



REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT NO 612 OF 2001

YOBESH OYAROPLAINTIFF

VERSUS

ALWAKA T/A WEEKLY CITIZEN & 2 OTHERS.....DEFENDANT

JUDGMENT

This claim was filed through a plaint dated 5.12.2001 probably filed on the same date. The plaint avers that the plaintiff is a qualified accountant/ auditor who worked at Kenya Ports Authority as a procurement manager.

It avers further that the defendants are business persons and/or business enterprises carrying on business at Nairobi. It would appear that the defendants jointly and severally did print, publish and distribute or circulate through a weekly newspaper called *Weekly Citizen* volume 4 No 42 intended to cover the period 29th October to 4th November, 2001 an article with the following words:

“Meanwhile Kenya Ports Authority (KPA) looting bonanza has reached dangerous proportions with a manager incharge of procurement taking a lead in opening gates for Asian looters to eat where they did not sow. *Weekly Citizen* is said to report Mr Yobesh Oyaro the KPA procurement manager has reportedly teamed up with a number of Asians to supply goods and services to the parastatal. Oyaro’s involvement in the supply of goods and services to KPA where he is an employee is said to be costing the government parastatal millions of shillings since in reality no goods were supplied at all, talk of conflict of interest. *Weekly Citizen* was told last week that at present, Oyaro is fronting for a company known as Josmill Enterprises to be awarded a Kshs 5 million tender of which he is to share the said money by half. Preliminary investigations established that Josmill Enterprises is owned by an African couple but an Asian looter whose other companies had been black-listed at the port has taken over the company in unclear arrangements to use it to loot the KPA through the support of Oyaro, we learnt...

We are told that Josmill Enterprises was among other companies supplying goods to the port, which Oyaro has an interest in. Sources further added that there are over 50 other companies supplying goods to the port, which Oyaro has a stake in. Oyaro normally gives tender especially the ones below Kshs 5,000,000/- after being given a 20% commission kick-back, or one must agree with him first that the money is to be shared by half with him, said a friend of his. Oyaro whose political god-father is Kanu rebel MP and Ford People presidential hopeful, Simeon Nyachae, is said to be a proud man who is always heard boasting of how he has pocketed reporters and publishers in Mombasa. Oyaro hails from Kisii land Ö At the same time sources told the *Weekly Citizen* that Oyaro is leading a team of KPA managers who are opposed to the parastatal’s chairman Mr Jonathan Mturi. Oyaro, sources say, is publishing for the removal of Mturi from the port arguing that the chairman who is a Mijikenda, was fighting port managers

of upcountry origin ..”

The plaintiff further also avers in the said plaint that the defendants as well printed, published and circulated and distributed in the *Weekly Citizen* volume 4 No 40 of 15th – 21st October 2001, the following words:-

“The Ports Procurement Department headed by one Yobesh Oyaro is also being used by crooks to mint millions of shillings at the expense of KPA. Friends and relatives of Oyaro are known to win tenders and sometimes get paid thousands of shillings even when nothing is supplied to KPA. Procurement manager is said to be empowered to give out some tenders without subjecting to bidders to tendering procedures and this is where the port is losing heavily.”

The plaintiff further said that the above quoted words have seriously injured, damaged the plaintiff’s reputation, character and good standing at his place of work and in the society and that the same, mean, in the ordinary meaning and to the right thinking members of the society, that the plaintiff is a liar, a thief, a cheat, as well as being corrupt, unreliable, dishonest and incompetent and also is one without integrity. He further avers that those descriptions of him by the defendants are completely untrue and without foundation. He also states that by a notice exhibited as exhibit Y3 dated the 31.10.2001, the plaintiff asked the defendants to retract the published words or withdraw or cancel them, but that the defendants ignored or refused or neglected to do so. The plaintiff avers further the defendants action of printing, publishing and circulating or distributing the said words which are defamatory of him, is illegal, unlawful an malicious and has caused damage to him in his personal and professional capacity. He prayed that the defendants, jointly and severally, should be stopped permanently from printing, publishing and distributing similar defamatory words in regard to the plaintiff’s name, reputation, character, profession or official duties and that if they are not stopped forthwith, they would continue doing so and the plaintiff would continue suffering serious and irreparable damage and loss. The plaintiff concluded by praying for:-

(a) a permanent injunction to be issued to strain the defendants jointly and/or severally, themselves and/or their authorised agents, servants and employees from printing, publishing, and/or distributing any defamatory words, articles, newsletters and newspapers in respect of the plaintiff personally and/or his profession, official duties, character or reputation forthwith

