



REPUBLIC OF KENYA



KENYA LAW
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**KMK v Mediamax Network Limited & 2 others (Civil Case
E007 of 2021) [2023] KEHC 20651 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 20651 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL CASE E007 OF 2021
SM GITHINJI, J
JUNE 15, 2023**

BETWEEN

KMK PLAINTIFF

AND

MEDIAMAX NETWORK LIMITED 1ST DEFENDANT

MSENANGU RADIO FM 2ND DEFENDANT

GASPER TUMAINI 3RD DEFENDANT

JUDGMENT

1. Before this Court for determination is a suit embodied in a Plaint dated 10th May 2021 and filed on 27th May 2021. The Plaint was later amended on 24th November 2021. The Plaintiff sought judgment against the Defendants for;
 - a. Kshs. 1,000,000/- as solatium for defamation.
 - b. Aggravated and/or exemplary damages.
 - c. An order that the Defendants do publish an unqualified apology through the same medium as prominently and in similar manner as the offending broadcast.
 - d. A written apology to the Plaintiff by the defendants.
 - e. An injunction restraining the Defendants and each of them by themselves, their servant or agents or otherwise howsoever from further broadcasting or causing to be broadcasted, defamatory words against the Plaintiff.
 - f. Costs of the suit.
 - g. Interest on a) and c) above.



- h. Any such further or other reliefs as may to this Honourable Court appear fit and just to grant.
2. The cause of action arose from a broadcast attributed to the 2nd and 3rd Defendants made on 24th June 2019 which according to the Plaintiff was malicious, unjustified and false. The broadcast ran for a period of one week. The Plaintiff averred that the 3rd Defendant broadcasted in vernacular a story that the Plaintiff had defiled and impregnated his daughter, one EK, then a class eight pupil at [Particulars Withheld], and threatened her with a machete. The words broadcasted were pleaded as follows; -
- “Nalienda uchunguzi nikimanya kukala wagaidhisha mwanao wa kiche anaifwa EK akikala a kilasi cha nane. Kaliza sikuli ya msingi ya Mwakwala. Napata ugoro kukala wa mtishira maisha kwa kumumbozera upanga gonya ukimfungira nyumbani baada ya kumugaidisha hatha vivi ana mimba na hatha adzafikirwa.”
3. The English translation was pleaded as follows; -
- “I have investigated and found out that you defiled your daughter EK and are responsible for impregnating her while she is a class 8 pupil at [Particulars Withheld]. I have also received information that you threatened your daughter with a machete and locked her in your house.”
4. According to the Plaintiff, the contents of the broadcast were defamatory by innuendo and in their ordinary meaning understood to mean that;
- The Plaintiff defiled his underage daughter.
 - The Plaintiff impregnated his daughter.
 - The Plaintiff is an unfaithful husband and dishonest family man.
 - The Plaintiff is an evasive character who lives a life of hypocrisy.
 - The Plaintiff is unethical and unscrupulous.
 - The Plaintiff engages in indecent, criminal and illegal acts in utter disregard of the law.
5. The Plaintiff maintained that the foregoing lowered him in the estimation of right thinking members of the society. That the broadcast was calculated to injure, disparage and lower his esteem and character. That despite issuing a demand letter for retraction and an apology on 9th August 2019, the Defendants refused and or, neglected to meet the Plaintiff's demands.
6. The Defendants denied the allegations. They filed a joint amended statement of defence dated 13th December 2021 stating that the broadcast subject of the present suit was made on an occasion to afford the Plaintiff an opportunity to exonerate himself by giving his side of the story upon receiving multiple reports on the said defilement from the Plaintiff's relatives and members of the society. The Defendants averred that the words complained of were statements of fact and consisted of expressions of opinion hence fair comments made in good faith on a matter of public interest. The particulars of fair comment were listed as follows; -
- The Defendant commented on issue of defilement in society.
 - The Defendants did not pass judgment upon the Plaintiff.
 - The Defendants did not exaggerate any facts as the words complained of were only but a question put to the Plaintiff.



- d. The Plaintiff was afforded an opportunity to give his side of the story.
 - e. The issue addressed is a matter of huge public interest as it was an allegation involving the welfare of a minor.
7. The Defendants averred that in so far as the Plaintiff participated in the broadcast by way of answering questions put to him, the principles of balanced reporting were adhered to. To the Defendants, the plaintiff did not disclose any reasonable cause of action. They prayed that the suit be dismissed with costs.

