



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS

Civil Suit 579 of 2001

MARGARET WACHIRA.....PLAINTIFF

VERSUS

WACHIRA WARURU.....1ST DEFENDANT

STANDARD LIMITED.....2ND DEFENDANT

JUDGMENT

By way of a plaint dated and filed on 9th April 2001 the Plaintiff brought this suit against the Defendants jointly and severally seeking damages general and aggravated or exemplary for defamation.

The facts giving rise to this suit are largely incontestable and briefly may be stated as follows. On 12th May 1998 on June O a minor aged about 13 years in the company of her father went to Premier Club at around 7 a.m for swimming. They were both members of the club and enjoyed swimming facilities of the club. She went to take a shower and while she was in the female changing room undressing one R.V. Patel who was the secretary of the club stormed in and grabbed her by the hand and forcefully ejected her out of the changing room as he remarked that that was not a place meant for Africans.

She sustained a bruise on the hand where the said Patel grabbed her. She filed a civil suit through her father being PMCC NO. 6235 of 1998 against the said Patel seeking general damages costs of the suit plus interest. The Plaintiff who was a Principal Magistrate then at the Chief Magistrates' Court at Milimani presided over the suit and in her judgment delivered on 11th February 2000 she awarded the minor a sum of Shs.50,000/= general damages with costs and interest.

This was adequate compensation for the bruise sustained by the minor and she was satisfied with the award

On 24th November 2000 the Defendants falsely and maliciously wrote, printed and published or caused to be published or caused to be written printed and published on page 3 of the issue of the East African standard dated that day and concerning the Plaintiff and concerning the Plaintiff in the way of her said office as a judicial officer the words following: **BUSINESSMAN, AGED 60 IS GUILTY OF SEX ASSAULT.**

“A 60 years old city businessman was yesterday found guilty of sexually assaulting a 13 year old girl.

The businessman also found guilty of racial discrimination was consequently ordered to pay the victim Shs.50,000/= in damages plus interest at court rates. R.V. Patel received the sentence from a Principal Magistrate at the Milimani Commercial Court Ms Margaret Wachira. He is the proprietor of Universal Auto and Electrical Spares Ltd in the City. Patel was convicted of storming into the Women’s Changing room at Premier Club, Nairobi and throwing out the minor who was naked prompting her father to sue. The incident occurred in May 1998.

The businessman who was the Secretary of the Club told the minor and her father that Premier Club was not for Africans. The father of the minor J WO, was at the time of the assault a Swimming Instructor at the club but has since been sacked.

Wachira said Patels’ actions had caused the minor. Psychological anguish and bodily harm. She was represented by lawyer J Ramogo.

Further on 25th November 2000 the Defendants jointly and severally wrote, printed and published or caused to be written, printed and published on page 3 of the issue of the East African Standard dated that day, of and concerning the Plaintiff and concerning the Plaintiff in the way of her office, calling and profession the following words:-

“ANGRY REACTION TO SEX ASSAULT, RACISM RULING

Human Rights groups reacted angrily to a court order that a city businessman pays Shs.50,000/= for sexually molesting a girl.

A cross section of Kenyans also called out news room to protest the sentence.

The Program Manager at African Network for Prevention and Protection Against Child Abuse and Neglect (ANPPCAN) Mr. Peter Munene said the ruling had set a bad precedent for perpetrators of similar offences. It was unsatisfactory since it failed to deal with the Defendant and the club adequately, he said Munene said the Defendant should be compelled to go for counseling or probation.”

International Federation of Women Kenya Lawyers (FIDA), Kenya Chapter condemned the act and criticized the ruling. It amounted into an insult the Chairperson of the Federation Ms. Martha Karua, said.

These are issues we seek to address in the Equality Bill. We want every Kenyan irrespective of their race or class to have equal rights, she said. Businessman V.K. Patel was on Thursday found guilty of assaulting a 13 years old girl at Premier Club, Nairobi. He was also found guilty of racial discrimination. Patel who was then the Club Secretary is said to have stormed into the ladies changing room and ejected the girl who was naked. He told the minor and her father, a swimming instructor at the club that the facility was not for Africans.

Meanwhile Premier Club yesterday described as a “joke’ the Shs.50,000/= penalty.

An official of the club, who spoke on condition of anonymity said the presiding magistrate should explain to Kenyans the basis of her leniency.