(b) General damages and exemplary damages

(c) Costs

(d) Any other relief

By an interlocutory application filed together with the plaint and heard by this Court on 20.12.2001 an interim order based on prayer (a) was granted to the plaintiff restraining the defendants jointly and severally, until the case is fully heard and determined, from repeating the alleged offences against the plaintiff. On 8.6.2002, the case came for formal proof, before me. It was then noted that although the defendants had been served with the summons accompanied with the plaint, they had failed to enter appearance or later, defence as prescribed by law. As a result an interlocutory judgment was entered against the defendants on 24.1.2002. When the case came up for formal proof as aforementioned the plaintiff gave evidence to prove his case as averred in the plaint repeating each averment and supporting it with oral evidence. He stated that apart from what is stated in the plaint which he repeated, he was a happily married man with three school going children. He testified that the publication very adversely affected him in the family and among both close and other friends. He believed that his friends and associates both socially and otherwise no longer regard him as an honest or fair person. He believed that people now believe that whatever he earned as a salary and from his honest business is stolen or obtained under the alleged corruption. He feared that even professional colleagues will never respect him anymore in his profession and employment. He also feared that it was likely that his employer would no longer continue bestowing confidence in his work and it is most likely that the result would most likely adversely affect him in his present position as a procurement manager, and will certainly adversely retard his

chances of promotion. For these reasons a finding of this Court clearing him would be very important and necessary. The plaintiff called three witnesses, PW 2 Abaigoa Muduruma Ngome who asserted how honest, honourable, incorruptible, and competent the plaintiff has been. The witness confirmed that the plaintiff rose in this grade in his employment because he was a good and honest worker. He had seen the adverse publication in the *Weekly Citizen* but because he had worked with the plaintiff for that long and had known him well, he was not misled by the articles especially since as an insider of the Kenya Ports Authority, he knew well that goods and services contracts tendered by the authority were not a one person job but of a committee. He therefore found it difficult to believe the allegations in the newspaper aforementioned. However, not the 2nd witness PW3, Daniel Ngugi. The latter in his evidence was alarmed by the words and allegations used in the said publication. He believed them. He believed that the plaintiff was dishonest and corrupt and that such explained why he gave Ports

Authority contracts after receiving bribes in terms of commissions. He believed the plaintiff had thus abused his office, had used god-fathers to protect him and that finally the plaintiff might end up being arrested and prosecuted in the courts of law. He saw the plaintiff as a person who has obtained all the properties he has through corruption and through the protection of political god-fathers. He also had information that the plaintiff who had been elected to and held various chairmanships or headships of several professional and social society, was about to lose such, due to the revelations in the *Weekly Citizen* aforesaid. The plaintiff has since the publication greatly reduced his appearances in social clubs some of which he was the chairman. He also believed that many people, including those who knew him and those who did not know him before, in the whole country where the magazine was distributed now knew him very adversely.

The third witness Dickson Kibagendi PW4, expressed the impression expressed by the 2nd witness. He concluded that he now, after the stated allegations, knew the plaintiff as an unfit person, not only to hold his present job but to lead any social and professional societies that now he led due to the man he really is from the information published by the *Weekly Citizen* aforesaid. He confirmed that many people were impressed by and believed the words published as above.

It was upon this evidence that the plaintiff sought the remedies that he did as hereinabove stated. I have carefully perused and examined the evidence on the record, which at the same time, was not rebutted since this was a formal proof. It is my finding as supported by the copies of the *Weekly Citizen* tendered in evidence and which were marked herein as exhibit 1 covering 29th October to 4th November 2001 exhibit 2 covering the period 15th – 21st October 2001 and exhibit 3, covering the period 18th – 24th February 2002, that the defendants jointly and/or severally printed the exhibited articles. I also hold that the publications were in their ordinary and implied meanings definitely defamatory within the meanings testified by the plaintiff and since the plaintiff who was the subject person denied the truthfulness of the allegations and I believed him and believed the evidence of this witnesses. I find and hold that those who read the articles and such could be many, especially in Mombasa and Nairobi will have believed it and their esteem of the plaintiff would definitely have been seriously lowered before their eyes. That the plaintiff was, due to the publications, likely to lose social and/or professional friends and associates, is highly likely. It is also likely likewise that he might lose his job or lose immediate opportunity for promotions. He also stood to lose leaderships he was holding in social and professional clubs. It is my finding and I so hold that the plaintiff has proved his case beyond doubt on the issue of liability and I will now turn to the issue of assessment of damages. However, I will first note that the defendants or defendant's servants or employees were served with a notice of demand before this suit was filed. Copy of same was tendered in evidence as exhibit 4. It is in evidence that the defendants failed, refused or neglected to tender any amends or apology. There is a suggestion that there was an attempt to negotiate some kind of settlement out of court but no progress emerged as the defendants appeared not to be serious.

