



REPUBLIC OF KENYA



KENYA LAW
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**Gitau v Mbugua (Civil Suit 546 of 2010)
[2024] KEHC 15751 (KLR) (Civ) (11 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15751 (KLR)

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

**CIVIL
CIVIL SUIT 546 OF 2010**

JN NJAGI, J

DECEMBER 11, 2024

BETWEEN

JACINTA WANGARI GITAU PLAINTIFF

AND

HON. STEPEHEN NG'ANGA MBUGUA DEFENDANT

JUDGMENT

1. The plaintiff herein instituted this suit seeking for a judgment against the defendant for;
 - (a) Aggravated or exemplary damages;
 - (b) General damages;
 - (c) Costs of this suit;
 - (d) Interest in (a) & (b) above from the date of the judgment until the date of payment in full; and
 - (e) Any other relief this Honourable Court may deem fit.
2. The Plaintiff pleaded in her plaint dated 15th November 2010 that she was a public servant who by dint of devotion to duty had risen through the ranks over the years to the secretary of his Lordship the Chief Justice of Kenya, a position she served exceptionally under several chief justices and has thus gained a name and reputation.
3. That pursuant to the 2007 national general elections wherein the defendant was elected as a member of parliament for Kamukunji constituency within Nairobi county, an election petition challenging his election was lodged at the High Court by one Ibrahim Ahmed (herein referred to as the Petitioner), a person unknown to the plaintiff.



4. It was pleaded that on 2nd November 2020, the defendant wrote a letter addressed to the then Chief Justice, Hon. Justice Evan Gicheru alleging that the plaintiff had been in the company of the Petitioner throughout the hearing; that the plaintiff had a keen interest in the case; that the plaintiff consistently followed the file and had a vested interest in the case and that the appointment of Lady Justice Ang'awa to hear the case was the result of lobbying by the plaintiff.
5. It was the case for the plaintiff that the said words were defamatory to her. That the natural and ordinary meaning of the said words meant and were understood to mean:
 - (a) That the plaintiff is known to the petitioner.
 - (b) That the plaintiff has lent her office and influence to the petitioner.
 - (c) That the plaintiff has lent her office and influence to the petitioner in a bid to manipulate the results of the petition against the defendant.
 - (d) That the plaintiff has had an interest in the Petition the Defendant is facing and has had a hand in the appointment of The Honorable Lady Justice Mary Angawa by the Honorable Chief Justice to hear the said petition.
 - (e) The plaintiff is corrupt.
 - (f) The plaintiff is unfit to hold public office.
 - (g) The plaintiff's behavior has rendered her unsuitable to serve in the Judicial Service Commission and more particularly in the office of the Honorable Chief Justice of Kenya as his secretary.
6. The plaintiff pleaded that the letter was widely published with copies thereof being sent to the Minister of Justice and Constitutional Affairs, the Honourable the Attorney General, the Speaker of the National Assembly, Parliament's Legal Affairs Committee, The Honourable Deputy Registrar, Civil Division, High Court of Kenya and M/s Kinoti & Kibe Company Advocates. Further that the letter received extensive coverage in The Star in its edition of 4th November 2010, a widely read and popular newspaper having a national outlook and international circulation. The plaintiff therefore claimed for compensation in damages.
7. The defendant filed his statement of defense dated 9th March 2011 wherein he denied the contents and the particulars of the plaint and put the plaintiff to strict proof thereof. The defendant further averred that he did not author the said letter and even if he did so, the same did not bear the meaning construed by the plaintiff. The defendant averred in the alternative that if at all he authored the letter, the same was not addressed to the plaintiff but to his Lordship the Chief Justice and it is the plaintiff who unprocedurally took possession of the letter and caused its circulation.
8. The plaintiff testified in the case and did not call any witness. The defendant elected not to call evidence in the case.
9. At the close of the case, parties filed written submission in support of their respective cases.

