



**Miriti v Nairobi Star Limited; Ondoro (Third party) (Civil Suit 132 of 2011) [2024] KEHC 763 (KLR) (Civ) (1 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 763 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL SUIT 132 OF 2011**

**JN MULWA, J  
FEBRUARY 1, 2024**

**BETWEEN**

**GILBERT MUGAMBI MIRITI ..... PLAINTIFF**

**AND**

**THE NAIROBI STAR LIMITED ..... DEFENDANT**

**AND**

**BERNARD ONDORO ..... THIRD PARTY**

**JUDGMENT**

1. By a Plaint dated 8/04/2011, the Plaintiff sued the Defendant for alleged libel and slander allegedly published in its Star Newspaper under the Star classified on 1/5/2010 and sought judgment for:
  - a. General damages for libel and slander.
  - b. Aggravated and/or exemplary damages.
  - c. Costs of this suit
  - d. Interest on (a) and (b) above.
  - e. Any further relief the court deems fit to grant in the circumstances.
  
2. The Plaintiff’s case is that on 1/05/2010 at page 30 in the issue of “The Star Newspaper” the Defendant falsely, maliciously and spitefully printed and published, and circulated and/or caused to be printed and circulated words as follows of and concerning the Plaintiff:

“Relationship” .....



“I am Gilbert seeking a handsome boy between 18 and 33. Money is not a problem call or sms 0722795129”

3. He contended that the said words were falsely and maliciously and spitefully printed and published of and concerning the plaintiff without confirming and doing due diligence as to the identity of the said person as named in the advertisement, contended that in their ordinary and natural meaning were understood to mean by right thinking members of the public that:
  - a. The Plaintiff is a homosexual
  - b. The Plaintiff has no sense of decency
  - c. The Plaintiff is not worthy of the good repute he possesses.
  - d. The Plaintiff should be shunned and avoided by right thinking members of society.
  - e. The Plaintiff is not chaste and is of questionable morals.
4. He further claimed that the said words were malicious and set out the particulars of malice as follows:
  - a. The Defendant chose to recklessly and maliciously publish the false statement with the cell phone number of the Plaintiff without caring to ascertain as to whether the person drawing it up was indeed the person referred to in the said advertisement and to whom the cell phone number belonged.
  - b. The Defendant published the defamatory statement when they knew or ought to have known that said advertisement was supposed to have been vetted before publication.
  - c. That the Defendant never bothered to verify the truth from the person concerned or otherwise of the statement complained of before publishing the same.
  - d. The Defendant has knowingly breached the freedom of press and have thereby exposed the Plaintiff to embarrassment and public ridicule.
  - e. Further, the Defendant published the said words calculating thereby to increase the circulation of the Defendant’s said newspaper with a view to making a profit from the sale of the said newspaper.
5. It was his further contention that by reason of the malicious publication, he has received several phone calls and text messages soliciting for sexual favours and as a result has suffered injury in his reputation in the eyes of the public, peers, family members, his students and the right-thinking members of the society.
6. The Defendant filed a Statement of Defence dated 30/06/2011 in which it denied the words published were capable of being construed as referring to the Plaintiff and that it authored the statement complained of in good faith as received from the automated system operated by M-tech, and that it took reasonable care in relation to its publication, and further that the said words as published could not be understood in their natural and ordinary meaning to the meaning attributed to them by the plaintiff in his statement of claim, and put him to strict proof.



7. Additionally, the Defendant took out 3rd Party proceedings against to one Bernard Ondoro dated 30/6/2011 claiming indemnity and/ or contribution for any judgment that may be passed against it who filed a statement of defence dated 5/11/2018 denying all allegations raise by both the plaintiff and the defendant.
8. During hearing of the suit, only the Plaintiff testified to support his case while the Defendant called one witness to support their case.

### **Plaintiff's Case And Evidence**

8. PW1 Gilbert Mugambi Miriti the Plaintiff adopted his witness statement dated 20/11/2019 as his evidence in chief and produced his list and bundles of documents dated 28/10/2019.

