



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO.238 OF 2006

KENNETH KARIUKI GITHI.....PLAINTIFF

VERSUS

ROYAL MEDIA SERVICES LTD.....DEFENDANT

JUDGMENT

BACKGROUND

1. The plaintiff's suit arises from program known as *Kwamba Ndurika* allegedly aired by the defendant through Radio Inooro presented by the **Professor Ngugi Njoroge** and **Nderitu Wachira** on 6th May 2006, 20th May 2006 and 25th May 2006 at 10.00am concerning the plaintiff and his official duty as set out in paragraph 4 of the amended plaint; the words stated in Kikuyu translated in English as hereunder: -

a. Kikuyu Version of broadcast: -

"Haha he muthuri kuma Subukia witagu ANTHONY GATHUA KARIUKI akiaria uhoro wa mugunda wake agurire ituraini ria Bahati...Akienderio ni PETER NJOGU MUCHEMI...Mugunda Bahati – Bahati Block 1/977.

Mugunda ucio agurire ni atunyiruo ni mutumia was Njogu Muchemi akihuthira Registrar wa randi Nakuru. Agicenjerio muguda ucio handu ha ANTHONY GATHUA KARIUKI. Mutumia ucio mari ndugu na Registrar.

Kai Registrar uyu athomire ku? Angicenjeria mugunda mundu utari muguri atia? Ucio ni ukora na ungumania.

Muthuri ucio athiaga wabici iyo ya Registrar akamwira athii igotini."

b. The English version of the broadcast: -

"We have an old man from Subukia called ANTHONY GATHUA KARIUKI talking about his piece of land in Bahati – Subukia namely LR. No. Bahati/Bahati Block 1/97 sold to him by one PETER NJOGU MUCHEMI. That piece of land was taken away from him by the wife of NJOGU MUCHEMI, using the Nakuru Land Registrar. The land was transferred to her instead of being transferred to ANTHONY GATHORA KARIUKI. Where did this registrar go to school? How could he transfer the land to a person who was not a buyer." This is corruption whenever this old man goes to the lands office for help, the registrar tells him to go court."

2. Paragraph 4 of the amended plaint quote the conclusion of broadcast as hereunder: -

"...on the coming Wednesday, we shall go to Nakuru lands office and inject the said registrar from the office" He had threatened to go to court if we mention his name again."

3. The plaintiff's case is that, the aforesaid words in their natural and ordinary meaning were understood to have the following meaning: -

"that the plaintiff is corrupt, man of immoral character, unworthy of his job and a man who abused his office for personal gain."

4. The plaintiffs instituted this suit against the defendant through a plaint which was amended on 8th September 2016 seeking judgment

against the defendant for the following prayers: -

- a. **General damages for defamation for each broadcast.**
- b. **Aggravated damages over each broadcast.**
- c. **Costs.**
- d. **Interest at court's rate from the date of filing this suit.**
- e. **Any other relief that this court may deem fit and just to grant.**

5. The plaintiff averred that by virtue of the said publication, he has been seriously injured in his character, reputation and credit and has been exposed to public ridicule, scandal, odium and contempt in the estimation of right thinking members of the society; and has suffered loss and damage.

PLAINTIFFS EVIDENCE

6. The plaintiff **Kenneth Kariuki Githii** testified that he is a retired civil servant and Land Registrar Nakuru from year 2004 to 2008; his duties were to sign titles and all other matters pertaining to land registration. I am the plaintiff in this case. He said he was the only land registrar in Nakuru and had assistant land registrars. He filed witness statement on 21st June, 2018. He testified that Radio Inooro gave false and malicious allegation concerning him and his office which were very damaging to his character and the work he had been assigned by Kenya Government. He said he did not hear broadcast of 25th May, 2006 but his friends called him telling him that it was aired. He said he heard the second broadcast was made on 20th May, 2006 and he also heard 3rd broadcast made on 25th May, 2006 being aired by a person called **Prof. Ngugi Njoroge** and **Mr. Nderitu Wachira** made in Kikuyu.

7. The plaintiff testified that after hearing the broadcast, he contacted the defendant's agent in Nakuru and told them what they were broadcasting was false but he was told it is what they knew and they were going to continue.

