



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 406 OF 2015

VIMALKUMAR BHIMJI DEEPAR SHAHPLAINTIFF

VERSUS

GERYL OTIENO.....1ST DEFENDANT

HEADLINK LIMITED.....2ND DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit vide the plaint dated 1st December, 2015 seeking damages and orders of injunction. The claim was stated to have arisen when the Defendants allegedly published a defamatory article concerning the Plaintiff. It was pleaded that on 9th November, 2015, the Defendants published in the **weekly citizen** an article headed “**Vimal Shah sex escapades exposed**”. It was pleaded that the said article alleged that the Plaintiff had an extra marital relationship with one Mrs. Kanja to the detriment of Mr. Kanja who slipped into depression and died a lonely man having suffered a broken heart.

2. It was further averred that the publication portrayed the plaintiff as immoral, exploitative, callous and an insensitive person with no respect for the institution of marriage and the one responsible for the death of Mr. Kanja. That the article greatly lowered the Plaintiff’s reputation and exposed him to embarrassment and ridicule amongst his peers and caused him to be shunned by the right thinking members of the society.

3. The Defendants failed to enter appearance or file a Defence. Interlocutory judgment was entered for the Plaintiff. The case subsequently proceeded to formal proof.

4. The Plaintiff testified (PW1) and called one witness, Judy Momanyi (PW2).

5. Relying on his witness statement filed herein, the Plaintiff described himself as the Director of Bidco Africa Ltd, the largest Manufacturer of edible oils in East and Central Africa, a respected member of the business community both locally and internationally, Chairman of many organizations, Member of the Advisory Board of 3GF (Global Green Growth fund), a Member of the Advisory Board of Tony Elumelu Foundation in Nigeria, a Chancellor of the Jaramogi Oginga Odinga University of Science and Technology and a Trustee of the United States International University (USIU).

6. The Plaintiff reiterated the contents of the plaint and stated that the contents of the article are false and malicious. He produced the article in question as an exhibit and testified that the article has his photograph on it.

7. Judy Momanyi (PW2) testified and adopted her witness statement filed in court on 23rd January, 2020. A legal officer at Bidco Africa Ltd, PW2 testified that upon reading the article in question, she started doubting the Plaintiff’s moral decency.

8. At the close of the Plaintiff’s case, written submissions were filed. I have considered the same.

9. Defamation is defined in **Winfield in J.A. Jolowicz and T. Ellis Lewis – Winfield on Tort 8th Edition**, thus:

“Defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of the society generally, or which tends to make them shun or avoid that person.”

A defamatory statement, according to Gately on Libel and Slander 8th Edition by Phillips Lewis paragraph 4 page 5

discredits a man or tends to lower him in the estimation of others or to expose him to hatred, contempt or ridicule or to injure his reputation in his office trade or profession or to injure his financial credit.”

10. This is a suit founded on the tort of defamation. The Court of Appeal in the case of **Wycliffe A Swanya v Toyota East Africa Limited & another Nairobi CA No. 70 of 2008** set out the elements of defamation thus:

“It is common ground that in a suit founded on defamation the plaintiff must prove:-

(i) That the matter of which the plaintiff complains is defamatory in character.

(ii) That the defamatory statement or utterance was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.

(iii) That it was published maliciously.

(iv) In slander subject to certain exceptions that the plaintiff has suffered special damages.”

11. The Plaintiff’s evidence is uncontroverted. The article the subject of this suit has been produced as an exhibit. There is no doubt that the article was published and refers to the Plaintiff by name and even has his photograph on it. The Plaintiff’s evidence has established that the article was false and malicious. The article was therefore defamatory.

12. The Plaintiff is therefore entitled to general damages to compensate him for the harm caused to his reputation and the distress and humiliation caused by the defamatory publication (See for example **Ken Odondi & 2 others v James Okoth Omburah T/a Omburah & Co. advocates [2013] eKLR; Standard Ltd v G. N. Kagia T/a Kagia & Co. Advocates [2010] eKLR**).

