



**Fondo v Radio Africa Group Limited & 2 others (Civil Suit
5 of 2020) [2024] KEHC 8339 (KLR) (8 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8339 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL SUIT 5 OF 2020
SM GITHINJI, J
JULY 8, 2024**

BETWEEN

MICHELLE BIBI FONDO PLAINTIFF

AND

RADIO AFRICA GROUP LIMITED 1ST DEFENDANT

THE NAIROBI STAR PUBLICATION LIMITED 2ND DEFENDANT

MAUREEN MUDI 3RD DEFENDANT

JUDGMENT

1. By a Plaint dated 23rd January 2020 and filed on 19th February 2020 the Plaintiff sought judgment against the Defendants for: -
 - a. A declaratory judgment against the defendants and in favour of the Plaintiff that the statement published by the defendants at page 25 of the Star Newspaper on 4th September 2019 were defamatory to the Plaintiff.
 - b. A permanent injunction to issue against the defendants either by themselves or their servants, restraining them from further publishing in print or any media or continuing to publish in print or any media, the defamatory words or other words containing defamatory allegations concerning the Plaintiff.
 - c. General, exemplary and aggravated damages against the defendants and interests thereon, from the date of filing of this suit till its final conclusion.
 - d. A suitable apology and retraction of the defamatory statements.
 - e. Costs of the suit.



2. The Plaintiff described herself as an advocate of the High Court of Kenya and the (former) Kilifi County Director of Legal Services having been appointed as such by the former Kilifi County Governor upon vetting and satisfactory compliance with chapter 6 of *the Constitution* of Kenya. She added that due to her position, she had attained a good name and reputation, high moral standing, integrity and is held in high esteem by the governor, members of the Law Society, elected leaders and the public in general. Further, that since her appointment, she discharged her duties diligently, professionally and ethically.
3. She pleaded that the cause of action arose from a statement published in the Star Newspaper by the Defendants on 4th September 2019 which according to the Plaintiff was false and choreographed to malign her reputation since during the time of the issue stated in the publication, she had not been appointed as the director of legal services in Kilifi County. The publication that was under the banner “county frustrating old man in land dispute” read in part: -

“ the county government says it had documents indicating other residents were owners of the land... most of the titles cited by the Appellant were registered between 2010 and 2012, with Bibi Fondo, the acting County Secretary and director of legal services of Kilifi...”
4. According to the Plaintiff, the contents of the publication were false and libelous and the words used in their ordinary meaning are understood to mean that the Plaintiff is; -
 - a. Corrupt and of corruptible nature.
 - b. A gun for hire enjoying the protection of the county government and third parties to execute illicit businesses .
 - c. A criminal and a fraudster.
 - d. A conspirator, conniver and an associate of corruption at the land registry.
 - e. Crooked person, a cheat and dishonest.
 - f. Opportunist, unethical, unprofessional, a scoundrel and a rascal.
 - g. Conspirator, conniver and schemer.
 - h. Lacking in ethical standards and undeserving to hold public office.
 - i. A nihilist and wanting in gratitude; is of an oppressive disposition; and intolerant; complete social misfit and a thief.
5. The Plaintiff maintained that the publication was defamatory and has since caused her distress, anguish and injury to her reputation. That it has brought her to public scandal, ridicule, odium and contempt to her person, office and profession. She averred that the publication was done maliciously, negligently, carelessly without due regard to the Code of Conduct for the Practice of Journalism and Reporting in Kenya. The Plaintiff particularized the details of recklessness, false hood and malice as follows-
 - a. Failing to exercise accuracy and fairness in their reporting.
 - b. Failing and/or refusal to contact the Plaintiff prior to publishing the defamatory statements.
 - c. Failure/refusal to inquire from the Plaintiff the veracity or otherwise of the false and defamatory words.
 - d. Failure/refusal to afford the Plaintiff an opportunity to respond to false allegations.



