



REPUBLIC OF KENYA



**Mutua v Everest Production Corporation (Civil Suit 131 of 2017)
[2023] KEHC 17557 (KLR) (Civ) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17557 (KLR)

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

**CIVIL
CIVIL SUIT 131 OF 2017**

JN MULWA, J

MAY 11, 2023

BETWEEN

ERIC KYALO MUTUA PLAINTIFF

AND

EVEREST PRODUCTION CORPORATION DEFENDANT

JUDGMENT

1. By a Plaint dated 15/6/2017, the plaintiff sued the defendant for alleged libel and slander and sought judgment for:
 - a. General Damages including aggravated and exemplary damages.
 - b. Costs of this suit.
 - c. Interest on (a) and (b) above at court rates from the date of judgment until payment in full and final satisfaction of the decree herein.
 - d. Any other relief that this Honourable Court may deem fit and just to grant.
2. The plaintiff's case is that on 29/10/2016 while airing it's news bulletin between 11pm and 12am, the defendant's Ebru Africa Television/ Ebru Tv Station published by way of libel and slander, the following words of and concerning the plaintiff and/ or his profession and calling:-

“The Law Society of Kenya, LSK former boss Eric Mutua has been accused of defrauding his clients millions of shillings, the victims claim Mutua's firm, E.K. Mutua & Company Advocates, has not paid them large amounts of money made from payments collected from



insurers for accident related injuries and other losses as claimed by Kisi Fredrick Kasyoka and Muli Kithae...”.

3. The plaintiff averred that the defendant repeated the said defamatory words in a YouTube video titled "Mutua On Graft" that was widely circulated on social media, the internet and other electronic media. He contended that the said words were in their ordinary meaning whether directly or by innuendo understood to mean that:-
 - a. He is a criminal and a thief.
 - b. He has committed the criminal offences of fraud, stealing by agent and theft.
 - c. He is engaged in professional misconduct and acting in a most unprofessional and criminal manner.
 - d. He is lacking in professional and personal integrity and moral standards.
 - e. He was unworthy of leadership.
4. He further claimed that the said words were malicious and set out the particulars of malice as follows:
 - a. The words were published without contacting the plaintiff for verification of the same.
 - b. A purported correction was deliberately vague, ambiguous and had deliberate omissions.
 - c. The choice of words was deliberately incendiary, malevolent and reckless.
 - d. One of the defendant's employees, one Doreen, has a close relationship with the plaintiff's competitor in politics and hence she influenced the airing of the story.
5. It was his contention that the said words have ruined his personal, professional and public reputation and have subjected him to public odium, ridicule, scandal, calumny and contempt. Further, he averred that the defendant admitted liability in writing but has failed, refused and/or neglected to respond to the question of payment of damages thereby rendering this suit necessary.
6. The defendant filed a Statement of Defence dated 26/9/2017 in which it admitted that it published the words set out in paragraph 4 and 5 of the plaint, but denied that the same were defamatory of the plaintiff and/or widely circulated. The defendant averred that the said publications by way of libel/slander were news items done in good faith and not actuated by malice as it was a fair and accurate report of facts as represented by the plaintiffs' clients, Kisi Fredrick Kasyoka and Muli Kithae. Further, the defendant denied any admission of liability and set out the particulars of facts showing absence of malice as follows:
 - a. The defendant did the necessary background checks before broadcasting the news item.
 - b. The defendant contacted the plaintiff on the story before it's publication.
 - c. The defendant did not in any way seek to malign the character of the plaintiff as it presented the story as received without proffering it's own opinion on the matter.



