



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 1996 OF 1997

FRED OLIVER OMONDI N’CRUBA OJIAMBO PLAINTIFF

VERSUS

1. STANDARD LIMITED 1ST DEFENDANT

2. KAMAU KANYANGA 2ND DEFENDANT

3. OMULO OKOTH 3RD DEFENDANT

JUDGMENT

The Plaintiff herein is Fred Oliver Omondi N’Cruba Ojiambo, an advocate of the High Court of Kenya and a senior partner in the firm of M/S Kaplan and Stratton Advocates. He filed this suit on 3rd August 1997, against the Standard Limited, Kamau Kanyanga and Omulo Okoth.

The Standard Limited is publisher and printer of “the Sunday Standard”, a newspaper sold throughout Kenya and is also now available in the Internet. Kamau Kanyanga was or is an editor and Omulo Okoth was or is a reporter in the employ of the Standard Limited.

I shall hereinafter refer to the plaintiff as “*Ojiambo*” and the defendants as “the Standard”, “*Kanyanga*” and “*Omulo*”. Ojiambo’s complaint is found at paragraph 4 of the plaint aforesaid. In that paragraph, he avers as follows; -

In the center pages of the “Sunday Standard” issue No 918 of 3rd of August 1997 the defendants and each of them falsely and maliciously printed and published or caused to be printed or published in bold the following words defamatory of the plaintiff: -

“The Country’s constitutional law experts have been engaged to work on the draft Constitution due to be presented to Parliament for debate. Grapevine sources have it the lawyers who have affiliation with the ruling party Kanu were hired by Attorney General’s office a few days ago. The two names mentioned by inside sources as main players in the exercise is criminal lawyer Fred Ojiambo and Steve Mwenesi. A third person mentioned as also providing input to the exercise is legislator Moses Wetangula.

They have virtually completed their work which reportedly centered on the Statute (miscellaneous) Amendments Bill seeking to repeal or amend 11 controversial Acts. An inside source, however confided that the experts merely paraphrased the wordings of the relevant sections of the Constitution.

‘They may remain virtually the same but their wordings will be different’ the source said.

This claim was disputed by a high-ranking official in the Attorney General’s Chambers who claimed the Government is committed to making the amendments compatible with aspirations of Kenyans.”

At paragraph 5 of the plaint, it is said as follows: -

“In their natural and ordinary meaning the said words meant and were understood to mean

- a) The plaintiff who was only a criminal lawyer had been recruited to manipulate the Parliament in particular and the public in general with a view to subvert any meaningful or honest debate on the issue of constitutional reform in the Republic of Kenya.
- b) The plaintiff accepted a brief in respect of a matter in which he had neither the ability nor the capability to discharge his professional obligation.
- c) The plaintiff was a criminal lawyer with neither the knowledge nor the experience in any other area of the law.
- d) That the plaintiff had for financial reward been drafted to mislead and manipulate Members of Parliament and other Kenyans with a view to subverting the constitutional process.
- e) That the plaintiff had been corruptly induced to manipulate the public mind for narrow political interest.
- f) That the plaintiff’s appointment was based solely on ethnic consideration.
- g) That the plaintiff was extremely unreliable and lacks any moral standing or sense of social duty.
- h) That the plaintiff had fraudulently accepted a brief from which he derived personal financial benefit to the prejudice of his partners”.

Plaintiff’s Case

Ojiambo testified before me and said that he is by all means a seasoned, respected and eminent lawyer having practiced law in the firm of Kaplan & Stratton Advocates, a large and busy firm by Kenyan standards for close to thirty (30) years. Ojiambo also said that as a senior partner in the firm, he holds a special position of responsibility not to mention the financial rewards that accompany the title.

He lists among his peers, judges of this Court and the Court of Appeal as well as advocates of standing and repute in Kenya. He is also an accomplished businessman, a feat not many lawyers manage to thrive in and has served in professional bodies in Kenya and abroad. He has for example been a past chairman of the Law Society of Kenya, and a committee member of the International Bar Association.