- e. Failure to pay due regards to the Plaintiff's reputation and the public trust the Plaintiff enjoyed from her employer, the residents of Kilifi County and as a champion of justice and fairness.
6. The Defendants filed an undated statement of defence on 16th March 2020. They denied the allegations and stated that the contents of the publication were true in substance and fact, and that the same was made in good faith on account of a matter of immense public interest. They averred that the publication was a fair and accurate reporting of the court proceedings in a land case ELC No. 243 of 2014 Tsangwa Ngala Chome (suing as the administrator of the late Mumba Chome Ngala) v The Town Council of Mariakani & others.

The Plaintiff's Evidence

7. The Plaintiff (PW1) adopted her written statement dated 23rd January 2020 as part of her evidence in chief. She told the court that she worked as the Kilifi County Attorney from July 2014 to October 2022. She produced a copy of the newspaper extract as PEXH-1 and continued that she became aware of the same in a community 'Whatsapp' forum for advocates. She stated that the publication indicated that she was involved in procuring a fraudulent title between the year 2010 and 2012 when she was not even employed by the county government as they were not existent at that time. The Plaintiff added that she was neither employed as a lands' registrar at that time.
8. In relation to the land case pleaded in the defence, the Plaintiff testified that she was not a party therein but she swore affidavits on behalf of the county government by virtue of her employment position. She added that the judgment in that case did not mention her name and that the publication brought her name to disrepute and investigations were initiated against her. The Plaintiff asserted that prior to the publication, the Defendants did not reach out to her for clarification.
9. She added that upon writing a demand letter, the Defendants did an apology letter dated 24th October 2019 where they indicated that a public apology had been published. She however denied that the same was done. She further deposed that the Defendants have failed to pull down the electronic version of the publication which she contested was still in circulation.
10. On cross-examination by Ms. Gichoya, the Plaintiff told the court that she did not have a copy of the demand letter or the response from the 2nd Defendant. She also did not have any evidence to show that the electronic version of the publication was still in circulation.

The Defendant's Evidence

11. Maureen Mudi (DW1) also adopted her written statement dated 4th March 2021 as her evidence in chief and produced as DEXH 1-5 the documents entailed in the list of documents filed on 8th March 2021. She testified that she authored the impugned publication and urged the court to dismiss the suit with costs.
12. The witness told the court on cross-examination by Mr. Odunga, that the reporting was based on some judicial proceedings and that it was not restricted to the aforementioned land case. She added that in the ELC case judgment by Angote J., the titles in question were registered in 2013 and 2014 and not as published in the impugned publication. She also referred to paragraph 158 of the judgment which she asserted was in line with the publication. She added that she did not seek any clarification from the Plaintiff because she relied on documents filed in court.