- d. The defendant made an offer to make amends as soon as practicable after it received notice from the plaintiff that he felt that the story was defamatory of him.
 - e. The defendant pulled down the said publications and made a correction statement on the matter in the prime news bulletin on 05/11/2016.
 - f. The defendant offered the plaintiff an opportunity for a TV interview 'in order to set the record straight' in view of the pertinent concerns raised by the complainants in the story but the plaintiff declined the offer for interview.
7. During hearing of the suit, only the plaintiff and his witness testified while the defendant neither participated nor called any witness.
 8. PW1 Erick Kyalo Mutua, the plaintiff herein, adopted his witness statement filed on 15/6/2017 as his evidence in chief and produced the list and bundle of documents filed on even date. It was his testimony that he was and is an advocate of the High Court of Kenya practising under the name of M/s E.K. Mutua & Co. Advocates for over 24 years, having been admitted to the bar on 31/1/1995. He further testified that he was the former President of the Law Society of Kenya and the Vice President of The Pan African Lawyers Union (PALU).
 9. He contended that the defamatory story was maliciously and falsely published in order to make him lose credibility among the residents of Mwingi Central Constituency, in Kitui County, where was vying for a parliamentary seat at the material time. The plaintiff claimed that the offensive publication was aired due to the influence by one Doreen, an employee of the defendant who was a close friend and purported wife of his competitor in Mwingi Central Constituency politics, one Gideon Mutemi Mulyungi. He averred that the defendant was well aware (through a text message that was read as part of the story) that a radio station by the name Athiani FM had carried the same story but subsequently retracted it and apologised upon establishing that it was false. Further, it was his statement that his Advocates issued a demand letter to the defendant on 1/11/2016, and that by a letter dated 7/11/2016, the defendant admitted liability and apologised over the defamatory words. However, the defendant failed to respond to a subsequent letter dated 14/11/2016 which sought damages for the defamatory words.
 10. In his oral testimony, the plaintiff stated that he was notified of the defamatory news by one Nicholas Kyunuve, and that thereafter, the defendant apologised and pulled down the video on YouTube. The plaintiff however testified that the defendant, despite the admission failed to offer any amends or compensation. He also denied that the defendant contacted him before the publication.
 11. PW2 Nicholas Maluki Kyunuve also adopted his witness statement filed on 2/7/2019 as part of his evidence in chief. He testified that he is a businessman and knows the plaintiff and that on 29/10/2016, while listening and watching his television in his house, he saw a news brief showing the plaintiff's picture on Ebru TV and waited for the main news. The news was that the plaintiff had defrauded some of his clients of some money paid to him by insurance companies. He did not believe the story because he knew the plaintiff was a good person. He decided to call the plaintiff the following day and informed him that other people had also called him regarding the story and that it was malicious since he was doing some politics at his rural home at the time.

Analysis and Determination

12. The plaintiff filed written submissions focusing on proposed damages payable to him. The defendant failed to file any submissions. The court has considered the pleadings, documents and the evidence



adduced by the plaintiff as well as the submissions and authorities cited by the plaintiff, and flagged for determination the following issues:

- a. Whether the plaintiff has made out a case for defamation against the defendant;
and
 - b. Whether the plaintiff is entitled to an award of damages, and if so, the quantum.
13. 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...”
14. 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.
15. In the instant case, it is not in dispute that the broadcasts in question were aired and/ or published by the defendant and referred to the plaintiff as pleaded and duly admitted. What is in issue is whether the offending words in those broadcasts were defamatory as against the plaintiff and whether they were false and malicious.
16. In *SMWVZWM* [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.”
17. 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.”



18. 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.
19. Bearing in mind the words used in the broadcast, a reasonable person consuming them would obviously understand them to mean or deduce that the plaintiff engaged in professional misconduct by stealing client's money and lacked integrity as pleaded at paragraph 6 of the plaint. One's image and reputation is an integral and important part of human dignity which is one of the National Values and Principles of Governance under article 10 as well as article 28 of the *Constitution* which provides that "every person has inherent dignity and the right to have that dignity respected and protected."
20. The court is therefore satisfied that the publications made on 29/10/2016 were defamatory to the plaintiff's reputation as a long-standing advocate of the High Court of Kenya, and a former Chairperson of the LSK.
21. Were the publications actuated by malice? In *Phinebas Nyaga v Gitobu Imanyara* [2013] eKLR, Odunga J. stated as follows: -