In cross-examination, the Plaintiff stated that he has never advertised his number before and that apart from the name Gilbert and his phone number 072279129 which he admitted to have been his photo did not appear alongside the impugned advertisement nor his second name, age or occupation, nor his address in the publication. The Plaintiff further stated that the publication. He however admitted knowing the Third party as his student and that he had reported the matter to the Police in 2010 before he filed this suit and the Third party was arrested for insulting him and placing the advertisement in the Defendant's Newspaper and that he knew who had placed the advertisement after the Police did their investigations.

9. It was the plaintiff's further evidence that his family and friends kept calling him with regard to the advertisement. He further told the court that he knew that it was the 3rd party who had placed the advertisement in the defendant's paper as he had reported him to the police, was arrested and investigated, but was not sure whether he was taken to court. He denied being a homosexual and that he had a good relationship with his family. He testified that the 3rd party send the messages using his telephone number to his number, and could not be responsible for messages he did not send. Asked why he instituted the case, it was his case that it was because of the messages he received in his telephone arising from the advertisement in the defendant's newspaper.

The plaintiff closed its case without calling any witness.

### **Defendant's Case And Evidence**

10. DW1 William Chesire Officer testified as the Chief Executive officer of M Tech Limited and adopted his statement dated 25/03/2015 as his evidence in chief and produced his list and bundles of documents dated 11/12/2015.

In cross-examination, the witness stated that he is the Chief Executive Officer of M-Tech Limited which is a licensed content provider by Communications Authority of Kenya and that it provides product platforms comprising of SMS, voices, interactive voice Responses services and other similar products; That M-tech provides the Star Newspaper with a read only interface that shows received messages from their audience for the Newspaper's classified service. The witness stated that the message complained about was related to the message in its original form to the Newspaper where it was published and that the message received from the advertisers cannot be reviewed, edited and displayed verbatim on the Newspaper's viewer interface where it is taken to be printed. He testified that he was not working for the defendant but had authority to testify on its behalf, though produced no evidence of such authority. He testified that his company does not advertise with the defendant.

The defendant closed its case without calling any other witness.



11. The 3<sup>rd</sup> party, Bernard Ondoro did not testify so his case was closed. The plaintiff and the Defendant filed submissions.

### Issues For Determination

- a. Whether the Plaintiff has made out a case for defamation against the Defendant and/or the 3<sup>rd</sup> Party.
  - b. Whether the Plaintiff is entitled to an award of damages, and if so, the quantum.
  - c. costs.
12. The law of defamation is concerned with the protection of a person's reputation. Patrick O'Callaghan in the Common Law Series: The Law of Tort at paragraph 25.1 expressed himself in the following manner:

“The law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation: 'As a general rule, English law gives effect to the ninth commandment that a man shall not speak evil falsely of his neighbour. It supplies a temporary sanction ...' Defamation protects a person's reputation that is the estimation in which he is held by others; it does not protect a person's opinion of himself nor his character. 'The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit' and it affords redress against those who speak such defamatory falsehoods...
  13. The elements of defamation were outlined by the Court of Appeal in the case of Selina Patani & another v Dhiranji V. Patani [2019] eKLR and Raphael Lukale v Elizabeth Mayabi & another [2018] eKLR as follows:
    - a. The statement must be defamatory.
    - b. The statement must refer to the plaintiff.
    - c. The statement must be published by the defendant.
    - d. The statement must be false.
  14. In the instant case, it is not in dispute that the publication in question was published by the Defendant and referred to the Plaintiff as pleaded. What is in issue is whether the alleged offending publication was defamatory of the Plaintiff and whether it was false and malicious in the circumstances.
  15. In SMW v ZWM [2015] eKLR, the Court of Appeal succinctly stated: -

“A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided.”
  16. In Halsbury's Laws of England 4<sup>th</sup> Edition Vol. 28 at page 23 the authors opined:

“In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable



man to whom the publication was made would be likely to understand them in a defamatory sense.”