Plaintiff's Submissions

10. The Plaintiff through her counsel submitted that at the material time when the allegations were made she held an office requiring utmost diligence, integrity and professionalism and it was undoubtedly injurious to have such a publication sent to the various addressees and the Star newspaper. That it is not disputed that the letter mentions the plaintiff's name nor is it disputed that the same was published to the people stated.



11. Counsel submitted that the publication had the implication of submitting the plaintiff to disciplinary proceedings with a possibility of being dismissed from a long served public service and prosecution had the allegations been substantiated. Accordingly, her reputation was injured. Reliance was placed in the Court of Appeal case of Miguna Miguna vs. Standard Group Limited & 4 others (2017) eKLR on what a defamatory statement is.
12. The Plaintiff submitted that a right-thinking member of the society would construe the contents of the letter to mean that the plaintiff was corrupt and used her position to influence appointment of judges to hear cases, a role that is an absolute reserve of the Chief Justice, her boss. She contended that she had suffered reputation loss, respect and standing as a long public servant.
13. Counsel submitted that the defendant only filed a statement of defense but failed to show up and testify and thus his defense remained a mere allegation. Counsel relied in the case of *Motex Knitwear Limited vs Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002* where Lesiit J. (as she then was) cited the case of *Autar Singh Bahra & another v Raju Govindji*, HCCC No.548 of 1998 where it was held that:

“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the Defence rendered by the 1st Plaintiff in support of the Plaintiff’s case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”

14. See also *North End Trading Company Limited (carrying on the business under the registered name of Kenya Refuse Handlers Limited vs. City Council of Nairobi (2019) eKLR*, *Edward Mariga through Mobisa Mariga vs. Nathaniel David Shulter & another (1979) eKLR* and *CMC Aviation Ltd v Crusair Ltd (No.1) (1987) KLR 103*. In the later it was held that:

The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.

15. On quantum the plaintiff urged this court to make an award of Kshs. 7,500,000/= as general damages and Kshs. 2,500,000/= in exemplary/aggravated damages. Reliance was placed in the cases of *Miguna Miguna v Standard Group Ltd & 4 others (2017) eKLR* where Ksh.5,000,000/= was awarded in general damages and Ksh.1,000,000/= in aggravated damages; *Nelson Havi v Headlink Publishers Limited (2018) eKLR* where Ksh.6,000,000/= was awarded in general damages and Ksh.1,000,000/= in aggravated damages; *Mwangi Kiunjuri vs. Wangethi Mwangi & 2 others (2016) eKLR* where Ksh. 4,000,000/= was awarded in general damages and Ksh.1,000,000/= in aggravated damages; , *Erick Gor Sungu vs. George Oraro Odinga (2014) eKLR* where an award of Ksh.3,000,000/= in general damages at the High Court was enhanced by the Court of Appeal to Ksh.5,000,000/= and *Ken Odondi & 3 others vs. James Okoth Omburah t/a Okoth Ombura & Co. advocates, Kisumu Civil Appeal No. 84 of 2009* where a sum of Ksh.4,000,000/= was awarded in general damages for libel and Ksh.500,000/= in aggravated damages.

Defendant’s submissions

16. Counsel for the defendant submitted that every person has the right to freedom of expression recognized under international charters and *the Constitution*. Counsel referred the court to the case of



Robert Alai vs. The Honourable Attorney General (2017) eKLR and Hector vs. Attorney General and Barbuda & another (2019) in support of the position that freedom of expression is critical in any democratic society that seeks to attain transparency and accountability.

