



REPUBLIC OF KENYA
 IN THE HIGH COURT OF KENYA
 AT NAIROBI (NAIROBI LAW COURTS)
 Civil Case 938 of 2002
 HON. MAJ. (RTD) MARSDEN H. MADOKAPLAINTIFF
 V E R S U S
 1. WACHIRA WARURU
 2. THE STANDARD LIMITEDDEFENDANTS
 J U D G M E N T

The Plaintiff herein, MAJOR (RETIRED) MARSDEN HERMAN MADOKA, has sought in this suit exemplary and general damages for libel against the Defendants, WACHIRA WARURU and THE STANDARD LIMITED, jointly and severally. It is his case that the words published at page 6 of the “East African Standard” newspaper of 31st October, 2000 and in the editorial section of the paper, and again in the editorial section of the same paper of 20th December, 2000, and the cartoon of the day and words accompanying it, were, in their material and ordinary meaning, defamatory of him. The words and cartoon complained of are set out in paragraphs 5, 6 and 7 of the plaint. Copies of the publications carrying them were produced in evidence.

At the time of publication of the words and cartoon complained of the Plaintiff was a Member of Parliament and a Cabinet Minister. He was still such Member of Parliament and Cabinet Minister when he filed suit. At the hearing of the suit he was still a Member of Parliament but no longer a Cabinet Minister. His political party was in opposition and he was a Shadow Minister.

The Plaintiff pleaded that the words and cartoon complained of, in their material and ordinary meaning, meant and were understood to mean:-

- (i) that he was incompetent, a reckless speaker and unsuitable to hold office of Member of Parliament and Cabinet Minister;
- (ii) that he is ridiculous and uninformed;
- (iii) that he abused his office, has turned flippant and reckless in his public speeches;
- (iv) that he is a man of poor memory, prone to dishonest and/or confused talk; and
- (v) that he is unfit to hold public office.

The Plaintiff further pleaded that by reason of the words complained of he has been injured in his credit, character and reputation, and has been brought into hatred, ridicule, public odium and contempt. Finally, he pleaded that publication of the words complained of was actuated by “**malevolence or spite**” and was meant to disparage the Plaintiff in his office as Member of Parliament and Cabinet Minister.

At the material time the 2nd Defendant was the publisher of the newspaper the “**East African Standard**” while the 1st Defendant was the editor-in-chief of the paper. They filed a joint defence. They admitted publishing the words complained of but denied that the publications were circulated country-wide and world-wide via the **internet** to persons known and unknown to the Plaintiff. They also denied that the words were capable of bearing, or being understood to bear, any of the meanings pleaded by the Plaintiff, or that he was injured in his character, credit or reputation, or that he suffered any injury or loss known to law, or that he was entitled to damages as sought.

The Defendants also pleaded:-

- (a) that the words complained of were published on an occasion of qualified privilege, relying on Part II, paragraph 6 of the Schedule of the Defamation Act, Cap. 36 in conjunction with section 7 of the Act;
- (b) that the words were published innocently and completely without malevolence or spite;
- (c) that the words were fair comment on matters of public interest, with particulars given under Order 6, rule 6A of the Civil Procedure Rules. Section 15 of Cap. 36 aforesaid was also invoked; and
- (d) that the Plaintiff’s reply was published in the same newspaper of 22nd December, 2000. In this connection section 7A of Cap. 36 was invoked.

In his reply to defence the Plaintiff joined issue with the Defendants upon their defence. A statement of issues dated 13th May, 2002, signed only by the Plaintiff’s advocates, was filed on 14th May, 2002. The issues set out therein are:-

1. Whether the words and cartoon complained of were published in all copies of the “**East African Standard**” newspaper on the pleaded dates and circulated country-wide and world-wide via the **internet** to persons known and unknown to the Plaintiff as alleged in paragraph 8 of the plaint?
2. Whether the words complained of in paragraphs 5, 6 and 7 of the plaint were, in their ordinary and material meaning, defamatory of the Plaintiff?
3. Whether as a result of the said publication the Plaintiff’s character and reputation were put into ridicule, hatred, public odium and contempt?
4. Whether the words and publications complained of were actuated by malice, malevolence and spite towards the Plaintiff?
5. Whether publication of the said words was innocent and/or made on any privileged occasion?
6. Whether the Plaintiff is entitled to the reliefs sought in the plaint?