Submissions

The Plaintiff's Submissions

13. In their submissions filed on 17th November 2023, the Plaintiff's counsel identified three issues for determination namely- whether the statements published by the defendants were defamatory; whether the defense of justification is available to the defendants; and whether the plaintiff is entitled to the damages sought.
14. In relation to the first issue, counsel relied on the definition of defamation quoted by Gatley on libel and Slander. He added that the test to determine whether a statement is defamatory is an objective one which depends on what a reasonable person on reading the statement would perceive. To this extent, counsel relied on the Halsbury's Laws of England 4th Edition Vol 28, and the cases of Nation Media Group Limited & 2 others v Joseph Kamotho & 3 others; and Miguna Miguna v Standard Group Limited & 4 Others [2017] eKLR.
15. He added that the ingredients were summarized in the case of [*John Ward v Standard Ltd HCCC 1062 of 2005*](#), as; the statement must be defamatory; the statement must refer to the Plaintiff; the statement must be publicized by the defendant; the statement must be made with a malicious intent; and the statement must be false.
16. Counsel further submitted that a statement is defamatory if it lowers a person in the estimation of right-thinking members of the society as was explained in the Halsbury Laws of England and in Phinenas Nyaga v Gitobu Imanyara [2013] eKLR; SMW v ZVM [2015] eKLR; and Selina Patani & another v Dhiranji Patani [2019] eKLR. To counsel, the statements published by the Defendants were defamatory and meant to injure the Plaintiff's reputation so much that they published a hasty apology on 19th -20th October 2019, outside the guidelines set to regulate media reporting.
17. Further quoting the cases of Newstead v London Express Newspaper Ltd [1940] 1KB 377 [1939] 4 ALL ER 319; E Hulton & Co. v Jones [1908-1910] ALL ER; and East African Standard v Gitau [1990] EA 678 counsel argued that the publication referred to the Plaintiff in her capacity as the County Secretary and Director of Legal Services, Kilifi County.
18. Relying on the definition of malice enunciated in the case of Joseph Njogu Kamunge v Charles Muriuki Gachari [2016] eKLR and Phineas Nyaga v Gitobu Imanyara [supra], counsel submitted that the publication was malicious considering that the Plaintiff was not a county secretary; between the period 2010-2012, county governments were nonexistent then and therefore the Plaintiff had not been appointed as an employee of Kilifi County. There is no evidence that the Plaintiff in her tenure of employment aided in registration of any title document in favour of the county government.
19. Counsel submitted that defamatory statement was indeed publicized and that the same was false and this he stated is affirmed by the action of the Defendants to publish an apology on 19th -20th October 2019.
20. On whether the defence of justification is available to the Defendants, counsel relied on a quote from Peter Carter-Ruck on Libel and the cases of Machira t/a Machira & Co. Advocates v East African Standard [2001] KLR 638; Uhuru Muigai Kenyatta v Baraza Limited [2011] eKLR and submitted that for the said defence to succeed, the reporting must be based on true facts. To counsel, the Defendants did not adduce any evidence to justify their defence.
21. In the ultimate, counsel submitted that the Plaintiff is entitled to Kshs. 26,000,000/- as damages, broken down as Kshs. 18,000,000/- general damages and Kshs. 8,000,000/- aggravated/exemplary



damages. Counsel relied on the case of *Alnashir Visram v Standard Limited* [2016] eKLR and the argument that the Plaintiff is an advocate of the high court of Kenya of over 13 years standing in practice and a public servant.

The Defendant's Submissions

22. Counsel for the Defendants filed written submissions on 21st February 2024 wherein she identified five issues for determination. Firstly, whether the publication was defamatory. Like counsel for the Plaintiff, she relied on the cases of *Phinenas Nyagah v Gitobu Imanyara* [supra]; *John Ward v Standard Limited* [supra]; *Miguna Miguna v the Standard Group Limited & 4 others* [supra]; and paragraph 22 of the *Halsbury Laws of England* 4th edition vol. 28. To counsel, the Plaintiff failed to adduce any proof of her reputation before and after the publication therefore she was not entitled to the prayers sought.
23. The second issue was whether the contents of the publication were true and published in good faith as a matter of public interest. At the onset counsel referred the court to Articles 33, 34 and 35 of *the Constitution* which provide for the freedom of expressions and media and the individual right to access to information. She submitted that the Defendants merely reported what had happened in court and at no point did they imply or expressly state that the Plaintiff is the one who registered the titles. To her, the publication only stated that she held the office of county secretary and director within the Kilifi County government, which she contested was an inadvertent error that was later remedied.
24. According to Ms. Gichoya, the publication was therefore justified. She relied on the cases of *Fraser v Evans & others* [1969] 1 ALL ER CA 6; *Bernard & another v Perriman* [1891-4] ALL ER 965 as cited in *Samuel Ndung'u Mukunya v Nation Media Group Limited & another* [2015] eKLR.
25. In relation to whether the publication was actuated by malice, counsel argued that the publication was a fair and accurate reporting of court proceedings not actuated by any form of malice. She cited the case of *Nation Newspaper Limited v Gilbert Gibendi* [2002] eKLR.
26. Counsel argued that the Plaintiff was therefore not entitled to an award for damages having failed to demonstrate any harm of loss that she suffered as a result of the publication. She added that on the contrary, the Plaintiff continued to rise through the ranks in her career from county director of legal services to County Attorney and was even elected as chairperson of the County Attorneys Forum, and re-elected to that position on 12th November 2020. She relied on the case of *Dr. Richard S. Kimazi v Nation Newspapers Limited* [2011] eKLR; and *Bernard Bifwoli v Simon Wetundu & 2 others* [2008] eKLR.
27. I have considered the pleadings, evidence adduced and submissions presented before this court; I find that the following issues arise for determination; -
 - i. Whether the publication published by the defendants at page 25 of the Star Newspaper on 4th September 2019 was defamatory of the Plaintiff.
 - ii. Whether the Plaintiff is entitled to the prayers sought.