17. Kuloba J. (as he then was) in *J. Kudwoli & Anor v Eureka Educational & Training Consultants & 2 others* [1993] eKLR stated that a reasonable man in the context of defamation cases is simply a fair-minded person with ordinary intelligence.
18. Bearing in mind the words used in the publication, would a reasonable person, a fair minded ordinary person with ordinary intelligence, probably walking along Nairobi city streets, or Kisumu streets, or an ordinary farmer tilling land at the Rift Valley region, or a nomad herding cattle at the North Eastern parts of Kenya, consuming them understand them to mean or deduce that the Plaintiff is homosexual, indecent, not worthy of the good repute he possesses, to be shunned and avoided as of questionable morals?
19. The plaintiff also pleaded that as a result of the impugned publication, he has suffered injury in his reputation in the eyes of the public, peers, family members, his students and the right thinking members of society. It is worthy to note that the plaintiff did not adduce any evidence, by any witness, or otherwise that they identified him as the person referred to in the advertisement as only one name no second or third names, his photo age or occupation save for the telephone number appeared alongside the advert. Save for family members and probably his close friends would connect the telephone number to the plaintiff, but again none testified.
20. In my opinion , had the above particulars appeared in the Advertisement complained about, a good number of persons known to the plaintiff or who knew him including his students peers and family would have identified him as the person referred to therein, and would probably understand the said words to be defamatory of the plaintiff, as captured in the judgment of Patricks Ocallegan in the Common Law Series cited at paragraph 13 when he stated that the Law recognises in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discreet and it affords redress against those who speak such defamatory falsehoods.
21. For a plaintiff to succeed in a defamatory publication, he must establish the parameters as stated by the Court of Appeal *SMW VS. ZWM* (2015) eKLR that: -
  - i. It tends to lower his reputation in the estimation of right thinking members of the society.
  - ii. Exposes him to public hatred contempt or ridicule;
  - iii. Causes him to be shunned or avoided.
22. The burden of proof in the case lay squarely on the Plaintiff to prove by evidence that the impugned words in the publication lowered his reputation in the estimation of those who knew him, that indeed it, exposed him to hatred, ridicule or that he was shunned or avoided by right thinking members of the society, to the required standard of proof –upon a balance of probabilities.
23. It is trite that a party who alleges has a legal duty to prove his allegations against those that he accuses of wrongdoing, as provided in the *Evidence Act*, Sections 107 to 109. It is not enough to plead a case, adduce sketchy evidence and expect the court to fill in the gaps.

### **The Third Party: Bernard Ondoro**

24. In his statement of defence, this party, denied all the allegations labelled against him by the plaintiff, and the Defendant. Despite having been notified of the hearing date, he failed to avail himself to defend his



defence by evidence before the court. It is trite that such defence remains unsubstantiated and therefore of no evidential value as rendered in the Court of Appeal case Edward Maringa through Stanley Mobisa Maringa vs Nathaniel David Shulter & another (1979) eKLR.

25. It is not disputed that the 3rd party telephone number was the one used to place the impugned advertisement with the defendant's newspaper, and the plaintiff testified to have known that before he filed this suit.
26. Without a doubt, had the plaintiff proved his case against the defendant and the third party to the required standard, the court would have found both the defendant and the third party liable for the tort of defamation and award damages, either jointly and or severally in favour of the plaintiff.
27. However, the court finds and holds that the plaintiff has failed to prove its case against the defendant, and by extension, the reliefs sought by the defendant against the third party.

However, had the Plaintiff proved its case against the Defendant, this court would not have had any difficulty in awarding him damages as prayed in the plaint, under the various sub-heads, as ably stated in Joseph Njogu Kamunge vs. Charles Muriuki Gachari [2016] eKLR, Mativo J. rendered as follows: -

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

Exemplary damages on the other hand had gone beyond compensation and are meant to “punish” the defendant. Aggravated damages will be ordered against a defendant who acts out of improper motive e.g. where it is attracted by malice; insistence on a flurry defence of justification or failure to apologize.”

28. At the end, I find that the Plaintiff has failed to establish a case against the defendant to warrant an award of damages in compensation to the legally required standard of proof.

Consequently, the Plaintiff's case is hereby dismissed with costs to the Defendant.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 1<sup>ST</sup> DAY OF FEBRUARY, 2024.**

**J. N. MULWA**

**JUDGE**