The statement or words complained of are quoted hereinabove. I have already above indicated the natural and ordinary full meaning assigned to the words by the plaintiff and his witness while PW2 Abaigoa Muduruma Ngome who knew the plaintiff well and worked with him was not misled by the publication complained of. This was because he knew from the inside as an employee working under the plaintiff that the publications were totally untrue. However PW3, Daniel Ngugi believed the disparaging publication.

So did PW4, Dickson Kibagendi. The two concluded that the plaintiff was corrupt and dishonest, and was involved in fraudulent activities. They believed further that he used his position to unlawfully award contracts to his friends and other business persons on the basis of commissions and was therefore unfit and incompetent to hold the position of procurement manager with Kenya Ports Authority. There is no reason not to think that many people who read the publications in question thought differently of the plaintiff and that more than likely they believed the contents cited. Looking back at it, and considering the denial by the plaintiff and PW2 of the veracity of the publication the position this court believes is that the publication were untrue, malicious and intended specifically to cause damage to the plaintiff personally and in his employment as well as professionally. An action for defamation such as this is essentially an action to compensate a person for the harm done to his reputation. In all actions for libel and in some for slander, the law presumes that the plaintiff has suffered harm. Although the person's reputation has no actual cash value, the Court will form its own estimate of the harm in the light of all the circumstances of the case. The Court will therefore take into account the plaintiff's profile *vis a vis* what has been published about him. In this case before me the plaintiff is a qualified accountant and auditor. He works with Kenya Ports Authority as procurement manager. Kenya Ports

Authority is one of the largest parastatal and corporations in this country and therefore is exposed to great traffic of business people in the country. He is a member of the Institute of Certified Accountants and a member of the Kenya Institute of Management. He is a member of Mbarak Sports Club and a chairman of Abagusii Welfare Association. He had been a treasurer of Mbarak Sports Club and treasurer of Abagusii Welfare Association for six years respectively due to his honesty and competency. He is presently the chairman of Ports Co-operative Society. That he is a person of good reputation therefore cannot be doubted. That the defendants chose not to defend the case even after trying negotiations only goes to put weight to the fact that the facts published against the plaintiff were not only false but also malicious. What damages fit this case then?

In *George Oraro v Mbaja* HCCC No 152 of 1993, the High Court Nairobi awarded Kshs 1.5 million to a libelled senior advocate. In the case of *Joshua Kulei v Kalamka Limited*, Nairobi HCCC No 375 of 1997, the Court awarded a prominent business man and a highly placed civil servant a total sum of Kshs 10 million as damages in a similar case. In the case of *Pyramid Stragesies Ltd v Charles A Shillanga* Nairobi HCCC No 792 of

2000, where also the case was similar as this, the Court noted that the defendant repeated the offending publications and refused to apologise.

It awarded damages of Kshs 2 million. In the case of *Kipyator Nicholas Kiprono Biwott v Clays Limited and 3 others* in Nairobi HCCC No 1067 of 1999 consolidated with *Kipyator Nicholas Kiprono Biwott v Dr Ian West and Chester Stern*, in Nairobi HCCC No 1068 of 1999, the court awarded damages of Kshs 15 million with exemplary damages of another 15 million.

I have carefully considered this case before me in light of the above cited cases. I note similarly that the defendants in this case failed, neglected or refused to tender apology and repeated the publications twice after the first one. I will however take into account that the publication is limited mainly to Nairobi and Mombasa cities. Doing the best I can, I find that a suitable amount to award will be Kshs 3,000,000/- which I hereby order in favour of the plaintiff, with costs and interests at court rates.

I also order that a permanent injunction do issue restraining the defendants jointly and severally, by themselves or by their servants and employees from printing, publishing and/or distributing any defamatory words, articles, newsletters, or newspapers in respect of the plaintiff herein personally and/or by his profession, official duties, character or reputation.

Dated and delivered at Mombasa this 1st day of September, 2003

D.A. ONYANCHA

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JUDGE