At the hearing, only the Plaintiff testified. He did not call any other witness. The Defendants did not lead or call any evidence. The 1st Defendant did not even attend court. I have considered the testimony of the Plaintiff and the words complained of. I have also considered the submissions of the learned counsels, including the many cases cited. I propose to deal with the issues as framed.

1. Were the words and cartoon complained of published in all copies of the “East African Standard” newspaper on the material dates and circulated country-wide and world-wide via the internet to persons known and unknown to the Plaintiff as alleged in paragraph 8 of the plaint?

It has been admitted in the statement of defence that the words and cartoon complained of were published as alleged. Copies of those publications were produced in evidence. There was no challenge to the assertion that the “East African Standard” newspaper had a nation-wide circulation in Kenya. It was also admitted that the newspaper has been available on the internet from 1997.

I accept the Plaintiff’s testimony that the words complained of were published both country-wide in Kenya and world-wide via the **internet** to persons known and unknown to the Plaintiff.

2. Were the words complained of in paragraphs 5, 6 and 7 of the plaint, in their ordinary and material meaning, defamatory of the Plaintiff?

At the time of publication, the Plaintiff was a Member of Parliament and Cabinet Minister. These are high and prestigious public offices. He had had an illustrious military career from which he had retired honourably. He had served in the private business sector in high positions for over twenty (20) years. He had an active social life and served on many civilian, social and religious organizations, again in high positions. He was a very well-known person nationally. I accept his own uncontradicted assessment of himself that he is a man of high integrity, focused, principled, fair, restrained and thorough – an “**officer and a gentleman**”.

In their ordinary and natural meanings, the words complained of meant, and would be understood by an ordinary person reading them, to mean, that the Plaintiff had become an irresponsible and loose talker, that he is no longer a gentleman or that he has all along been pretending to be one but was now emerging in his true contrary colours. He is unreliable, unprincipled and unworthy. The words, though carrying a heavy element of insult and abuse, went much further than mere insult and abuse. They were also not mere malicious falsehoods. They were an assault on the Plaintiff’s character and reputation and would tend to lower his character and reputation in the eyes of right-thinking and ordinary members of the society in which the he lived and worked. I am satisfied that the words were libelous. Though politicians, and the Plaintiff was and is one such, and persons holding high public office, must expect close attention from the media, and perhaps politicians, more than anyone else, thrive on this attention, their characters and reputations are entitled to protection under the law. Those attributes of theirs should not be sallied merely because they are politicians and holders of public offices.

3. Were the Plaintiff’s character and reputation put into ridicule, hatred, public odium and contempt as a result of publication of the words complained of?

The Plaintiff testified that after publication of the words complained of he received calls from many people asking if he had changed. His own son commented adversely about him in view of the cartoon. He was not challenged in cross-examination over these assertions. Given the exemplary attributes of the Plaintiff as is evidenced by his long and illustrious career in the Army, in the private business sector and in the public sector, I am satisfied that the Plaintiff’s character and reputation were put to ridicule, public odium and contempt as a result of publication of the words complained of.

4. Was publication of the words complained of made with malice?

The onus was upon the Plaintiff to prove on a balance of probabilities that the words complained of and publication thereof was actuated by malice. Has the Plaintiff discharged this burden? I think not. Given the Plaintiff’s position as a Member of Parliament and Cabinet Minister, it was expected that the media would want to report on him. He was speaking at public functions attended by him as such Member of Parliament and Cabinet Minister. He was misquoted, and some words that he did not utter attributed to him. As already observed, the words complained of carried a heavy element of insult and abuse. There is also disclosed, on the part of the reporters, carelessness and recklessness in the manner of reporting. But no malice is proved. The Plaintiff did not at all, in his testimony, lay any foundation for the claim of malice. I find that the publication of the words complained of was not made with malice.

5. Was publication of the words complained of privileged?

Under section 7 of the Defamation Act, Cap. 36, newspapers enjoy **qualified privilege** in regard to publication of any report or other matter as is mentioned in the Schedule to the Act unless such publication is proved to be made with malice. Such reports or matters include a fair and accurate report of the proceedings of any public meeting in Kenya *bona fide* and lawfully held for a lawful purpose and for the furtherance or discussion of any matter of public concern, whether the admission to the meeting is general or restricted. See Part II, paragraph 6 of the schedule.