He condemned Patels’ action as the most inhuman treatment one could accord a child.

The best place for him is prison the official said.

On the same date and in the same newspaper on page 6 the defendants jointly and severally wrote, printed and published or caused to be written, printed and published of and concerning the Plaintiff and of

her in the way of her office, profession and calling, a lead and prominent editorial in the words following:-

INADEQUATE JUSTICE FOR A MINOR ABUSED

“It is said justice, or the execution of it, has many faces. But sometimes it requires quite a critical look to decipher just what kind of face certain variations of justice have. Last Thursday a commercial court found a 60 year old man guilty of sexually assaulting a 13 year old girl and ordered him to pay the victim Shs.50,000/= in damages.

The man a Mr. R.V. Patel was convicted of storming into the women’s changing room at Premier Club, Nairobi and throwing out the naked minor, warning her and her father that the facility was not for Africans.

For this astonishing act, the man was fined only Shs.50,000/= which he was told to pay to the victim. If ever there was a real slap in the wrist, then this was it.

Through such verdicts one looks at the face of justice, looks again, finds none, and wonders whether our courts really accord justice to the common man or whether the common man has any chance of getting reprieve from our courts.

It does not take a law expert or a pedantic interpretation of this offence to know that the punishment the offender got was not commensurate with the crime.

People go to the courts because they believe and expect that they shall get justice in them. They also hope that by doling out punishment the court would not only discourage other potential offenders from committing crimes but would also leave the complainant feeling that justice has at last been done. And punishment is supposed to be a deterrence. It works better if the offender is dragged into pains trying to atone or repay for his or her offence.

We doubt that a fine of Shs.50,000/= is punitive enough for a man whose standing in society – being the proprietor of a firm in the city is well above the status of a common man.

We also doubt whether this kind of punishment would deter others with racist or brutal streaks from committing similar crimes against hapless citizens.

We do not know the parameters the learned magistrate used to hand this sentence but in the face of an obvious case of assault, humiliation and racist, this offence was in no way required. Could the humiliation suffered by the victim be palliated by this niggardly sum of Shs.50,000/= ? Was this just a case of money or damages? No amount of money, we believe, can assuage the humiliation and the pain this innocent minor went through.

Obviously the offence was committed against a helpless minor by a person who clearly has no respect for Africans, and who would love to see them restricted as they were under the oppressive colonial or apartheid regimes.

Oh justice, it is in such verdicts that one looks for thy face and finds it not. Deliver us not unto such tribulations.”

And on 26th November 2000 on page 28 of that day’s issue of the **Sunday Standard** the Defendants jointly and severally wrote, printed and published or caused to be written, printed and published of and concerning the Plaintiff in the way of her office, profession or calling the words following:-

“WOMEN DEMAND RACIST OFFENDER BE TRIED

“The coalition Against Woman (CONVAW) yesterday held demonstrations in city streets to mark the international day for Elimination of Violence Against Women. Dagoretti MP Beth Mugo who addressed the demonstrators called for a fresh retrial against a 60 year old city businessman Mr. R.V. Patel who was found guilty of sexually assaulting a 13 year old girl.

And People Against Torture (PAT) Organization have written to the Chief Justice demand a retrial of the businessman.

PAT Co-ordinator Kang’ethe Mungai said Patel deserves a much stiffer sentence than what he got for breaking both the statute and moral laws of our land, the basic tanets of the United Nations Convention Against All Forms of Racial Discrimination that Kenya is signatory.”

Mugo said the Shs.50,000/= five sentence on the Asian businessman was “too lenient”.

We are appealing to FIDA and other human rights organizations to appeal for a stiffer sentence and even deportation if need be a furious Mugo said:

She accused the Government of failing to provide security for women and gave the recent rape of nurses and the harassment of women inmates by male warders at Langata Prison as cases in point.

A COVAW official who led the demonstrations wondered how the court presided over by a woman could be so lenient on such a convict. She said if the businessman was found guilty then he should serve the maximum sentence handed on convicts.

The businessman was also found guilty of racial discrimination and was subsequently ordered to pay the victim Shs.50,000/= in damages plus interest at court rates.

Patel received the sentence from a Principal Magistrate at Milimani Courts, Ms Margaret Wachira, the minor was represented by lawyer J. Ramogo.”

