



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

Civil Suit 108 of 2003

ALLAN K.N. MBUGUA.....PLAINTIFF

VERSUS

ROYAL MEDIA SERVICES LIMITED.....DEFENDANT

JUDGMENT

The Plaintiff, an Advocate of the High Court of Kenya the Defendant the Royal Media Services Limited, one of the leading media houses in the country.

In an Amended Complaint dated 23rd February, 2004 the Plaintiff claimed that :-

(i) On 11/08/2003, the Defendant vide a programme called “Wembe wa Citizen”, broadcast in its “Citizen Radio” uttered and published words whose text and import were defamatory and slanderous to the Plaintiff as follows:-

“Wakili mmoja mlaghahi wa Eldoret kwa jina Ngigi Mbugua alimlaghai Bwana Japheth Gichuki Macharia ploti yake aliokuwa ameiweka kama dhamana na Benki na kumuuzia Simon Waweru Mwangi hawa ndio wamefungua maafisi za kuwaibia mali ya umma Ngigi fanya hima urudishe mali ya wenyewe kabla mkono wa sheria haijakufikia”

Translation into English:-

“ A Corrupt Advocate in Eldoret by the name Ngigi Mbugua defrauded Mr. Japheth Gichuki Macharia of his plot whose title deed he had deposited with a Bank as security and sold the same to Simon Waweru Mwangi It’s their type of people who have opened offices as avenues to steal from the public. Ngigi Mbugua, hurry up and return other people’s property before the long arm of the law reaches you”

(ii) On 1/10/2003, the Defendant again went on air through the same programme, ‘ Wembe wa Citizen’ broadcast on its Citizen Radio and made allegations against the Plaintiff insinuating that he had defrauded orphans of late Ibrahim Nyaga Kingora of their parcel of land known as plot No. Eldoret Municipality Block No. 11/809 by forging the title deed thereof and transferring the same to one Stephen Kihara Karobio.

The Plaintiff claims that verbatim Kiswahili quote for the broadcast of 1/10/2003 in Wembe wa Citizen programme was as follows:-

“ Iko haka kamutu kamekwisha nywele na hakakomi ufisadi. Kakaribishwe tena kwenye salon.

Wewe Bwana Ngigi Mbugua Advocate kutoka Eldoret hauna aibu kuwaibia watoto mayatima. Umenyakua plot nambari Eldoret Municipality Block 11/209 mali ya marehemu Ibrahim Nyaga Kingora na kumbadilishia jina bwana Stephen Kihara Karobio bila idhini ya wanawe marehemu”

Translation in English:

“There is this small man whom we have shaved clean but he cannot leave being corrupt. Invite the small fella into the salon. You Mr. Ngigi Mbugua from Eldoret, you are not ashamed to steal from orphans. You have grabbed a plot known as Eldoret Municipality Block 11/209 which is the property of the late Ibrahim Nyaga Kingora (deceased) and changed its ownership in favour of one Stephen Kihara Karobio without the authority of the deceased’s children”

That again the Defendant implored upon the long arm of the law to deal with the Plaintiff.

(iii) On 3/11/2003, the Defendant once again broadcasted through the said programme allegation to the effect that the Plaintiff in cohorts with one Simon Waweru Mwangi had unlawfully acquired a parcel of land belonging to one Japheth Gichuki Macharia which the latter had mortgaged to a bank. The Defendant further alleged that the Plaintiff in collusion with one Simon Waweru had instigated forceful and unlawful arrest of the said Japheth Gichuki Macharia.

On 3/11/2003, the “Wembe wa Citizen” presenters – Joyce Gituro and Waweru Mburu were at it again as follows:-

“ Bwana Ngigi Mbugua Advocate from Eldoret ambaye tumekwisha kumnyoa mara kadhaa karibu tena kwenye ‘ Wembe wa Citizen.’ Inadaiwa ya kwamba wewe ukishirikiana na afisa mmoja wa polisi Sergeant Barasa na mteja wako kwa jina Simon Waweru Mwangi mlishirikiana kumtia nguvuni mzee Japheth Gichuki Macharia mnamo kumi na saba, mwezi wa kumi mwaka huu wa elfu mbili na tatu bila sababu.

Ni wewe tu bwana Ngigi Mbugua ambaye ulishirikiana na mteja wako Simon Waweru Mwangi kumlaghai bwana Japheth Gichuki Macharia plot yake ambayo alikuwa amenadi kwenye benkiFanya hima urudishe mali ya wenyewe kabla ya kumulikwa na sheria”

Translation in English

“ Mr. Ngigi Mbugua Advocate from Eldoret whom we have shaven severally is welcome again to ‘Wembe wa Citizen’. It is claimed that you, in collusion with a police officer, Sergeant Barasa and your client one Simon Waweru Mwangi’ you colluded and instigated the unlawful arrest of old man Japheth Gichuki Macharia on 17/10/2003 without any reason.

