REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 3368 OF 1994

DR. JUMA MIKIDADI ..... PLAINTIFF

VERSUS

ALI KHALFAN ..... 1ST DEFENDANT

KENYA MEDIA TRUST LIMITED ..... 2ND DEFENDANT

JUDGMENT

The plaintiff Dr Juma Mikidadi was a lecturer at the University of Nairobi, at the time when he filed this suit, on 19th September 1994.

By a plaint dated 16th September 1994, the plaintiff sued the defendants for defamation. The 1st defendant, Ali Khalfan was then a writer with the Kenya Times Group newspapers, whilst the 2nd defendant, Kenya Media Trust Limited was the publisher of "Kenya Times" newspapers.

It was the plaintiff's contention that on 22nd July 1994, the defendants falsely, maliciously and without probable cause printed and published of the plaintiff, the following words:-

"A notice board at the mosque announced that today's prayers will be led by Dr Mikidadi. Two years ago the lecturer was chased away from the mosque by the committee because of his *Khutba* (speeches) against Saudi Arabia regime. He was delivering Friday prayers (*Khutba*) when the Imam was on leave. The invitation of Dr Mikidadi is believed is one way of using Africans at the dominated Asia mosque to import a Pakistan Imam."

The plaintiff asserted that the words above-cited meant and were understood to mean that he was not wanted by worshippers at Jamia mosque; he had no respect for the Republic of Saudi Arabia; he was not law abiding and should therefore be arrested and charged; he was privy to or intended to cause a split among the worshippers at Jamia mosque; he was a dishonest and untrustworthy person who was not fit to give a sermon at the mosque; he had been imposed on the worshippers at the mosque; and he was a stooge.

As a result of the publication, the plaintiff said that his character, credit and reputation had been injured, in the eyes of right thinking Moslems and worshippers at Jamia mosque, and also in the eyes of the Kenyan public who read the article. He asserted that his professional reputation as a lecturer had also been exposed to public scandal, ridicule, odium and contempt, in the eyes of his students and all those who knew the plaintiff or dealt with him.

Having sought an apology from the defendants, which was not forthcoming, the plaintiff instituted these proceedings. By this claim the plaintiff seeks not only general damages, as compensation for the defamation, but also asks this Court to award him exemplary and/or aggravated damages.

Following service of the pliant and summons, the defendants entered appearance and then filed a joint defence. By the said defence, the defendants asserted that the publication complained of was a reproduction of factual material, without any malice. They further contended that the publication constituted fair comment on matters of public interest. Indeed, as far as the defendant were concerned, the words complained of were not capable of defaming the plaintiff as alleged or at all.

The defendants admitted that they did receive a notice from the plaintiff, demanding an apology. However, they did not apologize as, in their view, no apology was necessary or warranted. Finally, the defendants denied that the plaintiff was entitled to any compensation.

After the pleadings were closed, the case took a long time before it came up for hearing. And when it did come up for hearing, before me, on 28th January2004, the plaintiff was represented by Mr Khalwale advocate, whilst the defendants were not represented nor were they present in court. After the Court satisfied itself that the defendants had been given due notice, it allowed the plaintiff to proceed with the trial.

PW 1 was the plaintiff. He testified that he was a Member of Parliament in the National Assembly of Tanzania. He said that he had been elected into the Tanzanian Parliament, after he had worked as a lecturer, for five years, at the University of Nairobi. As a lecturer, the plaintiff used to socialize with many persons and groups of people, including the Jamia Mosque, the Saudi Embassy and the Kuwaiti Embassy, amongst others.

He said that on 22nd July 1994, the defendants published the offensive article in the newspaper. A copy of the said article was also placed on the notice-board at the Jamia Mosque. Whereas, the plaintiff did not know who put the copy on the notice-board, he knows that the defendants were responsible for the publication.

An original copy of the newspaper containing the offending article was adduced in evidence by PW3, Duncan Otieno Odima, who is a librarian working at the High Court library, Nairobi Law Courts. After the Court compared the original publication to the photocopy thereof, I released the original back to the library, after verifying that the publication complained of was authentic.

In his evidence, the plaintiff explained that he had previously undertaken part of his educational training in Saudi Arabia. He also said that the Kingdom of Saudi Arabia had paid a part of his fees. He therefore felt very offended when the article stated that he had allegedly given speeches, at the mosque, against the regime in Saudi Arabia.

Whilst explaining that he had given speeches at the mosque, on about 10 occasions, the plaintiff categorically denied ever having spoken anything ill against the Kingdom of Saudi Arabia. If anything, the plaintiff said that he had a lot of respect for the Kingdom, as it is the place where he got both his first and second academic degrees.

