



REPUBLIC OF KENYA



KENYA LAW
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**Musindi v Amuli & 3 others (Civil Case 14 of 2018)
[2024] KEHC 1414 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1414 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL CASE 14 OF 2018
HK CHEMITEI, J
FEBRUARY 15, 2024**

BETWEEN

MARY WAIRIMU MUSINDI PLAINTIFF

AND

LINET AMULI 1ST DEFENDANT

REITZ MUREITHI 2ND DEFENDANT

PETER MBURU 3RD DEFENDANT

NATION MEDIA GROUP LIMITED 4TH DEFENDANT

JUDGMENT

1. The plaintiffs filed this suit against the defendants jointly and severally praying for the following orders;
 - (a) General damages.
 - (b) Exemplary damages
 - (c) An order of permanent injunction restraining the defendant herein whether by itself, its agents, servants or proxies from publishing or continuing the publication of further material on the same or similar libel about the plaintiff.
 - (d) That the defendant be ordered to prominently publish a withdrawal and a substantive apology to the plaintiffs in both the online platform and Taifa Leo and Daily Nation newspapers.
 - (e) The defendants be ordered to bear the costs of this suit and interest thereon.
2. The defendants filed a joined defence denying the charges.



3. The matter proceeded to full hearing where the plaintiff testified and called two witnesses and the defendants two witnesses. The court shall proceed to summarise their evidence and later the submissions by the parties.
4. The undisputed facts are that there was a helicopter crash around lake Nakuru and on 22nd October 2017 the 4th defendant published an article entitled, “questions abound on disaster response after chopper crash”. The said article went on to state that “...the pilot may have been in an early morning adventure ride around the lake.”
5. The article contained the plaintiffs coloured photos mourning the victims of the crash.
6. On 24th October 2017 there was also another publication entitled “Nakuru parents did not know daughter was in ill-fated plane.”
7. The same went on to state that the said woman was a graduate of Rift Valley Institute of Science and Technology and her name was Veronica Muthoni. The said article carried on it the picture of the plaintiff.
8. The consequence of these articles caused great pain to the plaintiff as she was alive and was not the deceased referred to in the said newspaper articles. She then issued a demand to the defendants to issue a formal apology. The 4th defendant issued an apology which according to the plaintiff was not prominent enough like the main article.
9. The plaintiff thereafter filed this suit seeking damages as stated above. In her evidence she said that the article insinuated that she was in the flight and that she was in a night out with the pilot.
10. She said that she got many calls from those who had read the article including her parents, grandparents and her husband who was out of the country.
11. She went on to state that despite notifying the defendants it went on to publish on Taifa Leo newspaper of 26th November 2017 the same story which greatly prejudiced her. The defendants as well published it in its online platform which elicitate various reactions from the viewers and readers some bordering on abuses on her moral standing.
12. The plaintiff on cross examination denied that she was the said Veronica Muthoni. She said that during the period she was campaigning for Susan Kihika under the Jubilee party
13. She went on to state that she did not sue those who made comments in facebook.
14. PW2 Dorcas Wangui Muthoni testified that she saw the publication by the 4th defendant on the Facebook platform which contained the plaintiffs picture which attracted online comments and which were abusive and derogatory against her. She went on to indicate that the said comments implied that the plaintiff and the pilot were drunk and engaged in immoral escapades.
15. She said that she saw the same in other media houses like Kenya news.co.ke.
16. When cross examined she said that the name reported was Veronica Muthoni and not the plaintiff. She went on to say that she knew the plaintiff was involved in the political campaigns at that period.
17. On re-examination she said that her immediate reaction was that the plaintiff had died.
18. PW3 Veronica Nyambura Kibe testified that on 25th October 2017 there was a helicopter crash and subsequently there was a publication that her friend had died in the Sunday Nation newspaper.