17. Counsel submitted that the allegations by the Plaintiff do not satisfy the test for defamation as provided for in the *Defamation Act* and judicial decisions. Counsel submitted that sections 107, 108 and 109 of the *Evidence Act* places the burden of proof on the plaintiff to prove the case. Reliance was placed in the case of Antony Francis t/a Wareham & 2 others vs Kenya Post Office Savings Bank (2004) eKLR to buttress the principle that he who alleges must bear and discharge the burden and standard of proof. It was submitted that the plaintiff failed to discharge the burden of proof in this case.
18. It was submitted that in order to establish the tort of defamation, it must be established that the defamatory statement is false. Reliance was placed in the Court of Appeal cases of Wycliffe A. Swanya vs. Toyota East Africa & another Civil Appeal 70 of 2008 (2009) eKLR and Alexander vs. Eastern Railway Co. [1865] 6 B & S 340 in support of this point.
19. Counsel submitted that the alleged defamatory words must have been published by the defendant. In this respect reliance was made in the case of Musikari Kombo vs. Royal Media Services Ltd 92018) eKLR. It was submitted that the publication in this case was not in any way intended to harm the plaintiff's reputation as it was not made with malice. Further reliance was placed in the case of Phinehas Nyagah v Gitobu Imanyara (2013) eKLR where it was held that:

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. That may lead to an inference of malice but the law does not weigh in a fair balance and it does not follow merely because the words are excessive, there is therefore malice. 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.

20. The defendant submitted that there was no evidence in this case that the defendant had any ill- motives against the plaintiff.
21. Counsel submitted that the plaintiff is not entitled to the damages sought as she had failed to prove the elements of defamation. That it has not been proved that the reputation of the plaintiff was demeaned by the alleged publication as she did not adduce any evidence to demonstrate how her esteemed reputation was lowered among right thinking members of the society and if she suffered any harm.
22. It was submitted that the circulation and publication of the alleged letter with the Star was orchestrated by the plaintiff and therefore the claim should be dismissed.
23. Counsel submitted that an award of damages is discretionary and in this respect reference was made to the case of C A M v Royal Media Services Limited Civil Appeal No. 238 of 2005 (2013) eKLR where it was stated that:

No case is like the other. In the exercise of discretion to award damages for defamation, the court has a 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.

24. The defendant submitted that the plaintiff had failed to prove the allegations of defamation on a balance of probability. They urged the court to dismiss the suit with costs.

Analysis and Determination.

25. I have considered the evidence adduced before the court and the submissions by the respective advocates for the parties. The issues for determination are whether the plaintiff was defamed by the defendant and if so whether the plaintiff is entitled to damages.
26. In *Miguna Miguna v Standard Group Limited & 4 others* [2017] eKLR, the Court of appeal stated as follows regarding defamation:

“Speaking generally a defamatory statement can either be libel or slander. Words will be considered defamatory because they tend to bring the person named into hatred, contempt or ridicule or the words may tend to lower the person named in the estimation of right-thinking members of society generally. The standard of opinion is that of right-thinking persons generally. The words must be shown to have been construed or capable of being construed by the audience hearing them as defamatory and not simply abusive. The burden of proving the defamatory nature of the words is upon the plaintiff. He must demonstrate that a reasonable man would not have understood the words otherwise than being defamatory. See *Gatley on Libel and Slander* (8th edition para. 31).

The ingredients of defamation were summarized in the case of *John Ward V Standard Ltd, HCCC 1062 of 2005* as follows:-

".....The ingredients of defamation are:

The statement must be defamatory.

The statement must refer to the plaintiff.

The statement must be published by the defendant.

The statement must be false."

27. In *SMW vs ZVM* [2015] eKLR, the Court of Appeal held that in determining the words for purposes of defamation, the court does not employ legal construction but that the words complained of must be construed in their natural and ordinary meaning.
28. On the submission by the defendant in regard to freedom of expression versus the law of defamation, this court is persuaded by the words of Odunga, J. (as he then was) in *Phineas Nyagah v Gitobu Imanyara* (2015) eKLR, where the learned Judge stated that:

“Under article 32(1) of *the Constitution*, it is clear that every person has the right to freedom of conscience, religion, thought, belief and opinion and further provides that the freedom to express one's opinion is a fundamental freedom. Under Article 33 (1) (a) every person has the right to freedom of expression, which includes freedom to seek, receive or impart information or ideas. However, clause (3) provides that in the exercise of the right to freedom



of expression, every person shall respect the rights and reputation of others. This, in my view, is the constitutional fulcrum of the law of defamation. Accordingly, the law of defamation is not just anchored on a statutory enactment under the Law of *Defamation Act* but has been given a constitutional underpinning as well. In a claim predicated on the tort of defamation the Court is therefore under a duty to balance the public interest with respect to information concerning the manner in which public affairs are being administered with the right to protect the dignity and reputation of individuals.”