Analysis and Determination

28. In *Musikari Kombo v Royal Media Services Limited* [2018] eKLR, the Court of Appeal sitting in Nairobi explained as follows;



“20. 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 temporal 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...”

29. It follows that a claimant in a defamation suit ought to principally establish in no particular order:

- i. The existence of a defamatory statement;
- ii. The defendant has published or caused the publication of the defamatory statement;
- iii. The publication refers to the claimant.”

30. The court went ahead to state; -

“ 23. The next issue that falls for consideration is whether the statements or words used therein were defamatory as against the appellant? As succinctly put by this Court in S M W vs. Z W M [2015] eKLR: -

“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.”

24. The test for whether a statement is defamatory is an objective one. It is not dependent on the intention of the publisher but on what a reasonable person reading the statement would perceive. In Halsbury’s Laws of England 4th 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.”

31. In this case, it was undisputed that the statement or story was published by the 3rd Defendant in the 2nd Defendant’s newspaper on 4th September 2019. Undoubtedly, the Plaintiff was mentioned in that story. What is alleged by the Defendants on one hand is that the statement was justified and true in substance and was published in good faith as a matter of public interest. On the other hand, the Plaintiff alleged that the statement was malicious, reckless and false. It is therefore the duty of this court



to construe the meaning of the words contained in the statement as they could be interpreted in the context of a reasonable man, to weigh the defamatory effect.

32. Both parties herein relied on the case of Phineas Nyagah -v- Gilbert Imanyara [supra] where the court defined malice as follows; -

“Malice herein does not necessarily mean spite or ill will but recklessness itself may be evidence of spite. Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts...Courts should however be slow to draw the inference that the Defendant was so far actuated by improper motives as to deprive him of the protection or privileges unless they are satisfied that he did not believe that what was said or wrote was true or that he was indifferent to or falsity.”

33. Looking at the publication in this case, I am convinced that the same was perpetuated by malice, especially the paragraph where the Plaintiff is mentioned. While I agree that the story was reporting on a land case that had been filed and determined in the Environment and Land Court and an appeal emanating therefrom, there was no proper justification or reason in mentioning the Plaintiff therein, except, that the author’s intention was to give an impression to the reasonable reader that the Plaintiff was somehow involved in registration of some titles said to have been fraudulently registered or issued by a non-existent entity.

34. As per the impugned publication, the titles in question were registered between the year 2010 and 2012 with the Plaintiff as the county secretary and director of legal services. This to me amounts to recklessness on the part of the 3rd Defendant. She should have known that between the period 2010-2012, county governments were yet to be formed, therefore, the office of a county secretary and/or director of legal service was non-existent. Moreover, the Plaintiff was not contacted by the Defendants prior to the publication of the article to verify the facts.

35. The Plaintiff averred that the publication caused her distress, anguish, injury to her reputation and public scandal, ridicule and contempt to her person, office and profession as an advocate of the High Court of Kenya. I am indeed convinced that having proven the tort of defamation, the Plaintiff is entitled to damages to compensate her for the injured reputation. I say so because advocates are generally held in high regard and are expected by the society to honor their oaths and act in a manner that is ethical and lawful.

36. In John v MGN Limited [1966] 2 All 35 at page 47 it was held; -

“In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel; the more closely it touches the Plaintiff’s personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of publication is also very relevant; a libel published to millions has greater potential to cause damage than a libel published to a handful of people. A successful litigant may properly look to an award of damages to vindicate his reputation: but the significance of this is much greater in a case where the Defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the Defendant acknowledges the falsity of what was published and publicly expresses regret that the libelous publication took place.”

