



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL CASE NO 165 OF 1999

WILSON KALYA.....PLAINTIFF

SIMON C. LILANPLAINTIFF

VERSUS

STANDARD LIMITED.....DEFENDANT

WACHIRA WARURU.....DEFENDANT

PATRICK WACHIRA.....DEFENDANT

JUDGMENT

The two plaintiffs herein, namely, Wilson Kalya and Simon C. Lilan, are both advocates of the High Court of Kenya and at all material times were practicing as Kalya and Company Advocates with their main office based in Eldoret. They filed this suit against the three defendants, The Standard Limited; Wachira Waruru; Patrick Wachira, on the 24th August, 1999 seeking judgment against them jointly and severally as follows:-

- (a) A permanent injunction restraining the defendants by themselves, servants, directors, editors and or employees or otherwise from publishing or causing to be published or continue to publish any or every words, statements or matters regarding and touching on the plaintiffs or about them or concerning them which may in any way be injurious or prejudicial to the plaintiffs.
- (b) General, exemplary, punitive and aggravated damages.
- (c) Special damages for Kshs.30,297.80.
- (d) An order for publication of an apology and clarification as per paragraph 16 above (i.e. in the Plaintiff).
- (e) Costs of this suit.
- (f) Interest on (b), (c) and (e) above.
- (g) Any other or further relief that this court may deem fit to grant.

The plaintiff's cause of action arose from two newspaper publications of 5th and 6th August, 1999, the particulars of which appear in paragraphs 5(a), 5(b) and 6 in the Plaintiff. The plaintiffs gave the natural and ordinary meaning of the false and defamatory words about them in paragraph 7 of the Plaintiff.

The defendants filed a joint defence in which they admitted that they had published the words complained of but denied that they were defamatory at all. They also denied that they were motivated by malice and ill will or that the words were malicious, false or calculated to injure the plaintiffs. The defendants also pleaded qualified privilege of newspapers. They also denied that the plaintiffs had been injured or their reputation lowered as alleged in the Plaintiff.

Upon being served with the statement of defence, the plaintiffs filed summons in Chambers on the 3rd November, 1999 seeking for orders that that defence be struck out under O.VI .R. 13(1) (b) and (d) of the Civil Procedure Rules. In her ruling dated 6th February, 2001 Nambuye J allowed the application. The statement of defence was thus struck out and the plaintiffs allowed to fix the suit for assessment of damages. Both counsel for the plaintiffs and for the defendants agree that the issue of liability having been settled by Nambuye J, the only issue before this court is the assessment of quantum of damages. The 1st plaintiff is a prominent advocate who, according to his uncontroverted evidence, attracts a large volume of both qualitative corporate and individual clientele. He is an advocate of long standing and maintains a high profile in the social and administrative fields. This was also admitted in the submissions handed in by the counsel for the defendants. The plaintiff himself explained the mental anguish which he underwent as a result of the publications complained of and the numerous inquiries he received from close associates and friends which embarrassed him and his family members to the extreme. Independent witnesses testified before this court as to how they considered reviewing any future dealings with the firm of Kalya and Company Advocates with others threatening to withdraw, altogether, their briefs to that firm. There is no doubt, therefore, that the 1st plaintiff did suffer injury to his good reputation, was humiliated and distressed. Evidence was also adduced to the satisfaction of this court that what was published of both plaintiffs and complained of in this suit was totally false and facts to that effect were communicated to the defendants prior to the publication of the second article. Despite those facts being made known to the defendants, the second publication was given an almost equal prominence as the first.

It was the case of the 2nd plaintiff that he equally suffered embarrassment and humiliation and was shunned by dairy farmers who looked upon him and his firm as one of the culprits who had stolen from KCC and caused its collapse and yet it was the dairy farmers who formed the bulk of individual clientele of the 2nd plaintiff and his firm. He was, at the material time, an equally well known advocate and also served on the board of governors of a Teachers Training College.

From the above, it will be noted that although libel is actionable *per se*, the two plaintiffs did prove that they indeed suffered damage and are entitled to compensation. As was correctly put by counsel for the defendants, there is no formula for assessment of damages in libel cases. But the courts are always conscious of the guidelines which have emerged in decided cases. In *Nicholas K. Biwott v Clays Limited and Another* Civil Case No. 1067 of 1999 this court quoted with approval the words of Naivse, LJ in the case of *Sutcliffe v Pressdram Ltd.* [1990] ALL ER 269. Both counsel herein have relied on the *Biwott's* Case as relevant in this suit for purposes of the assessment of damages. In the English case above, it was stated that

“the purchasing power of the award must be taken into account ... ordinary sensible men and women ... could not regard (an enormous award of damages) as anything other than an enormous sum of money, a sum which would transform the life of any of them who received it.”

In referring to that case, counsel for the defendants submitted that the courts should guard against unjust enrichment. However, having enunciated the above guidelines, and in a case not very different from the present in that the publication had imputed a serious criminal offence against Hon. Biwott as in the instant case, the court went on to award him Shs.15 million. This court, is, with respect persuaded by the reasoning that went into the final award which that court handed out.