The Plaintiff's Evidence

8. The Plaintiff called a total of three witnesses in support of his case. He testified as PW1. He adopted his written statement dated 10th May 2021 as evidence in chief. He testified that on 26th and 27th June 2019, the 3rd Defendant called him on his mobile phone no. 0727309148 identifying himself as a children's officer working with the 2nd Defendant. The 3rd Defendant questioned him about defilement allegations against his daughter which he denied. The Plaintiff stated that the conversation was live on radio and that they spoke in Giriama language. That when he asked the 3rd Defendant the source of the information or allegations, the 3rd Defendant told him that the same was as a result of his investigations. It is his testimony that the conversation was repeated several times and he recorded it on his mobile phone.
9. The Plaintiff then reported the incident at Kaloleni Police Station where he took his daughter along. The police accompanied his daughter to the hospital where it was confirmed that she was a virgin and definitely not pregnant. The Plaintiff testified that the incident caused him to lose customers in his bodaboda business and psychological trauma. That the effect was similar to his daughter whom as a result of the humiliation, could not attend school. He produced as exhibits copies a laboratory report dated 8th July 2019 and medical examination report and notes.
10. On cross-examination by Mrs. Ondeyo the counsel for the Defendants, the Plaintiff told the court that he did not get to hear and or record the entire coverage of the broadcast since he was on the road. That his daughter was aged 19 years then and on the material date, she had not gone to school because of a cold.
11. The Plaintiff told the court on re-examination that his daughter's name was aired on the live broadcast.
12. Gabron Tsuma-PW2, assistant chief, [Particulars Withheld] Sub-location, equally adopted his written statement dated 10th May 2021 as evidence in chief. He testified that he heard the said broadcast. That he spoke with the 3rd Defendant through the Plaintiff's phone while at his office. The 3rd Defendant asked him whether he had any knowledge of the Plaintiff's alleged actions. The 3rd Defendant also told him that he had done his investigations and confirmed the allegations which the witness referred to as lies. PW2 added that he informed the 3rd Defendant that the allegations could not be true since he knew the Plaintiff's daughter and he confirmed that she was not pregnant.
13. The witness testified on cross examination that he did not hear what was being broadcasted by the 2nd Defendant and that he never recorded his conversation with the 3rd Defendant.
14. EK –PW3, the alleged victim and the Plaintiff's daughter, adopted her written statement as evidence in chief. She testified that she was 18 years old in 2019 and that on the material date while listening to the 2nd Defendant's broadcast at home after school, she heard the alleged defamatory statements. She told the court that the allegations were untrue and that the broadcast made her quit going to school. She added that they filed a report at the police station where she was taken to the hospital. On



cross-examination, the witness testified that she was in school on the 24th June 2019 when the incident started.

The Defendants' Evidence

15. The 3rd Defendant testified in support of the Defence case. He adopted his written statement dated 15th December 2021 as evidence in chief. He told the court that he was a journalist employed by the 1st Defendant and broadcasting for the 2nd Defendant. He denied speaking with the Plaintiff and PW2 while live on air. It was his testimony that he never mentioned the alleged victim's name.
16. He told the court on cross-examination that he received information about the Plaintiff's alleged defilement on 18th June 2019 through his private mobile phone. That together with his colleague one Fatuma Mwangala, he contacted the Plaintiff privately for deliberations regarding the allegations. According to him, when he called the Plaintiff, he told him that he was working with a department dealing with the welfare and reports on children. He denied telling PW2 that they were on live broadcast when he called. The 3rd Defendant added that he did not have the telephone number of his informer and that he only questioned the Plaintiff on one day. He did not even know the name of the Plaintiff's daughter.
17. On further cross-examination, the 3rd Defendant told the court that he broadcasted the deliberations live on air and that both PW2 and the Plaintiff denied the allegations. According to him, the allegations were only aired for 7 minutes on the material date as from 5.15p.m. He stated that as a result, members of the public called his mobile phone for follow ups. The witness confirmed that no apology has since been aired.
18. On Re-examination, the 3rd Defendant told the court that no names were mentioned during the live broadcast.
19. Parties agreed to file written submissions which they did.
The Plaintiff's Submissions
20. On whether the alleged broadcast was capable of being construed as defamatory, counsel for the Plaintiff relied on the case of *Wycliffe A. Swanya v Toyota East Africa Ltd and another* [2009] eKLR where the court listed the essentials of the tort of defamation. Counsel submitted that the allegations were defamatory in character and intended to injure the Plaintiff's reputation and expose him to hatred and ridicule.
21. Further quoting Odunga J in *Phinenas Nyagah v Gitobu Imanyara* [2013] eKLR, counsel argued that the publication was malicious and unjustified for failure to confirm the veracity of the information anonymously given to the 3rd Defendant.
22. Counsel submitted that an award of damages in such cases was discretionary as it was held in *CAM v Royal Media Services Limited* [2013] eKLR and *Ken Odondi and 2 others v James Okoth Omburah t/a Okoth Omburah and Company Advocates* [2013] eKLR. Counsel urged the Court to award Kshs. 9,000,000/- and Kshs. 2,000,000/- as general and aggravated damages; and Kshs. 5,000,000/- as damages in lieu of an apology. He was guided by the awards made in *Ernest Omondi Owino and another v Felix Olick and 2 others* [2021] eKLR; and in *Wilson Kalya and another v Standard Limited and 2 others* [2002] eKLR.