8. He said there were documents that had been brought by a lady in respect to a piece of land in Bahati, namely Bahati/Bahati/Block 1/97 alleging that he transferred the land illegally to the lady because she was his friend and he had abused his office by so doing because land had been sold to some other parties; to a person called **Anthony Gathua Kariuki**. He said he was aware of this case before the broadcast.

9. He further stated that he got orders from the court in case No.1/1998 (Chief Magistrate's Court at Nakuru.); a letter of consent signed by the Executive officer and application to land control board and the court order required him to transfer all that piece of land to **Harriet Wangari Njogu** and her children. He said he was not a party to court proceedings and he did not know how the orders were made and that he verified the court order before acting.

10. He further stated that after carrying out transfer, somebody went to his office and said he had bought the land and the land had been transferred to him. He said he advised him to lodge complaint in court.

11. He testified that the broadcast caused problems in his house as his wife thought the woman was his friend and that his vicar in church was looking at him suspiciously and he had to explain to him what had happened.

12. The plaintiff further stated that his friends started doubting his morality and his children who were in the university started feeling ashamed when their friends talked about the matter and people believed what was in the radio was the truth; he said it was impossible to explain to them. He produced documents filed on 19th July, 2007 in court. He said the defendant was not justified to broadcast the words broadcasted and to date, they have not apologized.

13. He prayed for damages for each broadcast and aggravated damages especially for announcement made after he had informed the defendant that the broadcast not true and further they be directed to retract the allegations plus costs of this suit.

14. On cross examination, the plaintiff stated that he is a Form 6 leaver and that he joined Ministry of Lands on 6th November, 1975 after Form 6 and his designation at the time he joined was clerical officer but was promoted to Land Registrar in 1979 while in Muranga and the same year, was transferred to Busia. He retired in the year 2009 on attaining age of 55 years.

15. On further cross examination, he said he did not lose his job after the broadcast and that he explained to his seniors what happened; he said he remained in the same office until retirement in 2009. He further stated that he is a member of a church in Kahuhia Parish in Muranga and has been a member for a period of over 30 years and the broadcast did not change his attendance.

16. He further stated that the church pastor and over 20 of his friend asked him what had happened. He said an agent of Royal Media Services went to his office and introduced himself to him though he never stated in his witness statement that the agent went to my office.

17. He stated that he is sure there were 3 broadcasts but he heard 2. On further cross examination, he admitted that in paragraph 4 of his plaint, he said there were 4 broadcasts and said it is true there were 4 broadcasts and that it has been a long time. He confirmed there were 4 broadcasts but he did not hear the 1st broadcast (6th May, 2006). He testified that his friend, boss and wife heard the broadcast; and he was told the words he has set out by his friends, wife and children.

18. He said he listened to the 2nd broadcasts at 10.00 a.m and he was recording as were said by presenter **Prof. Ngugi Njoroge** as he had a radio in his office. He said he recorded and forwarded to his advocate.

19. On further cross examination, he said he has heard of **Wanjiku wa Njuguna** but he is not aware if she was broadcasting in year 2006 He said he is aware that it is **Prof Njuguna Njoroge** who did the broadcast in Kikuyu language but it has been translated and certificate of translation filed. He said the broadcast were being repeated overtime, same words 4 times.

20 The plaintiff testified that he was seriously injured in character; that his family, church, friends started doubting my characters. He said his name **Kenneth Kariuki Githii** was mentioned in the broadcast as they said Land Registrar Nakuru **Kenneth Kariuki Githii**. He stated that he was the only Land Registrar Nakuru as the others were his assistants. He said the other 3 land registrars could transfer the property but they had to come to him before doing the transfer.

21. Plaintiff testified that the broadcaster also stated that he(plaintiff) had threatened to take the defendant's agent to court.

22. The plaintiff stated that his character means everything to him and that he now does business of running big hotels and has been in the business since 2009; and he is also a farmer and importer importing good from china.

23. He said following the broadcasts, people look at me as corrupt, immoral person and he would rather have character and miss money.

24. The plaintiff testified that demand letters was served on Royal Media Services by his lawyer but the defendant denied that broadcasts were made and said the broadcasts referred to him and not previous land registrar and that I handled the complaint from **Anthony Gathora**.

