Muigai** Advocates submitted that it was therefore normal, and in fact admitted by the Plaintiff, for music artists to go up and down in their career. In the instant case, the Plaintiff stated that not only was his third album a hit but that after the publication of the defamatory article, his sales went down particularly in the East African region. He said that one reason why sales may go down is the negative knowledge about the producer. Although it may be normal for artists to go up and down, the Plaintiff stated that there was no truth whatsoever in the Defendant's allegation that he got drunk, because he does not drink and further that it was not correct to say that the Plaintiff lived in an SQ. On this point of fact, the Defendant did not adduce any evidence to contradict the evidence given by the Plaintiff. I therefore accept the Plaintiff's evidence as true and conclude that the Defendants were reckless and malicious in publishing the article without cross-checking the facts. I do not think that what the Defendants published of and concerning the Plaintiff was honest criticism. In **John Flenning The Law of Torts** at page 585, as long as the criticism does not involve the private character of a person, then such criticism would be welcome for the welfare of the public. In the instant case the publication attacked the character of the Plaintiff when it alleged that getting drunk was one of the reasons for his going down. In my view, that publication amounted to personal defamation of the Plaintiff. The Plaintiff contended that the article cannot be said to be defamatory because no comment has been made on the Plaintiff's character or reputation. On the contrary an allegation that the Plaintiff gets drunk is an impeachment of his character; for one who was in the habit of “**getting drunk**” cannot perform as a music

artist. Mr. Mogere relied on the case of **Martha Karua –vs- The Standard & Another – HCCC No.294 of 2004** and urged the court to find that even if the words complained of by the Plaintiff in this case were false, they are not defamatory. I have stated earlier that those words were not only false, but that they are also defamatory for depicting the Plaintiff as a person who was getting drunk. The Plaintiff testified that his faith forbids him to drink and that he does not infact drink. Such an allegation was injurious to the Plaintiff and would definitely affect his career and bring the Plaintiff into ridicule and odium in the minds of right thinking members of the society.

17. On the issue of general damages Mr. Mogere urged the court to be guided by the provisions of section 16A of the Defamation Act and to find that even if the words complained were defamatory of the Plaintiff, they were not serious enough to warrant the award of the minimum provided under the said provision. Mr. Mogere proposed a nominal figure of Kshs.50,000 as being sufficient compensation for the injury sustained.

18. The Plaintiff stated that after the publication, he lost out on sales of his albums and that he could not conduct the local concerts he had hitherto been performing. The Plaintiff also stated that as a son of an Iman, he was greatly injured in his character when the publication portrayed him as a man who gets drunk. In the circumstances of this case, and in light of the authorities cited to me, I would award general damages in the sum of Kshs.500,000/=. I do not think that the Plaintiff's case calls for an award of exemplary damages.

19. In the result, I enter judgment for the Plaintiff in the sum of Kshs.500,000/= in general damages, costs of the suit and interest on these sums from the date of this judgment.

It is so ordered.

Dated and delivered at Nairobi this 17th day of October 2008.

R.N. SITATI

JUDGE

Delivered in the presence of:

Mr. Kimathi (present) for the Plaintiff

Mr. Mogere (present) For the Defendant