



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

Civil Suit 17 of 2005

SIMEON NYACHAE PLAINTIFF

VERSUS

LAZARUS RATEMO MUSA 1ST DEFENDANT

KALAMKA LIMITED 2ND DEFENDANT

JUDGMENT

The plaintiff is **Hon. Simeon Nyachae**. He is a member of parliament for Nyaribari Chache and the defacto leader of a political party known as **FORD PEOPLE**. He also contested to capture the coveted position of the president of the Republic of Kenya through Ford People party, during the December 2002, parliamentary and presidential elections. He failed in that venture and he is currently a minister in the Government.

It is also alleged he commands considerable and substantial public and private interest within and beyond the territory of Kenya. He qualifies to be called prominent personality and a leader holding position of public and private responsibility. It is alleged that on or about 27th March 2000 the first defendant falsely and maliciously spoke, wrote, printed and/or caused to be written, printed and published through the 2nd defendant certain defamatory material. The words were:- **Nyachae a land Grabber – Brother. And the 1st defendant particularly stated:-**

- (a) Calling for his prosecution for allegedly acquiring public utility land**
- (b) That there were proof that having grabbed almost all family land, the former Minister went on a rampage and started grabbing public utility land in various parts of the country**
- (c) Our father Musa Nyandusi had tried to stop him from grabbing.**

It is alleged that the words in their natural and ordinary meaning were meant and understood to mean

- (a) That the plaintiff is a manifestly dishonest and corrupt person who engages in irregular and illegal acts for his own personal gain in disregard of the kind**
- (b) That the plaintiff is a land grabber**

(c) That the plaintiff misused his authority while holding a position of public trust to wit the office of cabinet Minister to enrich himself illegally and unjustly, specifically by unlawfully acquiring public utility land.

(d) That the plaintiff is unworthy to hold any public office by virtue of the above purported transgressions.

And in paragraph 8 of the plaint, the plaintiff states:-

“ The aforesaid words which clearly refer to the plaintiff are false, malicious and a clear fabrication and are intended to discredit the plaintiff, embarrass and lower the plaintiff’s dignity in his capacity as a leader and bring him to ridicule, public odium and contempt in the eyes of right thinking members of the society and the plaintiff has been injured in his person, character and reputation and in his office calling profession and occupation. In consequence whereof the plaintiff claims damages”.

The 1st defendant appears to be a frustrated and desperate man whose fortunes have not taken him where he intended. Being the step – brother of the plaintiff who is prominent man, the 1st defendant seems to have a resolve to bring down his run away brother. He seems to have multitude and myriad of problems, which would heavily weigh on any man who does not enjoy the success and prominence of his brother. As a result of his despair and may be because of his financial quagmire, he wants to atleast prick his brother’s character. The brother has not been magnanimous to his pitiable and vexatious brother, who seems to enjoy village politics.

Ofcourse the plaintiff enjoys a national limelight with fabulous finances to boot. The 1st defendant in his defence contends that he was not the source of the information and material published and/or printed by the 2nd defendant. And in paragraph 6 of his defence, he states in part

“ The first defendant shall contend at the hearing hereof that the first defendant and the plaintiff are sons of one father and both are affiliated with different political camps and therefore, the plaintiff has been politically witch-hunting the first defendant for the first defendant’s strong political stand. The plaintiff has filed this case in order to intentionally dislodge, injure, confuse, frustrate, humiliate, disturb, instil stressful feelings in the first defendant with a motive to completely derail him (the first defendant) from his daily operations as a way of rendering him useless, hopeless, sick and bring him to complete halt in doing anything meaningful to assist my (1st defendant’s) family only because I am not supporting his ambitious political manoeuvres. I cannot be cowed down in order to be wooed into political aspirations, which are totally against my (1st defendant’s) conscience”.

The 2nd defendant on its part alleges the words set out were an accurate and fair account of a press conference held at Kisii Town and addressed by the 1st defendant detailing his complainants against the plaintiff who is his step brother. And the words were published as:-

(a) That the words complained of were written by the 2nd defendant under a sense of duty as a daily newspaper of a matter towards the plaintiff and in the honest belief that the statements were true and the matter published was of public concern and the publication of complaints made by a step brother against his prominent brother who is a potential presidential candidate, was for public benefit”.

(b) In the premises, the 2nd defendant had an interest in the subject matter and publication of the said words and/or the 2nd defendant was under a social and/or moral duty to publish the said words”.