25. On reexamination, the plaintiff stated that he never participated in transfer of the land complaint as shown by document he produced and they had no reason to allege he was corrupt. He said after his complaint, they never confirmed to him that they had checked nor the information did not relate to me.

26. He confirmed that he was the only land registrar in Nakuru when broadcasts were made and had two assistants; and that it is him who handled the complaint when it was taken to his office and his assistants could not transfer before he gave them a go ahead. He said it was not fair for defendant to character assassinate him yet he was not the one who transferred the land.

DEFENDANT'S EVIDENCE

27. The defendant availed one witness **Njenga Njehia** an Advocate who is employed by the defendant as legal officer. He adopted his witness statement recorded on 29/9/2012 as evidence.

28. On cross examination, he stated that what was broadcast in May 2006 is not available. He confirmed that **Prof. Ngugi Njoroge** was employee of defendant while **Nderitu Wachira** has never been employee of defendant. He said **Wanjiku wa Njuguna** is still employee of defendant and that both Prof. Ngugi and Wanjiku have not recorded statement. He said he recorded statement from records of the company and that he started working for defendant in 2012; this matter took place before I joined.

PLAINTIFF'S SUBMISSIONS

29. The plaintiff filed written submissions dated 17th February 2020. The plaintiffs Advocate started by giving history of the suit, quoted excerpts of the words broadcasted and submitted that by virtue of the said publication, the plaintiff has been seriously injured in his character, reputation and credit; and has been exposed to public ridicule, scandal, odium and contempt in the estimation of the right thinking members of the society; that the plaintiff has suffered loss and damage.

30. The plaintiff submitted that the defendant's argument that the plaintiff's claim should be dismissed for failing to present recording of the alleged broadcast cannot stand as **section 62 of the evidence Act** provide that all facts except documents may be proved by oral evidence; and the only caveat placed by section 63(i) is that such evidence must be direct; evidence of a witness who heard it as is the case herein. The plaintiff submitted that this position was expounded in the case of **Fidelis Wambua Musembi V Royal media services Limited [2018] eKLR**.

31. The plaintiff further submitted that the tort of defamation lies in two forms, libel and slander; and cited the case of clement **Muturi Kigano** to define the two forms of defamation being: -

“If a defamatory statement is made in writing, or printed, or printing or some other form, the tort of libel is committed and the law presumes damages. If the defamation is oral, or in some other transient form, it constitutes the tort of slander which is not actionable at common law without proof of actual damage, except where the statement is one of particular character.”

32. That the court further stated that a slander for which an action will lie is a defamatory statement if made or conveyed by spoken words, sounds, looks, gestures or some other non-permanent form, published of or concerning the plaintiff to a person other than the plaintiff, by which the plaintiff has suffered actual damage.

33. The plaintiff further quoted the definition of “**wireless broadcasting**” in **section 2 of defamation Act Cap 36** as follows: -

“a publication for general reception by means of radio communication within the meaning of Kenya Posts and

Telecommunications Corporation Act, as libel or slander, the publication of words by wireless broadcasting shall be treated as publication in a permanent form.”

34. The plaintiff submitted that the court in **Fidelis Wambua Musembi** qualified that a claimant is not required to prove that the defamatory statement was made in a permanent form in order to succeed in a claim for libel.

35. The plaintiff also cited the case of **Livingstone Maina Ombete T/A L.M Ombete & Company Advocates Vs Rotal Media Services T/A Inooro Radio [2010] eKLR** where the court held that, once words were published by radio, then the publication was in permanent form and therefore actionable per se as libel.

36. On whether the broadcasts referred to plaintiff and whether words were false and malicious, the plaintiff submitted that he has demonstrated evidence of the events that led to the broadcasts; that his evidence is that before the broadcasts, the reporters visited his office twice and he took them through the binder to the disputed properties and showed them orders from court and the transfer documents signed in pursuance to the court order but the reporters alleged they were forgeries which made him advise them to report to the CID; but instead they went ahead to accuse him of corruption and threatened to expose him to the public. That the same event was repeated again by the reporters after which they did the broadcast which was brought to the attention of the plaintiff by his secretary and friends.