The plaintiff also said that he was invited to give the speeches by the committee which was responsible for running the mosque. PW2, Mr Murad Ibrahim, who was a member of the Jamia Mosque Committee, confirmed that the said Committee did arrange for the plaintiff to give a *Khutba*, on 22nd July 1994. He explained that the committee had invited the plaintiff to give the *Khutba*, as they held him in high esteem as a good Muslim scholar.

However, after the article was published in the newspaper PW 2 noted that that the plaintiff was badly affected. He noted it from the plaintiff's facial and emotional expressions. Furthermore, the University of Nairobi, where the plaintiff used to lecture, did ask the mosque committee to explain the relationship it had with the plaintiff. PW2 explained to the Court that the University had taken the position that the

plaintif used to interfere with the Jamia mosque. That impression was derived from the article in issue.

Hamisi Muthigani Muchai was PW 4. He used to work as the caretaker at the Medina Community Centre, which is situated along Mbagathi way. Some of his roles were to look after the center's property, lead prayers, organize activities at the centre etc. He testified that in the course of his duties, he got to know the plaintiff as a scholar, who used to teach at Jamia mosque amongst other mosques.

On 22nd July, 1994, PW 4 met the plaintiff at Jamia mosque, at about 2.15 pm. He explained that the said meeting was after the prayers. He said that the plaintiff did give the speech on that day. PW4 said that the plaintiff did not say anything against the Kingdom of Saudi Arabia. He also testified that he had attended the earlier *Khutba*, by the plaintiff, at which he had allegedly spoken against the Kingdom of Saudi Arabia. In his testimony, PW 4 stated categorically that the plaintiff had not spoken against the Kingdom.

The witness further testified that the *Khutba* by the plaintiff did not cause any divisions amongst the worshippers at Jamia mosque. Thus, in a nutshell, he said that the contents of the publication were not correct.

At the close of the plaintiff's case, the 2nd defendant did not adduce any evidence.

In effect, the evidence by the plaintiff was uncontroverted. I will therefore accept it as reflecting the factual position. But I do not just accept it at face value, simply because the defendants did not lead evidence to controvert it. No I satisfied myself that the evidence was backed by tangible matter. I had occasion to see the publication itself. I also perused the letter from Khalwale & Company Advocates, dated 2nd August 1994. The said letter was addressed to the 2nd defendant, and it sought a written apology.

The 2nd defendant responded, by a letter dated 30th August 1994, stating, *inter alia,* as follows:-

"This company does not deny the publication as alleged but denies that the same was false or malicious. In any manner and further deny that the report could in any way be interpreted to carry any defamatory and/or libelous connotation capable of making your client suffer in his esteem."

The 2nd defendant concluded the letter (of 30th August 1994) by promising the plaintiff that if he did institute the threatened suit, it would be strenuously defended.

But when the time came, the 2nd defendant did not put forward its strenuous defence. Indeed its advocate only turned up in court on one occasion. Even though the advocate successfully sought an adjournment, to an agreed date, the said advocate did not turn up again. The 2nd defendant also failed to show up.

Meanwhile, the 1st defendant had passed away; so I was informed by the plaintiff. Therefore, he could not defend the suit either.

In consequence of the foregoing, as I have already stated, the plaintiff's claim herein is practically unchallenged. Therefore, I do hereby find that the 2nd defendant is liable to the plaintiff for defamation. I also hold that the 2nd defendant failed to take any action to contact the plaintiff, in an effort to verify the truth or otherwise of the statement before it caused the publication thereof. In other words, the 2nd defendant was, at the very least, negligent when it published the article without first seeking out the plaintiff for his comments.

Thereafter, when the 2nd defendant was given notice by the plaintiff,demanding an apology, the 2nd defendant said that no apology was necessary or warranted. They still insisted that the contents of the article were factual. Yet, ultimately, the 2nd defendant failed absolutely, to put forward any evidence to authenticate the article.

To my mind, the conduct of the defendants both prior to the publication, as well as after the publication, including the period during the trial, is a clear manifestation of an attitude of recklessness.

The 2nd defendant published untruths about the plaintiff, without bothering to check on whether or not it was factual. The Newspaper's Company Secretary thereafter wrote to the plaintiff's advocate, saying that the 2nd defendant would not apologize. In my assessment, that conduct of the 2nd defendant smacks of malice, or at any rate is evidence of gross negligence on the part of the 2nd defendant.

That the University of Nairobi, which was the plaintiff's employer at the material time had to ask the Jamia mosque to clarify if indeed the plaintiff was causing division at the mosque, is proof of the extent to which the publication adversely affected the reputation of the plaintiff.