13. Punitive or exemplary damages are awardable only under two circumstances, namely (i) where there is oppressive, arbitrary or unconstitutional action by the servants of the government; and (ii) where the Defendant’s action was calculated to procure him some benefit not necessarily financial, at the expense of the plaintiff. (See the Court of appeal exposition in **Obongo & another v Municipal Council of Kisumu [1971] EA 91**).

14. with regard to aggravated damages, as encapsulated in **Francis Xavier Ole Kaparo v the Standard & 3 others HCCC No. 1230 of 2004 (UR)**

“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.”

15. In the case at hand, the Plaintiff’s evidence was that he demanded an apology but there was none. The Plaintiff’s evidence that the article contained falsehoods reflects recklessness on the Defendants side. There is no evidence of any verification of the facts prior to publication. The Plaintiff is therefore entitled to aggravated damages and punitive or exemplary damages.

16. On general damages for defamation, the Plaintiff’s counsel referred the court to the case of **Christopher Ndarathi Murungaru V John Githongo [2019] eKLR** and **Abdul Ebrahim Ahmed v Municipal Council of Mombasa 2004 eKLR** were awards of Ksh.20,000,000/= and Ksh.15,000,000/= were made respectively.

17. 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 & another Civil Appeal No. 314 of 2000** 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.”

18. I have also considered the observations made by the Court of Appeal in the **Johnson Evans Gicheru** case (**supra**) regarding the awards made in some of the defamation cases involving prominent politicians, high ranking civil servants and advocates as follows:

“my considered opinion of the awards so made is that they lack juridical basis, they may be found to be manifestly excessive

and should not at all be taken as persuasive or guidelines of awards to be followed by trial courts, since the trial judges concerned appeared to have ignored basic fundamental principles of awarding damages in libel cases.”

The Court of Appeal further observed that compensation is solatium more than a monetary recompense for harm measurable in money

19. I award the sum of Ksh.5,000,000/= as general damages.

20. In assessing the damages herein, I have looked at comparable authorities. For example in the case of:

(a) Miguna Miguna v The standard Group Ltd & 4 others [2017] eKLR where a sum of Ksh.5,000,000/= was made.

(b) Musikari Kombo v Royal Media Services [2018] eKLR where a similar award of Ksh.5,000,000/= was made.

21. On exemplary damages, the Plaintiff counsel referred to the case of **Christopher Ndarathi Murungaru (supra)** and the case of **Henry Onyancha Obwocha v Headlink Publishers Ltd [2014] eKLR** where Ksh.2,000,000/= and Ksh.5,000,000/= was respectively, awarded. I have also looked at **Mwangi Kiunjuri v Wangethi Mwangi & 2 others [2016] eKLR** where a politician was awarded the sum of Ksh.1,000,000/= as exemplary damages and **Hon. AMB Chirau Ali Makwere v Royal Media Services Ltd HCCC No. 57 of 2004** where a politician was award of Ksh.1,000,000/= as exemplary damages.

I award Ksh.1,000,000/= as exemplary and punitive damages.

22. On aggravated damages the Court of Appeal in the case of **Miguna Miguna v The standard Group Ltd & 4 others [2017] eKLR** 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.”

23. The court was referred to the case of **Christopher Ndarathi Murungaru (Supra)** and **Samuel Ndungu Mukunga v Nation media Group Ltd & another** where awards made as aggravated damages were Ksh.5,000,000/= and Ksh.3.500,000/= respectively.

I have also looked at the case of:

(a) Musikari Kombo (supra)

(b) Miguna Miguna (supra)

Where the aggravated damages awarded was Ksh.1,000,000/=.

I award the sum of Ksh.1,000,000/= .

24. The total award comes to Ksh.7,000,000/=. Consequently, I enter judgment for the Plaintiff against the Defendants jointly and severally plus costs.

DATE, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021

B. THURANIRA JADEN

JUDGE