37. Plaintiff submitted that the chronology of events show that the broadcasts were directed at him as he was the land registrar at the material time and the others were his assistants.

38. The plaintiff submitted that malice can be inferred from the language of publication or failure to inquire into the truth of information and the fact that even after being supplied with all information, the defendant's agents went ahead to publish the broadcast pursuant to threats they had made earlier.

39. On damages, the plaintiff submitted that the purpose of general damages in a libel claim is to compensate the claimant for the damage to his reputation.

40. The plaintiff submitted that the libel complained of was published by Inooro radio owned and managed by defendant and the station has a national and international reach throughout East Africa and the world through online transmissions and the extent of publication could accurately be inferred as being worldwide.

41. The plaintiff urged the court to note that the broadcasts were made on four different days at various intervals being 6th, 13th, 20th and 25th May 2006 which means it was heard by different audience and the defendant had ample time to seek clarification of the issues in the broadcast had they been diligent.

42. Plaintiff submitted that he was a land registrar in Nakuru at the time of publication and it did not therefore only injure his personal integrity but also his professional reputation, honor, courage, loyalty and core attributes of his personality; that land is very emotive subject in Kenya and attribution to the plaintiff of corruption in the land office, made members of public regard him with odium; that the plaintiff made attempts to have defendant retract the libelous statement in vain; and at no point did the defendant made attempts to find out the truth or render an apology. He prayed for general damages of kshs 20,000,000 and aggravated damages of kshs 10,000,000 plus costs of this suit.

DEFENDANT'S SUBMISSIONS

43. In submissions dated 16th March 2020, the defendant submitted that the plaintiff's suit is misconceived in that, he cannot and has not proved his case before court. The defendant submitted that if the words were published against the plaintiff which is denied, they were so published in good faith, in public interest and without malice and not intended to injure the character of the plaintiff.

44. Further that it is in public interest that members of public know about activities and the role of individuals in the position of the plaintiff; and the words were privileged and a fair comment on a matter of enormous public interest and relied on the defences of qualified privilege and comment on a matter of public interest; that under **section 79 of the former constitution**, the public is entitled to know and have the information of activities of public officer and the defendant is entitled to freedom to impart such information to the public in a democracy like ours; further if the said words were published which is denied, the defendant was justified in airing the publication after thorough investigations had been done, in accordance with principles of responsible journalism to confirm their authenticity and that they are true in substance as they were so published.

45. The defendant submitted that from pleadings two broad issues arise being: -

1. Did the defendant defame or publish the said defamatory words against the plaintiff?
2. If the answer to the above is in the affirmative, what is the quantum of damages

46. The defendant submitted that the plaintiff did not call any independent/3rd party witnesses to support his claim and in evidence adduced, the plaintiff stated that the broadcasts were done in Kikuyu, that they were heard by other people and that he did not file defamatory clips in court.

47. The defendant quoted definition of defamation in **17th Edition of Salmond on the law of Torts** and submitted that some of the broadcasts have not been set out verbatim in the amended plaint; that the words in defamation are material and must be pleaded verbatim to enable court decide whether they constitute a cause of action.

48. The defendant further quoted **Gatley on Libel, (10th Edition)** on how to plead libel and submitted that, failure to quote all words has denied the court an opportunity to constitute a cause of action; and cited the case of **Kariunga Kirubua T/a Kariunga Kirubua Company Advocates v LSK& others, Meru Hccc No.117 of 2005** where the court struck the plaint for the mistake.

49. The defendant also cited the case of **Veronica Wambui Michael Wanjohi Mathenge [2015] eKLR** where the court held that failure to reproduce words in their original language and record in the proceedings as a serious omission.

50. The defendant further submitted that **section 3 and 106 (B) of the Evidence Act** recognizes information contained in electronic records as a document and the plaintiff claim that the words were aired by Inoro Radio and it therefore falls under **electronic records and section 106(A) of the Evidence Act** provide how such evidence should be produced and in the case of **William Odhiambo Oduola v IEBC & 2 Others [2013]eKLR** the court highlighted the relevance of this provision since electronic evidence present unique characteristic which necessitate careful treatment.