The Plaintiff in her testimony pointed out the falsity of the Defendants initial and often repeated report of the judgment in question namely that the Plaintiff was presiding over a civil matter and not a criminal one; that the Defendant before the Plaintiff’s court was sued for damages for assault not charged with sexual assault; that the judgment and decree were for damages for civil assault consisting of minor bruises to the wrist with no evidence or proof of sexual assault; that the award of Shs.50,000/= was reasonable the minor/Plaintiff having sought only Shs.90,000/= and so was not inordinately low; that the successful minor did not prefer any appeal against the quantum of damages awarded and in fact it is the Defendant businessman who appealed on the ground that the award was excessive; and that there was no conviction made or sentence passed by the Plaintiff.

The Plaintiff further testified that doubtless then, the substratum of the Defendant’s report which excited such nationwide public outrage and which the Defendant editorialized, was founded on gross falsehoods, errors and inaccuracies that were easily discernable and correctable from the record of court proceedings.

The Plaintiff further told the court that the said words repeatedly written and published in their natural and ordinary meaning conveyed and were understood to convey that the Plaintiff was unjustly lenient in favour of one of the litigants; that she was callous and uncaring for the minor litigant; that she makes judicial decisions on the basis of dubious considerations extraneous to the law; that she neither understands nor appreciates the rudimentary tenets of justice; that she dispenses unequal justice; that she approves of and encourages brutality; oppression and racism; that she is a person and judicial officer of doubtful probity; questionable integrity and shadowy honour; that she carries out of her duties with capricious whim and she is a stumbling block to justice and as a magistrate a tribulation to the general public in Kenya and a disservice to the judiciary.

There is no doubt that the Plaintiff professional integrity has been seriously compromised by the adverse publicity caused by the Defendant. The publication was embarrassing to her both in her personal capacity and professionally. The wrong of defamation consists in the publication of a false and defamatory statement respecting another person without lawful justification or excuse. A statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule or contempt or which causes him to be shunned or avoided or which has a tendency to injure him in his office, profession or calling.

The defendant admits to have published the words complained of but contends that they were fair comment on matters of public interest and were published on an occasion of absolute privilege. I agree with the Defendant that what he reported were proceedings in court and therefore advances the plea of privilege. But for the privilege to apply a report must be strictly confined to actual proceedings in court and must contain no defamatory observations.

The rule of law is that where there are judicial proceedings before a properly constituted judicial tribunal exercising its jurisdiction in open court, then the publication without malice of a fair and accurate report of what takes place before the tribunal is privileged.

The Plaintiff has demonstrated that all that was reported concerning her and her profession was palpably false. The court proceedings were very clear that the claim was based on simple assault and not sexual assault and the Defendant did not care or failed to inquire into the true facts which is a fact from which inference of malice may properly be drawn. See **GODWIN WACHIRA VS. OKOTH [1977] KLR 24.**

The Defendant did not avail of the opportunity to appear at the trial to establish the plea of justification or privilege and therefore the plaintiff's evidence goes unchallenged.

The successful Plaintiff in a defamatory action is entitled to recover as general compensatory such sum as will compensate him for the wrong he has suffered. The sum must compensate him for damages to his reputation, ridicule, his good name and take account of the distress, hurt, and humiliation which the defamatory publication has caused him.

The award must cover injured feelings, the anxiety and uncertainty undergone during the trial. Malicious conduct on the part of the Defendant will aggravate the damages to be awarded to compensate the Plaintiff for the additional injury going beyond that which would have flowed from the words alone.

In the instant case the Defendant triggered the public outcry and demonstrations and made sure that he was at every point adverse comments were made by various organizations as well as individuals and made sure he covered them while knowing very well that what he had published was all falsehood.

The damages in libel actions are awarded not only to compensate the Plaintiff for injuries to his reputation and hurt of his feelings but also to vindicate him to the public and console him for the wrong done.

Considering all the circumstances of the case awarding the Plaintiff a sum of Kshs.8,000,000/= as general damages and a sum of Sh.2,000,000/= as aggravated damages would be adequate compensation.

Accordingly I enter judgment for the Plaintiff in the sum of Shs.10,000,000/= plus costs and interest.

The Plaintiff is also awarded the costs of this suit plus interest.

Dated and delivered at Nairobi this 19th day of October 2007.

J.L.A. OSIEMO

JUDGE