29. Turning back to the matter at hand, the plaintiff's case is that the defendant published a defamatory letter of and concerning her which letter is dated 2nd November 2020 and addressed to the then Chief Justice, Hon. Justice Evan Gicheru alleging that the plaintiff had been in the company of one Ibrahim Ahmed, a petitioner in Milimani High Court Petition No. 35 of 2008 who was challenging the election of the defendant herein as Member of Parliament for Kamukunji Constituency. The letter was published to various persons including the Minister for Justice and Constitutional Affairs, the Honourable Attorney General, the Speaker of the National Assembly, Parliament's Legal Affairs Committee, The Hon. Deputy Registrar Civil Division High Court of Kenya and the firm of Kibe and Kinoti Advocates.
30. Though the defendant in his written statement of defence denied authoring the letter, he admitted in his written statement that was filed with the statement of defence that he did indeed author the letter. He however argued that the said letter was confidential and was not addressed to the plaintiff but was addressed to the Honourable the Chief Justice.
31. The defendant did not testify in the case. It is trite that where a party does not testify in a case, his/her statement of defence remain mere assertions, see *Trust Bank Ltd v Paramount Universal Trust Bank Limited & 2 others* (2009) eKLR. It is therefore my finding that the defendant did not controvert the evidence of the plaintiff that he authored the letter. In the absence of such evidence, I find that the defendant authored the letter complained of. That the letter was confidential does not arise as the defendant did not testify in the case to substantiate those averments. More so, the letter cannot have been confidential to the Chief Justice when it was copied to several people/institutions. It is clear that the defendant published the letter to the various persons/institutions named in the letter. Publication of the letter was therefore proved.
32. The next issue is whether the letter was defamatory. My plain reading of the letter shows the same to be defamatory. The letter directly referred to the plaintiff and purported that she had influenced for the election petition to be heard by Justice Ang'awa (as she then was). The claims by the defendant were unsubstantiated and therefore false. The post was picked up by a media outlet, the Star Newspaper which enjoys nationwide circulation. In the absence of any contrary evidence, I am satisfied that the defendant defamed the plaintiff in the said letter. The Plaintiff was a secretary to the Honourable the Chief Justice. To suggest that she had lobbied for Justice Ang'awa to be appointed to hear the case between the defendant and his challenger in the election petition, would be construed by right thinking members of the society that the plaintiff was a corrupt person who was unfit to hold public office. The words in my view had the tendency of lowering the reputation of the plaintiff in the eyes of right-thinking members of society and I therefore hold that the words complained of were defamatory to the plaintiff.
33. On whether there was malice in the publication of the letter, the same can be deduced from the publication and the facts of the case, as was held in the case of *Phinehas Nyagah v Gitobu Imanyara* (supra). The defendant herein made the false allegations without any iota of evidence and even copied the letter to several government officials. Failure to substantiate the allegations and the act of copying



the letter to some persons/institutions who had little to do with the complaint raised is clear proof that the publication was actuated by malice. It is therefore my finding that malice was proved against the plaintiff.

34. In view of the foregoing, it is my finding that the plaintiff has proved the elements of the tort of defamation against defendant. The plaintiff is entitled to compensation for the damage occasioned to her by the defamatory words of the defendant.