In *John V MGN Ltd* [1996] 2 All ER 35 at 47, the Court of Appeal of England held as follows:

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

Identifying the applicable principle of law is the easy part of such cases. However applying it is largely a very subjective exercise. But the Court must nonetheless take the necessary precaution to ensure that whatever award it gives to a successful plaintiff was generally in line with what the courts here have been awarding.

In this case, the plaintiff has sought not only general damages, but also exemplary or aggravated damages. The latter damages are meant to compensate the plaintiff for the additional injury going beyond that which flowed from the words alone.

The following are the factors which *Halsbury's* sets out as those that tend to increase or aggravate damages; (Please see paragraphs 237 to 242 of the 4th edition of *Halsbury's Laws of England)*.

(i) Manner of publication and extent of circulation

(ii) Defendant's actual malice

(iii) Defendant's subsequent conduct.

(iv) Failure to apologize

(v) Justification

(vi) Conduct of the defendant's case.

In this case, the publication was in a national daily newspaper. The impact of the publication would thus reverberate throughout our country, Kenya. And although the plaintiff did not lead evidence to prove actual malice, on the part of the 2nd defendant, the refusal by the said defendant to apologize is definitely a factor that would aggravate the damages. Indeed, the 2nd defendant not only wrote, saying that they would not apologize, he thereafter put forward a defence of justification. But when the case came up for trial, the 2nd defendant did not adduce any evidence to justify its actions. In my considered view, those factors, when applied to this case, justify the award of aggravated damages, against the 2nd defendant.

As regards exemplary damages, the same are only to be awarded in limited instances. The categories of cases in which exemplary damages should be awarded are set out, at paragraph 243 of *Halsbury's Laws of England*, as follows:-

"Exemplary damages should be awarded only in cases within the following categories:-

(1) Oppressive, arbitrary on unconstitutional action by servants of government;

(2) Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff; or

(3) Cases in which the payment of exemplary damages is authorized by statute.

When elaborating on the three categories, the learned authors of *Halsbury's* emphasize that:-

"In demonstrating the defendant's calculation as to profit, it is not sufficient to show merely that the words were published in the ordinary course of business run with a view to profit; the publication must be intended to make a specific profit."

In my assessment of the evidence before me, I find nothing to indicate that the publication was intended for a specific profit. I therefore hold that the plaintiff is not entitled to an award of exemplary damages.

The plaintiff's advocate has submitted that I should award Kshs 15 million as general damages, and a further sum of Kshs 3million as aggravated damages. I have considered the authorities cited by the plaintiff. As far as I am concerned, the authority which is most comparable with this one is *Abraham Kipsang Kiptanui v Francis Mwaniki & 4 others* HCCC No 42 of 1997. In that case, the plaintiff, who was the Comptroller of the State House, (which is the official seat of the President of the Republic of Kenya), had been defamed by a newspaper called the "Target." He was awarded Kshs 3,500,000/- general damages, and further Kshs 1,500,000/ - as aggravated damages.

I have also considered the following authorities:

(i) *George Oraro v Barrack Weston Mbaja*, HCCC No 85 of 1992, wherein the plaintiff was awarded Kshs 1,500,000/-, as general damages, for defamation contained in an affidavit which was sworn in the USA, but published in Kenya.

(ii) *John Evans Gicheru v Andrew Morton & Another*, HCCC No 214 of 1999, in which the plaintiff was awarded Kshs 2.25 million for libel contained in a book entitled "*Moi the making of an African Statesman*", by Andrew Morton.

(iii) *Kipyator Nicholas Kiprono Biwott V Clays Ltd & 3 Others* HCCC Nos 1067 and 1068 of 1999. The 3rd and 4th defendants in HCCC No 1067 of 1999 consented to judgment on liability and agreed to pay Kshs 5,000,000/- each. Thereafter, the learned trial judge found the other defendants liable, and ordered them to pay Kshs 15 million as general damages, and a further sum of Kshs 15 million as exemplary damages.

Doing the best I can in the circumstances, I assess general damages at Kshs 3,000,000/-, and aggravated damages at Kshs 1,000,000/-. I therefore enter judgment in favour of the plaintiff against the 2nd defendant as follows:-

(a) Kshs 3,000,000/- as general damages

(b) Kshs 1,000,000/-as aggravated damages

(c) Costs of this suit

(d) Interest on (a) and (b) above at court rates, from the date of judgment.

(e) Interest on costs, at court rates, from the date of taxation of the Bill of Costs, or from the date of agreement between the parties, on the quantum of costs, whichever comes earlier.

It is so ordered.

Dated and Delivered at Nairobi this 2nd day of November 2004.

F.A.OCHIENG

Ag. JUDGE