You are the same Mr. Ngigi Mbugua who colluded with your client one Simon Waweru Mwangi to defraud Mr. Japheth Gichuki Macharia of a plot of land whose title deed he had deposited with a bank move with speed and return other people’s property before the law catches up with you”

The Plaintiff averred that the broadcasts referred to him and they were defamatory and slanderous. That the said publications’ ordinary meaning and context in which they were broadcasted by the Defendant meant and were understood to mean inter alia, that:-

- (i) The Plaintiff is corrupt
- (ii) The Plaintiff is dishonest
- (iii) The Plaintiff had instigated the arrest of an innocent individual
- (iv) The Plaintiff had unlawfully and unjustly enriched himself

- (v) The Plaintiff is unprincipled
- (vi) The Plaintiff is unprofessional
- (vii) The Plaintiff had committed a Criminal offence under the Penal Code, the Advocates Act, and the Prevention of Corruption Act.
- (viii) The Plaintiff is not fit to practice as an Advocate of the High Court
- (ix) The Plaintiff had grabbed or abetted the grabbing of other people' property.

The Plaintiff also contended that the said publications and broadcasts were malicious, false and calculated to injure the Plaintiff and cause him pecuniary, professional and moral damage and to prejudice the Plaintiff's practice and source of livelihood.

In the Plaint the Plaintiff seeks injunctive orders, general, exemplary, punitive and aggravated damages. He also seeks costs and interest.

The Defendant filed a Defence on 31st May,2004 dated 7th February,2004 and raised the following defences:-

- (1) That by virtue of the Plaintiff being an Advocate of High Court of Kenya and practicing Advocate, he has within the meaning of section 79 of the Kenya Constitution consented to a robust discussion of his conduct as an Advocate.
- (2) Section 70 of the Constitution embodies the rule in **New York Times =vrs Sullivan 376 US 254 (1964)** and consequently a publisher is not liable for publishing pertinent facts pertaining to a public figure upon investigations of the circumstance of facts published of the public figure.
- (3) Section 16 A of the Defamation Act, Cap 36 of the Laws of Kenya is ultra vires Section 79 of the Kenya Cosntitution and is null and void to the extent that it purports to burden the exercise of freedom of expression by awards of damages that are manifestly excessive.
- (4) That the broadcasts complained of was made during the period the Plaintiff was practicing as an Advocate of the High Court of Kenya and the Defendant was at liberty to subject the Plaintiff's conduct to severe scrutiny.
- (5) That the Freedom of expression which is protected by Section 79 of the Constitution includes publication of information that shocks and disturbs the public and that the broadcast complained of fell in that category of publications.
- (6) That the reports were not malicious but amounted to fair comment.
- (7) That the Defendant gave an opportunity to the Plaintiff to give an explanation but he did not.

At the trial, the Plaintiff testified on oath led by his Counsel, Mr. Njuguna. Besides being an advocate of the High Court he said that he is married with three children. He is an Elder of the Baptist Church at Eldoret. He has served as the Chairman of the Law Society of Kenya – North Rift between 2000 and 2003. He is also founder and director of the Eldoret Water Sewerage Company Ltd. He served as vice-chairman of the company from 2001 – 2003.

He testified that after the broadcasts, he served a demand letter on 14th November,2003 but the Defendant did not respond or offer any apology.

The Plaintiff testified that the effect of the said publications were inter alia:-

- v Two of his associates resigned from his firm
- v He had to close down his Nairobi office
- v Majority of his clients withdrew their work and files from him
- v He had to live with endless enquiries from his colleagues, members of the Bench and others
- v Members of his family had to live under the same stigma.

He said that he was not given any chance to give an explanation. His rebuttal did not elicit any response. The Plaintiff was Cross-examined by the Defendant's Advocates Mr. Njiru.

The Plaintiff called 2 witnesses, a Mr. Joseph Mbugua, an Advocate and a Mr. Jonah Kariuki, a construction builder. He used to be a client of the Plaintiff. Both testified that they heard the broadcasts. Mr. Kariuki stated that he withdrew instructions from the Plaintiff due to these broadcasts.

The Defendant did not attend the trial through any director or other representative from the Management. It did not call any witnesses. Its Counsel thoroughly cross-examined the Plaintiff and the witnesses but closed the case without calling any single witness.

From the Defence, it is clear that the Defendant does not deny making the broadcasts and publishing the statements complained of. The Defendant also did not testify or call any witnesses.

Both parties filed written submissions. With regard to the evidence, I find on a balance of probability that the Defendant indeed did make the 3 (three) broadcasts and published the statements set out in the Plaintiff and which have been reproduced herein above. The Plaintiff and his two witnesses testified on oath that they heard the broadcasts.

The Defendant in its defence did not unequivocally deny publishing the statements. The Defendant went on to admit that it published the statements in paragraph 5 of the Defence. Of more significance, the Defendant did not call any witness to rebut the allegations of the Plaintiff.

On a balance of probability, I must find which I hereby do that the Defendant did publish the words and statements complained of.