It was also alleged by the 2nd defendant that the words did not bear or were capable of bearing any of the meanings attached to it by the plaintiff. And that the words did not injure the person, character, reputation and office, calling, profession and occupation of the plaintiff and that the plaintiff did not therefore suffer as alleged. The 2nd defendant further denied that it printed and published the alleged

words out of spite and malevolence towards the plaintiff. In short that the words were not published to discredit the plaintiff, embarrass and lower his dignity in his capacity and position as a leader. And that the words were not meant to ridicule the plaintiff and put him in contempt in the eyes of right thinking members of society.

On 21st July 2006, the matter came up for hearing before me. The two defendants and their Advocates were not present despite being properly served for that hearing date. I directed the plaintiff's Advocate to proceed, upon being satisfied that the two defendants were properly and regularly served. The plaintiff did not appear in court to give evidence in support of his case, instead two other witnesses gave evidence in support of the averments contained in the plaint.

The first witness is Michael Moragia Nyachae, who works for Sansora group, a holding company. PW1 stated that he is the son of the plaintiff and through a registered power of attorney he was nominated to give evidence and represent the plaintiff in this particular matter. He states that the power of attorney gives him the power to conduct and give evidence on behalf of the plaintiff.

PW1 states that the plaintiff is a prominent businessman of repute and is a shareholder of several companies, which are operating business in the country. He also alleges that the plaintiff is a large scale cereal farmer in Nakuru. And that the plaintiff is also a retired civil servant who has been at one point, the head of the Civil service of the Republic of Kenya. And at the time the offensive material was published, he was aspiring to run for the presidency of the Republic of Kenya. And the general public had confidence in his various capacities.

The witness also states that on 27th March 2000, a paper that goes by the name "**The People**" published by the 2nd defendant put an article alleging the plaintiff was a land grabber. And that the paper did not at any stage contact **Hon. Nyachae** in order to establish the truth about the alleged land grabbing. The witness further contended that Hon. Nyachae has never been charged or convicted of land grabbing while the publication called for his prosecution. He averred that on the basis of the said publication, the plaintiff lost repute and trust. And that any adverse information regarding a director and shareholder of a company causes the business partners to lose trust with the business. It also causes, he alleges, that the consumers to feel that the goods consumed are made by people who are not law-abiding citizens.

In the position of PW1, the article had the effect of making Hon. Nyachae appear dishonest, corrupt and one who engages in irregular and illegal acts for his personal gains in disregard of others. The article also makes Hon. Nyachae appear to be a person who is looking for public position so that he may enrich himself illegally and unjustly. And in the opinion of PW1, there was no basis whatsoever for the 2nd defendant to have published the offending article as there is no justification for the said publication. The witness further states:-

“ In the absence of an explanation, I wish to believe that the article was driven by malice in order to discredit the plaintiff, embarrass him, lower his dignity and break him into contempt in the eyes of right thinking members of the society”.

Lastly, the witness asked the court to award general damages to **Hon. Nyachae**.

The second witness is **Mr. Stephens Arica**, who describes himself as a small businessman at Nyaribari Chache. The evidence of PW2 is as follows; that the plaintiff is his area member of parliament and that he also regularly votes for him. He knows the plaintiff as a prominent businessman and politician who had contested the presidency of the Republic of Kenya. He says he saw the publication of **The People Daily** of 27th March 2000 at Kisii. And upon reading, he started knowing **Hon. Nyachae** differently. He further stated that he knew Hon. Nyachae as a good man with a good and straight forward character.

Mr. Ashitiva Advocate submitted that the natural and most logical interpretation of the publication is highly defamatory of the plaintiff, a prominent public figure whose reputation goes beyond this country.

And that the publication was therefore maliciously published and/or circulated to increase the 2nd defendant's sales. He urged me to award a sum of Kshs. 20 Million as damages. He relied on **HCCC number 2143 of 1999 Hon. Kipyator Nicholas Kiprono Biwott =vs= George Mbuguss and Kalamka Limited** where the court awarded Kshs. 20 Million. He also referred me to **HCCC number 956 of 2003 Hon. Obure =vs= Tom Oscar T/A Headline Publishers and 3 others**, where an award of Kshs. 17 Million was made by Lenaola J.