The Defendants' Submissions

23. Counsel for the Defendants submitted that where the impugned publication is in a language other than English or Swahili, a plaintiff ought to reasonably translate the same for the benefit of the court, something the Plaintiff herein failed to do. Counsel relied on the case of *Raphael Lukale v Elizabeth Mayabi and another* [2018] eKLR.
24. Further relying on the definition of a defamatory statement captured in the *Halsbury Laws of England*, counsel argued that the court should take into account the whole article and deduce the meaning given to words contextually as it was discussed in *Kudwoli and Another v Eureka Educational and Training Consultants and 2 others* [1993] eKLR; *Hiranandani Vandrevala v Times Newspapers Ltd* [2016] EWHC 250 QB; *Hall v Welz and others* 4960/94 [1996] ZAWCHC 2. According to counsel, the present suit was only based on a portion of a whole article which was not defamatory.
25. Counsel further submitted that the article was not in any event actuated by malice which is a mandatory element for the tort of defamation as it was explained in the case of *Wycliffe A. Swanya* [supra]. According to counsel, an author actuated by malice would not contact the plaintiff for comments.
26. Counsel submitted that publication was covered under section 15 of the *Defamation Act* on fair comment, since the conversation was limited to the matter that had been anonymously reported to the 3rd Defendant. Counsel urged the Court to be guided by the case of *Nation Newspaper Ltd v Gilbert Gibendi* [2002] eKLR.
27. It is counsel's argument that the Plaintiff was not entitled to the orders sought particularly the award for damages. He added that the cases cited by the Plaintiffs to justify an award of Kshs. 11,000,000 could not be used in this case since the Plaintiffs in those cases were well known professionals and reputable individuals as opposed to the Plaintiff herein. Counsel argued that an award of Kshs. 200,000/- aggravated damages would suffice in this case. He relied on the cases of *Vincent Milimu v Jose Augusto Pereira and another* [2021] eKLR; *James Omenda Abusa v Lydia Attieno Onyango* [2015] eKLR; *Patrick Nyoike v People Limited* [2013] eKLR; and *Daniel Kaimasach v Kalamka Limited and another* [2005] eKLR.

Analysis and Determination

28. I have considered the pleadings, evidence and submissions presented before this court. I find that the following issues are for determination;
 - i. Whether the publication/broadcast was defamatory of the Plaintiff.
 - ii. Whether the Plaintiff is entitled to the prayers sought.
29. This court and the court of appeal has in numerous cases pronounced itself on the principles pertaining to a claim for defamation. 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..."

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 *SMW v. ZWM* [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 the present case, the 3rd Defendant admitted publication. He testified in court that he was on live broadcast when he called the Plaintiff regarding the allegations made against him. The 3rd Defendant however denied that the publication was actuated by malice. According to him, the alleged defamatory statement was a fair comment made in the process of seeking the truth from the Plaintiff following a report he had received anonymously.

32. It is therefore the duty of this court to construe the meaning of the words as they could be interpreted in the context of a reasonable man to consider the defamatory effect. Nyakundi J. in *Jacob Mwanto Wangora v Hezron Mwando Kirorio* [2017] eKLR while explaining the tort of defamation and the defence of fair comment expressed as follows; -

"Thus in the case of *Onama v Uganda Argus Ltd* [1969] EA 92 the learned judges of the Eastern African Court of Appeal set out inter alia that:



“In deciding whether the words are defamatory, the test is what the words could reasonably be regarded as meaning, not only to general public, but also to all those who have greater or special knowledge of the subject matter.....”