19. There was thereafter an apology by the defendant which according to her was not prominent. She said that the defendants went ahead to publish the same information in the Taifa Leo newspaper. She said that she called the plaintiff who was shocked and devastated.
20. She said that her reputation was damaged as those who were involved were in a party overnight.
21. When cross examined she said that the plaintiff had been her friend for close to 13 years and that what stood out for her was the photo used which had a wrong name. She said that she was part of the campaigners during that time.
22. In its defence the DW1, the 2nd defendant witness testified that indeed there was a helicopter crash at Lake Nakuru and he was assigned the duty of following it up. He said that he went to the family of the deceased and her father gave him the deceased photograph which she used to publish the story.
23. He went on to say that he did not know the deceased nor the plaintiff and that when they learned that the photo belonged to the plaintiff and not the accused they issued an apology. He said that the deceased family was the source of the photograph.
24. On cross examination he conceded that the coloured pictures in the story were those of the plaintiff and that an apology was tendered afterwards by the 4th defendant.
25. He admitted that the 4th defendant has a social media platform which carried the same story and which attracted comments from the public although he did not have the time to read the same.
26. He admitted that Taifa Leo carried the same publication and that it reused the same photo of the plaintiff.
27. DW2 Peter Mburu testified that he worked for the 4th defendant and that he was part of the team that followed up the story and wrote the article in Taifa Leo.
28. He said that he thereafter forwarded it to his editor for publication and that he did not know the deceased nor the plaintiff.
29. On cross examination he admitted that Taifa Leo was owned by the 4th defendant and that the photo published was similar one and was in coloured form. He said that he was aware that the defendant tendered an apology.

Plaintiffs submissions

30. The plaintiff submitted that the said publication lowered her reputation in the eyes of the right thinking members of the society and that the same caused her to be shunned and or avoided. She submitted that the online attack upon her character were indeed damaging as she was seen to be a person of loose morals and character.
31. The plaintiff submitted that the publishing of the photos was malicious and worst of all was republishing it in the Taifa Leo newspaper on 26th November 2017.
32. The plaintiff relied on Section 4 of the *Media Council Act* which requires the 4th defendant to be accurate and fair in its reporting and publications. The plaintiff relied among others on the case of Jimi Richard Wanjigi & Another v. Stephen Gitagama & 3 Others (2019) eKLR.
33. The plaintiff submitted that the publishing of the photos three times was malicious.



34. She further submitted that the apology tendered was insufficient as it was not prominently displayed as expected when they published the article. The same did not bear the plaintiffs photograph nor appeared on page 2 or 3 as in the similar impugned publication.
35. The plaintiff prayed for general damages of kshs 10,000,00, Exemplary and Aggravated damages of kshs 3,000,000 as well as demanding an apology from the defendants and a permanent injunction.

Defendants submissions.

36. It was the defendant's submissions that the plaintiff had not proved her case on a balance of probability as she did not present any evidence of actual damage to her character and reputation. That she did not prove any loss to her businesses or at all.
37. They went on to submit that the plaintiff did not establish the necessary ingredients for the tort of defamation which included the question of whether or not the words used injured her reputation or not. According to the defendant's taken in the ordinary sense the publication did not agree with the claim by the plaintiff.
38. Further, that the plaintiff did not produce the online publication and they relied on the case of SMW V. ZVM (2015) eKLR.
39. The defendants submitted that the plaintiff for the reasons given above was not entitled to the damages it sought whether general or exemplary or aggravated and the said suit must be dismissed with costs.

Analysis and determination.