In the realm of religion, again in an area majority of lawyers in Kenya do not find firm ground or so I think, perhaps mistakenly, Ojiambo is a preacher of the Gospel and an elder of the Baptist Church.

Regarding the offending article, Ojiambo said that he had not read it on the Sunday when it first appeared but on Monday, the 4th August 1997, he was at the High Court when an advocate colleague confronted him with the words to the effect that he was one of those messing up the country with regard to alleged attempts at derailing the Constitution review process. Ojiambo expressed surprise and later in the day read the article.

He testified that the article offended him because: -

- i) He had no knowledge of the alleged team of experts mentioned therein,

- ii) By labeling him a criminal lawyer, it meant that he was being portrayed as lacking in expertise in constitutional matters.
- iii) by naming him alongside Steve Mwenesi, a Luhya by ethnic extraction, Moses Wetangula, another Luhya and Amos Wako, a Luhya and Attorney General, he was being shown as a tribalist and engaged in tribal acts to smother the review of the Constitution.
- iv) He was being falsely accused together with his Luhya confederates of having already drafted a new Constitution for Kenya.
- v) It was said that it took them 2 or 3 days to write the draft Constitution and therefore obviously a cosmetic job as no Constitution can be written in 2 or 3 days.
- vi) He was being shown to be against the writing of a new Constitution at a time when tension was high in the country with a great majority of Kenyans loudly demanding a new Constitution.
- vii) He was said to be affiliated to KANU (Kenya National African Union) the then ruling political party which was not exactly a popular body at the time. Worse, he has never been a member or associate of that party.

Regarding the effect of the offending article on his reputation, Ojiambo stated his credibility was subjected to question by his partners in the law firm as the article stated that he had received payment which he did not disclose. He had to do a memorandum to them denying the allegation.

At the Nairobi Baptist Church, his standing was lowered because as a preacher and an elder, he was painted as a partisan person and his pastor, Rev Gichinga had to make a statement on the Sunday following the publication of the article indicating that Ojiambo was innocent of the allegations.

Ojiambo then sought legal advice and his advocates wrote to the Standard, Kanyanga and Omulo seeking a retraction of the offending article. "The Standard" published an apology which Ojiambo said was inadequate as it was buried at a corner of the Standard Daily Newspaper of 12th August 1997 and did not have the prominence of the offending article.

Ojiambo said one more thing which is of significance to this matter. An advocate of the High Court and writer, Paul Mwangi did publish a book, "*The Black Bar*" detailing out the history of the Bar in Kenya. He used the offending article as evidence of Ojiambo's links with KANU and portrayed him as a lackey of that party, a matter Ojiambo vehemently denies.

Ojiambo now seeks general damages for defamation and exemplary damages as the Standard failed to publish a proper apology, nor investigate the matter as it had promised and generally was quite indifferent to the injury caused to him.

My record of the cross-examination by counsel for the defendant reads as follows, being Ojiambo's responses to all the questions put to him: -

"There is nothing wrong with calling a lawyer a criminal lawyer.

There is nothing wrong with calling a lawyer, a KANU lawyer.

There is nothing wrong with calling a lawyer, a constitutional lawyer.

That is all".

Defendant's Case

The defendants filed a joint defence on 1st September 1997. There is admission of publication of the

offending article but denied that the words used were defamatory nor were they capable of bearing a defamatory meaning nor were they “false and maliciously published” (paragraph 5 of the defence). It is further pleaded that the words were

“true in substance and fact, and in so far as are a fair comment made in good faith, and in so far as they consist of expressions of opinions, they are a fair comment made in good faith upon the said facts which are a matter of public interest” (paragraph 9 of the defence).