Quantum

35. The principles to be considered by the court in awarding damages in a defamation suit were set out by the Court of Appeal in the case of *Johnson Evans Gicheru v Andrew Morton* [2005] eKLR while quoting from the English decision of *Jones v Pollard* [1997] EMLR 233,243 as follows:

- “ 1. The 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;
2. The subjective effect on the plaintiff feelings not only from the prominence itself but from the Defendant’s conduct thereafter both up to and including the trial itself;
3. Matters tending to mitigate damages, such as the publication of an apology;
4. Matters tending to reduce damages;
5. Vindication of the plaintiff’s reputation past and future.”

36. The court is also required to have regard to the status, standing and character of the person defamed as re-stated by the Court of Appeal in *Nation Newspapers Limited v Peter Barasa Rabando* (2016) eKLR where it was held that:

We reiterate that all persons are equal before the law but it would be a Utopian fallacy to assume that a defamatory publication calls for an equal compensation regardless of the status, standing and character of the persons defamed. We dare say that for a person who is not known beyond the local limits of his immediate family, residential and work environment calls for less damages than a person of prominence whose station, position, profession, fame and notoriety may spread beyond county and country. We therefore reiterate as correct what this Court has stated before that the status of a particular person affects the extent of the injury suffered.

37. The plaintiff in this case was a secretary to Chief Justice of the Republic of Kenya. She had offered her services in that office to several succeeding Chief Justices. That would mean that she was a person of integrity and good repute. The defamatory words could have caused her to be removed from working in that office around which she had built her career.

38. I have considered the awards cited above by counsel for the plaintiff. The awards in those cases were in respect to persons who were of higher standing in society than the plaintiff. I have considered some relevant comparative authorities. In *Kibui v People Limited & another* (Civil Case 616 of 2006) [2022] KEHC 15311 (KLR) (Civ) (11 November 2022) (Judgment) Serگون J. awarded a school principal a sum of Ksh.2,000,000/= in general damages for defamation. In *Alice Atieno Odera v Radio Africa Limited & another* [2020] eKLR, the late Justice Thurania-Jaden awarded Ksh.2,000,000/= for defamation. In *Raphael Lukale v Elizabeth Mayabi & Royal Media Services Ltd* Civil Appeal No 286 of 2016 [2018] eKLR, the Court of Appeal awarded a head teacher a sum of Kshs 1,500,000/= for



defamatory statements aired by an FM station with wide listenership among the Luhya community. Considering these authorities and considering the status of the plaintiff as a secretary of good repute to the then Chief Justice of the Republic of Kenya, I find an award of Ksh. 2,000,000/= to be sufficient compensation in general damages for defamation.

39. The plaintiff in her plaint made a claim for aggravated or exemplary damages. In the case of Francis Xavier Ole Kaparo v the Standard & 3 others HCCC No. 1230 of 2004 (UR) as reported in Vimalkumar Bhimji Deepar Shah v Geryl Otieno & another [2021] eKLR, it was held that:

“Malicious and/or insulting conduct on the part of the Defendant will aggravate the damages to be awarded. The aggravated damages (distinguished from exemplary damages) are meant to compensate the plaintiff for the additional injury going beyond that which would have flowed from the defamatory words or statements above, caused by the presence of the aggravating factors ...Damages will be aggravated by the Defendant’s improper motive.”

40. The Court of Appeal in the case of Miguna Miguna v The standard Group Ltd & 4 others [supra] while quoting the case of John v GM Limited [1993] QB 586 stated:

“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.”

41. The defendant in this case declined to offer an apology when the same was demanded from him yet there was no plausible defence on his part. This aggravated the defamation. The plaintiff is entitled to an award of aggravated damages. I award her a sum of Ksh.500,000/= in aggravated damages.

42. The upshot is that the plaintiff has proved her claim against the defendant and is hereby awarded damages for defamation as follows:

- (1) General damagesKsh.2,000,000/=
- (2) Aggravated damagesKsh.500,000/=.

The plaintiff to have the costs of the suit.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 11TH DAY OF DECEMBER 2024

J. N. NJAGI

JUDGE

In the presence of:

Mr. Gwandaru for Plaintiff

Miss Lagat HB for Mr. Kibe Mungai for Defendant

Court Assistant -