40. Having gone through the evidence on record what is not disputed is that there was a helicopter crash on the fateful morning which caused the deaths of the occupants. One of the occupants was one Veronica Muthoni.
41. It is also not disputed that the defendants published the story or article in its Daily Nation newspaper and instead of the deceased photograph being displayed on the issue that of the plaintiff was placed there. The photo was in its coloured form.
42. The defendants admitted this fact and Dw1 testified that they obtained the photo from the deceased family as they did not know the deceased. Unfortunately, the same was not the deceased but the plaintiff.
43. The plaintiff in her evidence explained how she was distressed and more so her family members who included her husband who was overseas. Her witnesses as well testified concerning the same.
44. Subsequently the plaintiff through her counsel demanded an apology and the same was issued by the defendants and placed in its publication but according to the plaintiff the same was not prominently displayed and did not contain the actual photo of the plaintiff.
45. The basic issue therefore is whether the words so publish were defamatory or not and whether the plaintiff suffered any injury to her character and reputation in the eyes of the right thinking members of the society.
46. If that is the case was the apology sufficient and is the plaintiff is entitled to any damages.
47. The words which were published are worth reproducing, thus;

“Nakuru parents did not know daughter was in ill-fated chopper...”



“...the pilot may have been in an early morning adventure ride around the lake...”

48. There followed thereafter some “ferocious” comments on the online platform. Unfortunately, the said online publications were not produced as part of the plaintiff’s evidence. The court said as much in its ruling on record dated 27th January 2022.
49. Were the above words therefore malicious in any way and therefore defamatory? Taken in their plain and ordinary meaning it was true that a helicopter accident had occurred which fact was not in dispute. Therein the occupants had perished who included a victim whose parents were not aware that she was in the said chopper.
50. I respectfully do not find the words published malicious or untruthful. More importantly was the fact that the accident occurred in the morning.
51. The words that the pilot may have been in an “early adventure” ride around the Lake, taken in the ordinary sense does not connote the fact that he was involved in any immoral or deviant behaviour contrary to his duties. There was nothing to suggest that he could not venture out that morning around the lake.
52. I think in my view all that the plaintiff took out of context was an online publication mentioned above which had unsavoury comments against her character.
53. The only nexus between her and the story is the photograph used by the defendants. The defendants explained how they obtained the same from the deceased parents. I find that in their course of carrying out their work as journalists the defendants would ordinarily rely on such evidence and more so when they are not privy to the parties or their relatives.
54. In my view the only issue that warrants sanction from this court is republication by the defendants of the plaintiff’s photograph in its Taifa Leo publication of 26th November 2017. The same was blatantly done even after receiving a demand for an apology from the plaintiff’s counsel. This was duly admitted by the defendants in their submissions.
55. The other issue is whether the apology was sufficiently displayed. I do not think so. In as much as they were innocent of the initial use of the plaintiff’s photograph it was incumbent enough for the defendants to have taken seriously the apology and prominently displayed just like they did in the impugned publication.
56. To simply put it in “a corner” almost in the middle of the newspaper was insensitive in my view. Despite the fact that there was not much evidence of the damage suffered by the plaintiff whether in her reputation or business, it did not mean that she did not suffer emotionally. To be displayed as having died, a fact, although done innocently by the defendants, did not acquit them of moral and professional responsibility to apologies to the plaintiff.
57. To the extent that the story was “juicy” in the first instance, the apology ought to have been done on the same equal footing.
58. Is the plaintiff entitled to the damages prayed for? I think in so. This is buttressed by the two faults by the defendants I have mentioned above namely, the republication of the photographs next to the article even after being notified of the error and failing to adequately and prominently tender the apology to the plaintiff.
59. Although I have been requested by the plaintiff to award general and special damages amounting to over Kshs.13million, and the defendants gave a without prejudice figure of about Kshs 200,000 I find



that the plaintiff shall be entitled to a global sum of general damages. I state so for the reason that I find the publication was done with honesty and without any malice and in the course of their duties by the defendants jointly and severally. There is no reason to award punitive damages.

60. The award would have been mitigated if the defendants had published a reasonable and commensurate apology as stated above.
61. Consequently, this court hereby grants judgement for the plaintiff and against the defendants as hereunder;
 - (a) Kshs 1,000,000 being general damages.
 - (b) Costs of this suit and interest from the date herein.

DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 15TH DAY OF FEBRUARY 2024.

H K CHEMITEI.

JUDGE