51. The defendant also cited the case of **Clement Muturi Kigano v Hon Joseph Nyaga HCCC No.509 of 2008** where the plaintiff failed to produce any clip as evidence to prove publication and in **Phinhas Nyaga v Gitobu Imyanyara, Nairobi HCC No.697 OF 2009**, where the court held that it is not sufficient to prove that the broadcast was made but the plaintiff must prove that the same was made by the defendant.

52. The defendant also submitted that for an action of defamation to succeed, it must be proved that the defendant was responsible for the publication; that the plaintiff ought to produce TV clips he complains about and play it in court and that the plaintiff has failed to do so.

53. The defendant further submitted that evidence of independent witness is crucial for the court to prove defamation in the eyes of 3rd parties and cited the case of **Wycliffe A.Swanya V Toyota East Africa Ltd & Another [2009] eKLR** and three other authorities and submitted that failure to adduce independent evidence is fatal to the plaintiff's case.

54. The defendant submitted that certificate of translation of word broadcasted from kikuyu to English has not been produced and cited the case of **Raphael Lukale V Elizabeth Mayabi & Another [2016] eKLR** and urged this court to find that the failure to include a certificate of translation is fatal to claim before this court.

55. The defendant further submitted that, if publication is proved, the defence of fair comment is available to the defendant and quoted **Carter Ruck On libel & Slander page 11** which state that the defence of justification cannot succeed unless the defendant proves that the expression of opinion was based upon true facts and the case of defamation is a balancing act; that the court has to balance between the right to reputation and the right of the media to impart information under **Article 33 of the constitution**.

56. Among other authorities cited by the defendant include the supreme court of Appeal in **Canada in Wilradeolia v Simpson [2008] SCC 40** where the court set out requirements for fair comment defence: -

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

57. The defendant concluded by submitting that the defence has satisfied the criteria set out in the cited authorities.

58. On damages, the defendant submitted that in the event that the court is to differ with them, a proposed sum of kshs 500,000 as general damages for libel is sufficient had the plaintiff proved his case and cited the case of **Clement Muturi Kigano** where the court awarded damages of 1.1million; and submitted that the law of defamation is not meant for commercial advancement but to fairly compensate for injured feelings but plaintiff having failed to prove his case is not entitled to damages

59. On costs, the defendant submitted that the plaintiff did no issue demand letter prior to instituting this suit and although it is not a condition precedent, it is a universal practice in civil suit for defamation.

60. The defendant quoted **Gatley on libel and slander, Tenth Edition pages 759-760** where the author states the importance of issuing demand which should contain information and gives the defendant an opportunity to withdraw and apologize and if it goes to trial it gives the jury the gist of claimants complaint; and if defendant refuses to apologize, may aggravate damages; and failure to send a properly formulated letter before action may have adverse consequences in terms of costs; and submitted that in view of failure to issue demand letter, the plaintiff is not entitled to costs of this suit

ANALYSIS AND DETERMINATION

61. I have considered evidence adduced and submissions filed herein and consider the following as issues for determination: -

- i. Whether the alleged defamatory words were broadcasted by the defendant's Inoro radio station.

ii. Whether the publications availed to court by the plaintiff were directed to plaintiff & whether the broadcasts were defamatory.

iii. whether he deserves damages.

(i) Whether the said defamatory allegations were aired/broadcasted by the defendant.

62. The plaintiff's evidence is that the defendant through **Professor Ngugi Njoroge** and **Ndiritu Wachira** aired a program known as **Kwamba Ndurika** through radio Inooro and availed excerpts of words uttered on air on 4 occasions; they are in kikuyu version and a translation in English. From evidence adduced, they were aired on 6th, 13th, 20th and 25th May 2006. The plaintiff informed court that after airing false information which touch him and his office, the defendant repeated the broadcasts the 2nd, 3rd and 4th time. He said he never heard the first broadcast but heard the 2nd and the other 2 broadcasts. He said he learnt of the first broadcast from his wife and friends and on the 3 occasions he heard the broadcast, the excerpts were being repeated verbatim. He stated that after complaining to the defendant, they never told him that the broadcast did not relate to him.