Let me now determine the issues between the parties. First and foremost, it is important to state that the plaintiff did not give evidence though two witnesses gave evidence on his behalf and in support of his case. The two defendants also did not participate in the proceeding, therefore never called any witness. I appreciate that every man/woman is entitled to his alleged 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/her without lawful justification or excuse. It means that if defamatory statements are made in writing or printing or some other permanent form the tort of libel is committed and the law presumes damages to follow. If 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.

In my view the object of the plaintiff's case is to vindicate his reputation, character and/or dignity and to make reparation for the private injury done by the alleged wrongful publication. It is therefore incumbent upon a party faced with such situation to prove the truth of the defamatory matter and thus show he has suffered injury. In essence it means that defamation reflects upon the plaintiff personally, therefore the plaintiff must prove that the words complained of, were published and/or printed with actual and deliberate malice and without legitimate reason against his character, reputation and dignity. The offensive statement must be proved to be false and was published with actual malice towards the plaintiff and causing actual damages. It is necessary to prove actual damages in all such actions so that an award in damages can attach.

I think a defamatory statement is one, which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business. Damage to the plaintiff's reputation being the essence of this suit, there must be evidence by the plaintiff that the statement was meant to injure his reputation and character.

It is the evidence of PW1, that the publication was done falsely and maliciously and that it was done without just cause or excuse. In my view the knowledge, skill, capacity and/or judgment of PW1 can only support the case of the plaintiff but cannot be taken on the face value to be the actual sufferings of the plaintiff. It is the plaintiff who suffered, it is the plaintiff who knows the degree, extent and nature of his feelings, reputation, character or dignity was afflicted by the publication in a particular way to be entitled to certain amount of damages. I think having knowledge or understanding of the words is not equivalent to the expression of the actual loss suffered by the plaintiff. The two witnesses testified of what they understood the words to be and to have caused to the plaintiff. The words alleged may have caused enormous suffering to the plaintiff but when the plaintiff does not adduce evidence himself to the effects of the words, the court cannot rely on mere assertion and conjecture. The essence of a defamatory statement is its tendency to injure the reputation of another person. And it is upon the person seeking damages to show or establish how he was exposed to public hatred, contempt or ridicule or that the words had caused him to be shunned or avoided to by certain people. It is further plaintiff to prove that the natural effects of the words were meant to destroy, demean, degrade and diminish the esteem in which he was ordinarily and generally held. And that because of the derogatory imputation conveyed by the said publication, he lost something which he is legally entitled.

In an action for defamation, the actual words complained of and the substance must be proved by the plaintiff. And it is not sufficient to show the defendant made defamatory statements. The plaintiff must give particulars of the facts and matters from which the malice is to be inferred. He must show to court that the defendant acted maliciously. In my humble view, words are not defamatory per se, there has to be a statement of fact or expression of opinion or imputation conveyed by them, which will have the effect

of defaming an individual.

The question which I must answer is where is the evidence that the plaintiff has suffered actual damage whether in material or otherwise. The alleged publication was made in the year 2000, when the plaintiff was preparing his bid to become the president of the Republic of Kenya. Currently he is a Minister and Member of Parliament for Nyaribari Chache. I have no significant evidence to show that the said publication had bearing on his affairs whether politics or business. I have no evidence to show that as a result of that publication, he has become a lightweight both financially and politically.

Admittedly the plaintiff has nominated his son to prosecute this case meant to repair, restore and vindicate his character, reputation and dignity through a registered power of attorney. I think the power of attorney given to the son cannot be a substitute to the direct testimony of the plaintiff. And that the fact the son was given power to conduct and give evidence on behalf of the plaintiff cannot put him in the same shoes with the plaintiff. The witness can comfortably wear the shoes of the plaintiff in other circumstances, but I think in this particular case, he has failed to demonstrate that he can wear the shoes in order to vindicate the dignity and character of the father. In my view the witness cannot discount and/or disparage the publication merely because he was given a power of attorney. It becomes a mere allegation for the son to state that his father is not a land grabber. It also becomes a mere speculation for the son to state that on the basis of the publication the plaintiff lost repute and trust. It is the plaintiff who suffered as a result of the adverse publication by being portrayed as dishonest, and corrupt and it is him who can comfortably and diligently discount those allegations.