"Malice here does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice. Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts... Malice may also be inferred from the relations between the parties before or after publication or in the conduct of the defendant in the course of the proceedings. Malice can be founded in the publication itself if the language used is utterly beyond the facts. The failure to inquire into the facts is a fact from which inference of malice may properly be drawn. Any evidence, which shows that the defendant knows the statement was false or did not care whether it be true or false will be evidence of malice."
22. The defendant claimed that it did the necessary background checks and contacted the plaintiff before broadcasting the news item. However, it did not tender any evidence to show the steps taken to confirm the veracity of the news before publication. In the court's view therefore, the publication was indeed malicious.
23. For the foregoing, the court finds that the plaintiff has proved the tort of defamation against the defendant to the required standard of proof.

Whether the plaintiff is entitled to an award of damages and if so, the quantum.

24. It is well settled that an award of damages is a matter of judicial discretion. In *C A M v Royal Media Services Limited* [2013] eKLR, the court of Appeal stated that:

"No case is like the other. In the exercise of discretion to award damages for defamation, the court has wide latitude. The factors for consideration in the exercise of that discretion as enumerated in many decisions including the guidelines in *Jones v Pollard* (1997) EMLR 233-243 include objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published and any repetition; subjective effect on the plaintiff's feelings not only from the prominence itself but from the defendant's conduct thereafter both up to and including the trial itself; matters tending to mitigate damages for example, publication of an apology; matters tending to reduce damages; vindication of the plaintiff's reputation past and future."



25. In *Joseph Njogu Kamunge v Charles Muriuki Gachari* [2016] eKLR, Mativo J. cited the case of *John v MG Ltd* [1996] 1 ALL ER where the English Court of Appeal held: -

“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.”

26. On aggravated damages, the plaintiff submitted that the assessment of the whole conduct of the defendant from the date of publication to date reveals an underlying malicious intention to smear his name. In his view, that can be inferred from the vague and ambiguous purported apology issued by the defendant instead of a clear and unequivocal apology.
27. In the instant case, the court is not persuaded that the plaintiff is deserving of aggravated damages. This is because the plaintiff himself adduced in evidence a letter dated 7/11/2016 from the defendant to his advocates, in which the defendant indicated that it had made a correction statement on the matter in the prime news bulletin on 5/11/2016 and had since pulled down the video and text from their social media platforms. In his response thereto dated 14/11/2016, the plaintiff did not register any dissatisfaction with actions taken by the defendant but only stated that they needed to quantify the damages payable. Further, the plaintiff has not complained of any other or further actions by the defendant that aggravated the defamation thereafter. Aggravated damages are therefore not payable in this case.
28. As regards general damages, the plaintiff urged for an award of Kshs. 10,000,000/=. According to him, this is in view of the fact that he had and has faced ridicule from his friends, relatives, professional colleagues and clients which has had a significant effect on his profession. In assessing damages in this case, the court notes that the plaintiff did not provide any proof of how his profession had been negatively affected by the defamation aforesaid. He did not call any witnesses from his professional colleagues or clients, or friends to testify to any loss, or to the perceived innuendo caused by or to any of his friends and family members. Indeed the plaintiff did not tender any iota of evidence or proof of how the publication affected his reputation as a long standing Advocate of the High Court of Kenya, and a leader. The court has also considered the fact that there was no proof that the defamatory publications were widely circulated, taking into account the medium where it was published. In the premises, the court holds the view that an award of Kshs. 2,000,000/- in general damages would adequately compensate the plaintiff.
29. Consequently, judgment is hereby entered for the plaintiff against the defendant in the sum of Kshs. 2,000,000/= plus costs of the suit. The same shall attract interest at court rates from the date of this judgment until payment in full.

Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 11TH DAY OF MAY, 2023.

JANET MULWA

JUDGE