There are particulars filed by the defendants under Order VI rule 6A(2) which are of importance to my determination of this matter. They are enumerated as follows: -

i) As concerns the words “The Country’s constitutional law experts have been engaged to work on the draft Constitution due to be presented to Parliament” It is true that only experts would be engaged to draft such a bill, which was in fact presented to Parliament.

ii) As concerns the words “Grapevine sources have it that the lawyers who have affiliation with the ruling party KANU were hired by the Attorney General a few days ago. The two names mentioned by inside sources as main players in the exercise is criminal lawyer Fred Ojiambo and Steve Mwenesi” it is true that the plaintiff has in the past been closely associated with KANU. It is also true that unconfirmed sources mentioned the plaintiff’s name and this was indicated on the face of the article.

iii) As concerns the words “They have virtually completed their work” it is true that by the date of the publication, work on the Statute (miscellaneous) Amendments Bill had been completed as evidenced by its being tabled in Parliament shortly afterwards.

iv) As concerns the words “This claim was disputed by a high ranking official in the Attorney General’s Chambers who claimed the Government is committed to making the amendments compatible with the aspirations of Kenyans” it is true that the claim was disputed by an official from the Attorney Generals office.

It is also the defendant’s case that an apology was duly published on 12th August 1997, and therefore the complaint regarding the apology should be ignored. It is also generally denied that Ojiambo is entitled to any damages as claimed. I am asked to dismiss the suit with costs.

I must note here that the defendants called no evidence to rebut Ojiambo’s claims and testimony before this Court.

Submissions by Counsel for the Plaintiff

Learned counsel appearing for the plaintiff filed detailed submissions and annexed a number of useful authorities. He quoted at length the lawyer’s bible on defamation, “*Gatley on Libel and Slander*” and in summary said that the words used by the defendant were defamatory of Ojiambo and the plea of justification was not supported by any evidence on the part of the defendant.

It was further submitted that the defendants portrayed Ojiambo as a lawyer generally in criminal practice and could not purport to be an expert in constitutional matters. The imputation was that he was a fraudster in that area of law and that he was hoodwinking the Kenyan populace in a matter very close to their hearts. That the statements were made when tension was high in the country obviously, it is stated, heightened the effect of the slander.

On damages, I have been referred to a number of authorities, which I shall return to, but in conclusion I am asked to grant general damages in the sum of Kshs 16,000,000 and exemplary damages in the sum of Kshs 4,000,000 with costs.

Submissions by Counsel for the Defendant

Learned counsel for the defendants in equally detailed submissions stated that to his mind, the words used in the offending article cannot form the basis for an action in defamation. It is said that:

- i) There is nothing defamatory about a lawyer not generally in criminal practice being so called, and in any event, all lawyers in Kenya are trained in almost all branches of law, including constitutional law.
- ii) There is no basis for saying that Ojiambo was a fraudster out to manipulate the public and subvert the Constitution review process.
- iii) The allegation that the alleged group of legal experts named in the article were all of the Luhya ethnic group was far-fetched and an ordinary person would not look to the names for an opinion of Ojiambo as a tribalist.
- iv) The contentions that Ojiambo obtained a brief which he concealed from his partners was neither here nor there as the test that the ordinary man would know of such matters cannot be passed as the matter cannot be within the knowledge of such a reasonable person.

I am lastly asked to find that the words used were incapable of having a defamatory meaning either in their natural or ordinary meaning or by way of innuendo as pleaded. Further, that the claim in the plaint should fail.

In the event however, that I should find for Ojiambo, I am asked to look to the authorities supplied and grant general damages at no more than Kshs 1,000,000.00 and grant nothing as aggravated damages as the defendant did publish an apology as demanded by Ojiambo's advocate.

Conclusion

Having set out the facts and the contending positions of the parties, I should now turn to my appreciation of the case.

Firstly, I must be alive to the time and circumstance at which the Standard published its article on 3.8.1997. Courts should be alive to the happenings in society because law does not operate in a vacuum and a Court closed to the on-goings in society cannot possibly understand the impetus behind a pleading. This is of course not to say that it is those on-goings that should influence the outcome of a case. What should influence the outcome of a case is the law and facts as applied, with a background, if necessary, of the general circumstances under which the issues arose.