In a case for defamation the Plaintiff must call evidence on all matters alleged in the statements of claim, essential to his claim, which are not admitted by the Defendant, or presumed in the Plaintiff's favour, In "**Gatley on Libel and Slander**", 9th edition Sweet and Maxwell/1998 at P. 807, it is observed that:-

"In actions of slander, and in actions of libel where the oral evidence of witnesses is the only proof available, though precise words must be alleged in the statement of the claim, the Plaintiff does not have to prove that these precise words were in fact published. It is sufficient if he proves a material and defamatory part of them or words which are substantially to the same effect. In such a case, if the words proved convey to the mind of a reasonable man practically the same meaning as the words set out, the variance will be immaterial No slander of any complexity could ever be proved if the "*ipsissima verba*" of the pleading had to be established".

In the premises the lack of recorded cassette, tape or otherwise as demanded by the Defendant is not fatal to the standard of proof required in this case. The Defendant also admitted in its Defence that the statements were published.

Upon considering the statements published, I do hereby find and hold that in their natural and ordinary meaning and in the context they were published the Defendant meant and was understood to mean that the Plaintiff is:-

Corrupt

Dishonest

Had instigated the arrest of an innocent individual

Had unfairly and unjustly enriched himself

Unprincipled

Had committed Criminal offences under the Penal Code, the Advocates Act, and the Anti Corruption Statutes

Not fit to practice as an Advocate of the High Court.

There is no doubt therefore that the Plaintiff did suffer injury to his reputation, was humiliated, embarrassed and distressed. Sufficient evidence was adduced to satisfy this Court that what was broadcast by the Defendant as complained was totally false and the Rebuttal to that effect was communicated to the Defendant prior to the filing of this suit. Despite those facts being made known to the Defendant, it did not bother to retract, or in any way arrest the damage and injury visited upon the Plaintiff. Indeed even during the pendency of this suit, the Defendant persisted in broadcasting similar statements as those complained of.

I do hereby find and hold that considering the wanton and blatant manner in which the publications were made, the nature of the details, personal attacks and descriptions and the barbed venom with which they were said, the Defendant and its two broadcasters were actuated by ill-will and malice.

The statements indeed were calculated to cause him pecuniary, professional and moral harm and to prejudice his practice and source of livelihood.

I do not agree that section 16 A of the Defamation Act is ultra vires Section 79 of Kenya Constitution which protects the freedom of the expression. Section 79 of the Constitution does not give any person including the Media the license to make and publish slanderous and libelous statements which are actuated by ill-will and malice and geared towards the destruction of another person's name, character and reputation. An individual has the right to his good name, character and reputation and the laws of the country must protect him/her. Many a times, the right to protect one's name, image, character and reputation is even more sacred than the right to protect property.

This Court finds the fact that one is an Advocate of the High Court does not make one be a public figure-say like a Politician, Member of Parliament, Minister or other public officer. An Advocate is a professional representing the rights and causes of his clients. There are ways and laws to deal with a thieving or dishonest advocate just like many other individuals i.e from the penal laws to the laws relating to Professional Conduct i.e Law Society of Kenya Act. It is not the work of the media to police errant Advocates and if they go out to do so, then they must be fair, objective and truthful in their reporting.

This was not a case of objecting reporting a factual situation or fair comment. It was a personal, cruel and callous attack on the Plaintiff. It was calculated, orchestrated and intended to hound him, coerce and blackmail him to submission so that he surrenders the alleged property he had grabbed. It was venomous, and distasteful and calculated to injure the Plaintiff.

The Defendant did not pause to think of the consequences of the statements. It knew that its said radio broadcasts had a national reach and aired at prime time. I hereby find that the Defendant has no defence to this claim. The Plaintiff has proved his case on a balance of probability and is entitled to the remedies sought herein.

Having taken into account the words and statements published and complained of, the Plaintiff's standing in society, the authorities referred to and all the facts and circumstances, and doing the best that I can, I do hereby grant a permanent injunction against the Defendant in terms of prayer (a).

With regard to damages, the Defendant alleged and/or imputed that the Plaintiff had committed crimes for which the Plaintiff could be made to suffer physically by imprisonment. Also the words were calculated to disparage the Plaintiff in his profession, calling and practice. There is no requirement to prove special, actual or temporal loss. The Plaintiff ought to be compensated and the Defendant punished for its reckless conduct in his matter.

I do hereby award damages as follows:-

Ø General Damages - shs 2,500,000/=

Ø Exemplary / Punitive Damages- shs 1,000,000/=

Section 16A of the Defamation Act does not apply in this case as the claim herein was for slander and not libel.

As a result the total award is for shs 3,500,000/=. The Plaintiff is hereby awarded costs of the suit and interests thereon at Court rates. Judgment is hereby entered in those terms.

DATED AND DELIVERED AT ELDORET THIS 3RD DAY OF DECEMBER 2007.

M.K. IBRAHIM,

JUDGE.