I have already found that publication of the words complained of was not actuated by malice. It is also not in dispute that the words complained of were reports of proceedings of public meetings in Kenya, *bona fide* and lawfully held for lawful purposes. I also accept that the words were for the furtherance or discussion of matters of public concern, that is, the **HIV-AIDS** scourge and the **Street Children** problem. But, as already found, the words were not a fair and accurate report. The Plaintiff was not reported accurately at all, and the words used were not fair. The words amounted to a libelous attack upon the Plaintiff. The Defendants therefore cannot claim **qualified privilege**.

A defence of **fair comment** is also available under section 15 of the Act if the action for libel or slander is in respect of words consisting partly of allegations of fact and partly of expression of opinion, notwithstanding that the truth of every allegation of fact is not proved, if the expression of opinion is fair comment, having regard to such of the facts alleged or referred to in the words complained of as are proved.

The words complained of in this suit consist of both allegations of fact and expressions of opinion. The expressions of opinion were not fair comment, having regard to the language and tone used. The defence of **fair comment**, therefore, is not available to the Defendants.

6. Is the Plaintiff entitled to the reliefs sought in the plaint?

The Plaintiff has sought exemplary and general damages as well as costs of the suit.

Libel is actionable *per se*; injury is presumed and the complainant does not have to prove injury or loss. The Plaintiff is therefore entitled to general (compensatory) damages.

What about exemplary damages? Exemplary damages go beyond compensating the complainant and are meant to punish the defendant. They will be awarded only where the plaintiff proves that the defendant, when he made the publication, knew that he was committing the tort of defamation, or was reckless whether his action was tortious or not, and decided to publish because the expected profits would likely outweigh any damages that the plaintiff may recover. There must be guilty knowledge on the part of the defendant. See the various English decisions quoted in the case of this court (Visram, Commissioner of Assize, as he then was) in **Nairobi HCCC NO. 1067 of 1999, Biwott –vs- Clays Limited and Others** (unreported).

In the present case it has not been proved that the Defendants had such guilty knowledge. It has not been proved that they knew they were committing the tort of defamation when they made the publication complained of, or that they were reckless whether their actions were tortious or not, or that they decided to publish because they expected profits (from sale of the newspaper) that outweighed the probable damages that would be paid to the Plaintiff. I do not find that exemplary damages are justified in this case.

I will now assess the compensatory damages payable to the Plaintiff. Compensatory damages for defamation, it has often been said, are “**at large**”, meaning that there is not any set formula for assessing them. They are awarded to compensate the plaintiff for the injury to his reputation and the hurt to his feelings. It is expected that such damages will vindicate him to the public and console him for the wrong done to him.

In assessing these damages the court will take into account all relevant factors. These include the conduct of the defendant after the defamation, and even the conduct of the plaintiff; whether or not there

has been a satisfactory apology or attempt at correction of the wrong impression created; whether there has been malicious and/or insulting conduct; whether the plaintiff was accorded an opportunity to give his side of the story in order to correct the wrong impression created; and section 16 of the Defamation Act, which provides for mitigation of damages.

I have considered the station in life of the Plaintiff at the time of the libel. I note his efforts to have the Defendants correct the wrong impression created by the publications. I have also noted that there was an attempt at apology by the Defendants which was entirely unsatisfactory in terms of not having been given the same prominence as the publications complained of. I have also taken into account that the “**East African Standard**” was at the material time one of the leading daily newspapers with a wide circulation in the country. It was also available world-wide on the **internet**. Finally, I have looked at all the recent libel cases decided by various Judges of this court and by the Court of Appeal placed before the court by the learned counsels with their written submissions. I need not reproduce them here.

Having considered all relevant factors before the court, and having applied the relevant principles for assessment of compensatory damages in libel cases, and doing the best I can, I will award the Plaintiff general or compensatory damages in the sum of KShs. 1,500,000/00. There will be judgment for him in that sum. He will also have costs of the suit. There will be orders accordingly.

DATED, SIGNED AND PRONOUNCED IN OPEN COURT

THIS 23RD DAY OF NOVEMBER, 2007

H. P. G. WAWERU

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