In the instant case, Kenya was undergoing a generally tumultuous period round about 1997. The clamour for change and/or review of the Country's Constitution had reached fever high and elections were slated for December of the same year. Constitutional change was at the center of negotiations by political parties with a view to creating an acceptable environment for holding the General Elections. Anyone perceived to be working or was being used to derail the Constitution review process would in such circumstances be viewed suspiciously.

Ojiambo in saying that by being publicly announced as a member of a team of alleged experts who had in 2 or 3 days written a Constitution for the entire country, he had been put in bad light, is right and a reasonable man at that time would have no choice than to look at him with contempt. In such a situation, I agree that his reputation has been lowered and he has been defamed.

There is no doubt and there is no evidence to suggest all of the things published by the Standard. I am in agreement that a reasonable man reading through the article that is offensive to Ojiambo will come to the conclusion that he is a man without the interest of Kenya at heart and who has ganged up with a clique of Luhyas to forestall the review of the Constitution. That impression certainly lowered his esteem and that is an important ingredient in the proof of negligence. For avoidance of doubt, I am not in agreement with learned counsel for the defendant that the words used in the article are incapable of a defamatory construction. They do and I find in terms of paragraph 5 of the plaint and as reproduced at paragraph 4

page 3 of this Judgment. It is instructive that no evidence was called to rebut all the things that Ojiambo has complained of. I hold for him as prayed.

Assessment of Damages

I have been asked to assess damages at Kshs 16,000,000 by counsel for the plaintiff. The authority for this is my own judgment in *Hon Chris Obure vs Tom Oscar Alwaka T/A Headline Publishers & 2 Others* HCCC No 956 of 2003.

In that case, the plaintiff, a former Member of Parliament and Cabinet Minister had sued for defamation based on an article in the “*Weekly Citizen*” Newspaper whose heading was “Ex-minister Obure steals Man’s Wife” by Ronald Kwaba.

I found that the words used were defamatory to the extreme and awarded Kshs 16,000,000 as general damages.

In *Ojiambo’s* case, I shall borrow the words of Muli J in *Godwin Wanjuki Wachira vs Okoth* [1997] KLR 24 where he said that “mild” defamation cannot attract a large sum in compensation. In the instant case, I am not convinced that much as Ojiambo was clearly defamed, the magnitude of the same should be in the same bracket as that in the Obure case above.

Similarly, the defamation here cannot be compared to that in *John Evan Gicheru vs Andrew & another* (HCCC No 214 of 1999) where the present Chief Justice was while a Court of Appeal judge awarded Kshs 2.25 million in damages for libel in the book, *Moi: The making of an African Statesman*.

Neither should this matter be in the league of the case of *Kipyator N KBiwott vs Clays Ltd & another* HCCC No 1067 of 1999 where a former Cabinet Minister was alleged to have been involved in the murder of the late Robert Ouko, another former Cabinet Minister. A sum of Kshs 30,000,000.00 was awarded. Neither can the defamation in this case be compared to that of Ojiambo’s lawyer and colleague, George Oraro in *George Oraro vs Eston Barrack Mbajah* (HCCC No 85 of 1992) where a sum of Kshs 1,500,000.00 was awarded for sinister allegations by Barrack Mbajah, brother of the late Robert Ouko.

However, noting that these decisions were handed down a while ago, I shall agree with counsel for the defendant and award Kshs 1,000,000 in general damages.

Regarding aggravated damages, I find that since an apology was published by the Standard, its actions were in a sense mitigated. However, I agree with Ojiambo that the apology tucked away in a nondescript corner of the Standard issue of 12th August 1997 was not sufficient. I hereby order that a prominent apology in words to be approved by Ojiambo be published by the Standard on a date to be agreed by the parties’ advocates.

I therefore enter judgment as follows: -

- i) Kshs 1,000,000 in general damages
- ii) An apology in terms proposed above to be published by the Standard
- iii) Costs to the plaintiff

Orders accordingly.

Dated and Delivered at Nairobi this 7th day of May 2004.

I.LENAOLA

AG.JUDGE