PW1 states that the publication makes Hon. Nyachae appear to be a person who is looking for public position so that he may enrich or acquire an advantage illegally and unjustly. I have no evidence to show that the plaintiff is engaging in a public position with a view to bestow a benefit for himself. It is for the plaintiff to say that and no other person can step into his shoes to make such unsubstantiated claims. The believe of the son, however genuine is baseless in so far personal reputation, dignity and character of the plaintiff is concerned. That is personal and exclusive to the plaintiff. In essence it is for the plaintiff to plead and prove the existence, effect and nature of the publication. The imputation is against the plaintiff personally and it was not against the family of the plaintiff to enable PW1 to give sufficient evidence to prove the statement in the plaint. The mere fact that PW1 produced copy of what appears to be a daily paper called "**The People**" is not sufficient proof of the defamatory statement made against the plaintiff. In my view a representative witness cannot maintain or continue the action instigated by a party, so that the party can achieve or derive some substantial benefits/rights. It is for the plaintiff to prove the publication was meant to injure and has actually injured his reputation if he wants the intervention of the court.

It is my decision that it is the legal duty of litigants to prove the allegations set down in their pleadings. And it would be unreasonable for PW1 to attest to the contents of a plaint filed by the plaintiff, simply because he was given power of attorney by the plaintiff. Once a party expresses a case of defamation, he is expected to show in detail the statement was against his character, dignity and reputation. And as a result of that publication or statement, he has suffered injury to attract the award of damages. I think the peculiar nature of defamation cases, it requires parties to come before court and state the nature and extent of injuries suffered and/sustained. The personal suffering, injury to the character, reputation and dignity of the plaintiff are not wholly and truly known to the witnesses who gave evidence on behalf of the plaintiff. The award of damages is meant to vindicate and console the party for the injury to his reputation and the hurt to his feelings. I think it is safe to conclude that, I have no evidence to show the words complained of are reasonably capable of bearing a defamatory meaning in the minds of reasonable persons in the circumstances narrated by the two witnesses.

The dent or stigma was on the character of the plaintiff and he filed the present suit to be vindicated by an award of damages. He also wants the court to exonerate him against the allegation by entering judgment in his favour. As stated I have no evidence to show that the plaintiff had been shunned or that he had suffered any stigma. PW1 stated that being an agent through a power of attorney, he believed that the publication was malicious, false and with intent to lower the dignity of the plaintiff. Apart from PW1 saying that his principal had been scandalized, I have no evidence to support or prove the case of the

plaintiff. It is my decision that a party cannot delegate personal feelings, as the injuries allegedly suffered are personal to the reputation, integrity, character and dignity of the principal.

Let me say that it would be unreasonable to think that parties can present proxy evidence in defamation suits. And if such situation were to prevail or allowed then the court would be flooded by proxy suits and litigation especially by the rich and powerful. That would be preposterous, unnecessary and untenable to be sustained by our courts, especially this time when the rich and powerful are in an attempt to muzzle press freedom. The courts must show its commitment to press freedom by allowing health debate on matters concerning persons within public scrutiny.

The courts must play its role by encouraging mature and responsible journalism. The court must not allow itself to be theatre of fighting the press by giving injunction and overzealous awards in matters involving public interest. Of late the courts have been flooded with defamation suits by politicians to protect what they perceive to be their good character. The astronomical awards given by the courts in recent years must have sent shivers down the heart, brain and pen of the pressmen. The purpose of a mature press inter alia is to instigate public debate on an important public matter. The requirement that the press must first investigate the information to confirm its veracity and authenticity may be unnecessary hindrance to the right to proper information. I think the courts must exercise extreme caution and restraint in order not to stifle press freedom, without undermining the private rights of individuals.

It is not within my powers to substitute my opinion and discretion for that of my brothers and sisters who always endeavour to do their best. What I am saying is that the courts must call to its consideration the press freedom, which is paramount and the right of the public to get proper information. Of late the awards though discretionary have sent shivers to the press and print media. The press forms the bedrock of the enjoyment of fundamental rights. And democracy cannot grow or thrive without a vibrant press. The trembling of the press due to huge awards calls for abridgement of the situation in order to have an ideal situation to all parties. The threshold in my view is that the courts should not fall to the trap laid by the politicians and powerful to restrict the development and progress of press freedom. The comfort judgments must end and the press must work in a responsible manner. The stern and overzealous approach adopted by the courts must come to an end.

In the premises the suit is dismissed with no orders as to costs.

Dated and delivered at Kisumu this 23rd day of January 2007

M. WARSAME

JUDGE

23/1/07

Coram Warsame J

No appearance for the plaintiff

No appearance for the defendant

Collins court clerk

Court: Judgment read in open court

M. WARSAME

JUDGE

MW/ao