37. The plaintiff’s assessment of damages was pegged on the cases of Alnasir Visram v Standard Limited [supra] where the Plaintiff was a Judge of the court of Appeal and was awarded Kshs. 18,000,000/= as



general damages and Kshs. 8,000,000/- aggravated damages. The Defendant on the other hand cited Bernard Bifwoli v Simon Wetundu & 2 others [supra] where the Plaintiff was awarded Kshs. 500,000/-.

38. In this case, it was submitted for the Plaintiff that she is an advocate of the High Court of Kenya with 13 years standing in practice and a public servant at the county government hence fit to be awarded Kshs. 26,000,000/- as was in the case of Alnasir Visram [supra]. In relation to the Plaintiff's argument, I must first point out that the individual effect on a judge of the court of appeal cannot be reasonably equated to an advocate of 13 years standing in the profession.

39. Having said that, I am guided by the Court of Appeal in the case of Standard Limited v G.N. Kagia T/A Kagia & Company Advocates [2010] eKLR. In that case, which I find comparable to the present one, the appellate court highlighted the guiding principles as follows:

“The second guiding principle in determining our latitude in the appeal before us was well set out in the case of PRAED –vs- GRAHAM 24 QBD 53, 55 in these words: -

“In action of libel, the trial court in assessing damages is entitled to look at the whole conduct of the defendant from the time the libel was published down to the time the verdict is given. It may consider how his conduct has been before action, after action and in court during the trial.”

40. The third guiding principle was well described in the case of URN -vs- John Faifax & Sons Pty Ltd 117 CLR 115, 150, in these words: -

“It seems to me that properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways - as a vindication of the plaintiff to the public and as a consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money.”

41. Apart from the factors and principles set out in the case law above, we think that for the purpose of this appeal, the following two guiding principles should be added: -

- 1) In situations where the author or publisher of a libel could have with due diligence verified the libelous story or in other words, where the author or publisher was reckless or negligent, these factors should be taken into account in assessing the level of damages.
- 2) The level of damages awarded should be such as to act as deterrence and to instill a sense of responsibility on the part of the authors and publishers of libel. Personal rights, freedoms and values should never be sacrificed at the altar of profiteering by authors and publishers.”

42. The Court held the view that advocate of the respondent's status therein (who was an advocate of 30 years standing in practice), were awarded general damages between 1 and 2 million and exemplary damages between the same range. The court further relied on the case of Johnson Evan Gicheru -v- Andrew Morton & another (2005) e KLR, where the then Chief Justice who was at the relevant time an appellate Judge of the Court of Appeal, was awarded a composite award of Kshs.6 million. In the ultimate, the court of appeal awarded the advocate a composite sum of Kshs. 3 million.

43. In this case, the Plaintiff did not tender any evidence to demonstrate how the defamation affected her profession. As a matter of fact, she told the court in her testimony that she was promoted at her place of work even after the defamatory statements were published. Taking this into account, the principles enunciated by the Court of Appeal above, and the circumstances of this case as well as the time lapse



between then and now, I consider an award of Kshs. 3 (three) million general damages and 3(three) million exemplary damages sufficient.

44. There was no evidence of possible republication; I therefore see no basis for an order of permanent injunction. The result is that the Plaintiff is allowed in terms of prayer a, c, d and e. For avoidance of doubt, the Plaintiff is awarded Kshs. 3,000,000/- million general damages and Kshs. 3,000,000/- million exemplary damages as well as costs of the suit.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 8TH DAY OF JULY, 2024.

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S.M. GITHINJI

JUDGE

In the absence of; -

Mr Griffin Timbe for the Plaintiff.

Mr Gichoya for 1st, 2nd and 3rd Defendants

Parties be notified.

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S.M. GITHINJI

JUDGE

8/7/2024