63. On the other hand, the defendant's witness DW1 testified that the record of what was aired may not be available; he however confirmed that **Professor Njoroge** who aired the program is still working for the defendant and **Wanjiku wa Njuguna** is an employee of the defendant. No explanation was given as to why they were not availed in court nor why the record of the program was unavailable. DW1 said he started working for the defendant in the year 2012. The broadcasts are alleged to have been aired in 2006 and I doubt if the defendant did not genuinely have them in their possession at the time filing this suit. The defendant did not avail any evidence to controvert evidence adduced by the plaintiff. On weighing the evidence on record, I am of the view that, on a balance of probabilities the plaintiff proved that the defendant's radio station aired the information presented by the plaintiff.

(ii) Whether the broadcasts aired were directed to plaintiff and if in the affirmative whether they were defamatory.

64. The Plaintiff testified that he was the only land registrar in Nakuru county at the material time and that he dealt with the matter discussed following a court order. He stated that the broadcast referred to land registrar and he went on to state that last broadcast was that, on the next Wednesday they would go to his office to eject him. The plaintiff being the only land registry in Nakuru county at the material time, there is no doubt that the words said referred to him.

65. Further, in where no name is mentioned, **Gatley on Libel and Slander, 10th Edition** paragraph 7.2 state as follows: -

“It is sufficient if he is described by nickname, his initial letters, or by the first and last letter of his name, or even by asterisks, or blank, or if he is referred to under the guise of an allegorical, historical, fictitious or fanciful name, or by means of description of his status, physical peculiarities, or by recognizable likeness or caricature or his residence, the place where he has visited on his travels, his products or, indeed, if he is not mentioned at all...”

66. Defamatory statement is further defined in **Fraser on Libel and slander, 7th Edition** as follows: -

“A statement concerning any person which exposes him to hatred, ridicule or contempt or which causes him to be shunned or avoided or which has a tendency to injure him in his office, profession or trade”

And in **Halsbury's Law of England 4th edition** defamation is defined as follows: -

“A statement is defamatory of a person of whom it is published if broadly speaking, it is calculated to lower him in the estimation of right thinking members of the society or cause him to be shunned or avoided or expose him to hatred, contempt, or ridicule, or to disparage him in his office, profession, calling, trade or business. A statement is prima facie defamatory if the words in their natural and primary sense, that is their plain and popular meaning are defamatory.”

67. From evidence adduced, I note that on cross examination, the plaintiff said besides the broadcaster saying Nakuru land registrar, his name was mentioned; he said the assistant registrars could not transfer land without his authorization and the court order was directed to land registrar Nakuru.

(iii) Whether plaintiff deserve damages

68. The excerpts no doubt, showed that the land registrar they were referring to had transferred the land upon being influenced to so and was therefore a corrupt person; the statements point to a corrupt and immoral person who had illegally transferred land to his girlfriend. The Plaintiff in his testimony stated that he acted as per the court order and he was not a party to the court proceedings.

69. Plaintiff said even after informing the presenters that the allegations were not true they continued to broadcast to the 4th broadcast. He said no apology has been up to the time he testified in court.

70. There is no doubt after such broadcasts, one's character is put to question. There is no doubt that on a balance of probabilities, the plaintiff proved that his reputation was lowered in the eyes of a right thinking person.

71. The plaintiff prayed for damages for each of the broadcast and aggravated damages especially for broadcast made after he had informed the defendant that the information was not true.

72. Having consider the position of the plaintiff at the time and his age, I am of the view that he deserves general damages of kshs 5,000,000 and Aggravated damages of kshs 2,000,000.

73. I therefore enter judgement for the plaintiff against the defendant for kshs Sven (7) Million plus costs and interest.

74. **FINAL ORDER**

1. **Plaintiff awarded kshs 5 Million as General damages.**
2. **Plaintiff awarded Aggravated damages of kshs 2 Million**
3. **Costs of this suit to the plaintiff.**
4. **Interest on 1 & 2 above from the date of this judgment.**

Judgment dated, signed and delivered via zoom at Nakuru This 10th day of June, 2021

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RACHEL NGETICH

JUDGE

In the presence of:

Lepikas - Court Assistant.

Ms. Gatu Magana for plaintiff on behalf of the firm of Kimatta.

Mr. Ndungu for defendant.