Counsel for the defendants attempted to distinguish this case and that of *Joshua Kulei v Kalamka Ltd* Nairobi HCCC.NO.375 of 1997 which was relied upon by the plaintiffs. His reasons were that Mr. Kulei was the then State Comptroller with international business and official contracts and dealings. That being the holder of a public office, the potential and actual damage to his reputation is far greater than that of the plaintiffs herein. Further, that the offence with which the plaintiff therein was charged was punishable

by death. He also distinguished *Biwott's* case pointing out that he held a much higher profile locally and internationally as compared to the plaintiffs herein and that the defendants had expressly refused to apologize.

The other case relied upon by the plaintiffs was NAI.HCCC.NO.1709 of 1996 *J. P. Machira v Wangethi Mwangi & Nation Newspapers Ltd.* Counsel for the defendants was of the view that publication was made even after the correct facts were laid before the defendants and therefore they acted recklessly without regard to the torturous nature of their actions. In *Machira's* case (supra), he was awarded Shs.8 million as general damages. To my mind, this is the most persuasive of all the authorities that were presented before this court, both for the reason that Mr. Machira, like the plaintiffs herein was an advocate of the High court, and for the parity of the conduct of the defendants prior to, upon filing the suit and subsequent thereto. In both cases, the defendants refused to, were reluctant to or apologized in a most distasteful manner. Further, despite the two facts being laid before the defendants in both cases, the publications were not withheld. I, with respect, find no distinguishing circumstances between the two cases as suggested by counsel.

Having taken into account their standing in society and the violent damage to their reputation which the defendants deliberately and maliciously occasioned, I do award the plaintiff No. 1 general damages in the sum of Shs.9 million, heavily persuaded by the cited authorities, and in particular, that of *J. P. Machira's* case. The second plaintiff shall receive an award of Shs.4 million shillings. I am convinced that at the material time, he held a lesser profile than the 1st plaintiff.

Deriving from the authoritative text book, (*Gatley on Libel & Slander* 8th ed London. S&M 1998) which both counsel relied on, the court in assessing aggravated damages must look at the conduct of both parties before action, after action and during trial. Malicious and insulting conduct on the part of the defendants ought to aggravate the damages.

Counsel for the plaintiffs in his written submissions on pages 8 to 11 gave a detailed amount of the respective conducts of the plaintiffs and the defendants before, after action and during trial. The counsel for the defendants did the same on pages 8-10 of his written submissions. Both are lengthy and need no reproduction in this judgment. However, the two sides are in agreement that the same day that the first publication appeared in the daily, the plaintiffs faxed their protest to the defendants and demanded an apology. It is common ground that the defendants went ahead to publish the second article complained of and did not even respond to the plaintiff's letter of 5th August, 1999 until 8th August, 1999. There is no evidence of promptitude or diligence in that conduct and, if anything, that conduct was indicative of recklessness and malice and a total disregard for the truth. When the reply finally arrived, it did not only purport to seek particulars and a draft apology but attempted to justify the defendant's acts. In the end, there was no apology tendered then and to date. The defamatory material was repeated conspicuously for 2 consecutive days in a daily with a very wide geographical circulation nationally. By refusing to publish an apology and instead make a repetition led to the plaintiffs publishing the correct facts by a paid advertisement in the *Daily Nation*. In the defence which Nambuye J. struck out, the defendants tried to justify the publication. Their conduct in all circumstances as opposed to that of the plaintiffs makes them liable to pay aggravated damages, which I assess at Kshs.2 million for each plaintiff. In this regard I do not deem it fit to distinguish between the plaintiffs as I have done with regard to general damages.

The special damages claimed were due to the plaintiff's quest to mitigate the harm done to their reputation by the publications complained of after their letter of 5th August, 1999 had not been heeded, and, when a repetition was made on the 6th August, 1999, they had real apprehension of further repetitions. They thus moved with speed to publish the correct facts in an equally widely circulated paper. The item of special damages in the sum of Shs.30,297.80 is thus due to and is awarded the plaintiffs.

On the authority of *J. P. Machira* (supra) I find and hold that the period between August, 1999 and October, 2002 is so long that to order an apology would have no effect on the damage to the plaintiffs' reputation. It is immaterial that the plaintiffs did already mitigate through a paid advertisement or that they have been compensated. The court awards to each plaintiff the sum of Shs.300,000/- under the head of damages in lieu of apology.

I therefore enter judgment for the plaintiffs against the defendants jointly and severally as follows:-

- (a) (i) General damages for 1st plaintiff in the sum of Kshs.9,000,000.00
- (ii) General Damages for 2nd Plaintiff – Kshs.4,000,000.00

- (b) (i) Aggravated damages for 1st Plaintiff – Kshs.2,000,000.00
- (ii) Aggravated damages for 2nd Plaintiff – Kshs.2,000,000.00

- (c) (i) Damages in lieu of apology for 1st Plaintiff – Kshs.300,000.00
- (ii) Damages in lieu of apology for 2nd Plaintiff – Kshs.300,000.00

- (d) Special damages Kshs.30,297.80

The court does not deem it necessary to grant prayer (a) in the Plaint since it is too wide and indefinite. However, interest on the awards at court rates are granted the plaintiffs together with the costs of this suit. I so order.

Dated and delivered at Eldoret this 30th day of October, 2002

J.E.O TUNYA

JUDGE