33. The court further expressed; -

“In the persuasive authority from the Supreme Court of Appeal Canada, the court in Wilradeolia v Simpson [2008] SCC 40 set out the requirements for the fair comment defence:

- (a) The comment must be on a matter of public interest.
- (b) The comment must be based on fact.
- (c) The comment though it can include inference of fact must be recognizable as a comment.
- (d) The comment must satisfy the following objective test, could any person honestly express that opinion on the proved facts.
- (e) Even though the comment satisfies the objective test, the defence can be deflated if the plaintiff proves that the defendant was actuated by express malice.”

34. In the same court in the case of Grant v Torstar [2009] 3 SCR 640 SCC 61 the court provided the following guiding principles:

1. The defamatory statement must be read in context of the publication as a whole.
2. Public interest is not synonymous with what interests the public.
3. An individual’s reasonable expectation of privacy must be respected in this determination.
4. It is enough that some segment of the community would have a genuine interest in recovering the information on the subject.
5. The subject matter must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens or one to which considerable public notoriety or controversy has attached.
6. The public has a genuine stake in knowing about many matters ranging from science and the arts to the environment, religion and morality.”

35. As already established, it is not in dispute that there was indeed the impugned publication/broadcast, which was made by the defendants herein and which publication /broadcast concerned the plaintiff and his alleged encounter with his daughter. The only contention is whether the words broadcasted were, in their natural and ordinary meaning defamatory of the plaintiff’s character, reputation, professional and social standing, and whether the same were published/broadcast maliciously.

36. In the case, cited to me by the Plaintiff, phineas Nyagah -v- Gilbert Imanyara [*supra*] 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.”

37. The 3rd Defendant acted irresponsibly and recklessly. I am indeed satisfied that he did not himself believe the authenticity of the allegations. His shortcoming was failure to seek clarification in private. By airing it live on radio, the 3rd Defendant implied that the allegations were serious and that there was prima facie truth about them. By doing so, the 3rd Defendant invited public opinion on the issue knowing not all members of the public would be reasonable enough to think otherwise of the allegations. In the circumstances, I find that the Plaintiff has proved the tort of defamation.

38. It is trite law that a successful plaintiff in a defamation action is entitled to recover as general compensatory damages, such sum as will compensate him for the damage to his reputation and vindicate his good name. 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.”

39. The 2nd Defendant’s radio station has a wide listening within the coast region and it is inevitable to conclude that the defamatory broadcast reached many people.

40. The plaintiff’s assessment of damages was pegged on the cases of *Ernest Omondi Owino and another v Felix Olick* [supra] and *Wilson Kalya and another v Standard Limited* [supra] where the complainants were a well-established businessman and director; and well known advocates respectively. The former was awarded Kshs. 10million and 1 million general and exemplary damages respectively. In the second case, the complainants were awarded Kshs 9 million and 4 million respectively as general damages and Kshs 2,000,000 each for aggravated damages.

41. I have equally considered precedent on damages relied upon by the Defendants. The gravity of the defamation statements in those cases is distinguishable to this case.

42. In the case of *Lawrence Nginyo Kariuki v Wangethi Mwangi & another* [2009] eKLR, the Plaintiff, a well-established businessman, tea and coffee farmer was awarded Kshs 1,000,000/- as general damages.

43. The Plaintiff in the present case claimed to be at one point a boda boda rider and as at the point of testifying, a farmer. The defamatory statement however included serious allegations as they implied the Plaintiff had committed grave criminal offences to wit incest and or defilement. I note that the Defendants refused or neglected to apologize. In the foregoing circumstances, the Plaintiff is hereby awarded Kshs. 1,000,000/- as general damages and Kshs. 200,000/= as aggravated damages.

44. The outcome is that the claim in the Plaintiff succeeds in terms of prayer a, b, d, f and g.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 15TH DAY OF JUNE, 2023.



.....

S.M. GITHINJI

JUDGE

In the Presence of; -

Oyas holding brief for Mr Obonyo for the Plaintiff

Mr Tindi holding brief for Mrs Ochieng for the Defendant

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S.M. GITHINJI

JUDGE

15/6/2023

Miss Ochieng; - I apply for 30 days stay and a copy of the Judgment.

Court; - 30 days stay is granted

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S.M. GITHINJI

JUDGE

15/6/2023

