



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1490 OF 2005

JOHN KAHIU NDUNG’U.....1ST PLAINTIFF

ALLAN RUGU KAMAU.....2ND PLAINTIFF

MOSES MBUGUA NGETHE.....3RD PLAINTIFF

JAMES WABURUGU THION’GO.....4TH PLAINTIFF

STANLEY KAMAU KIORIA.....5TH PLAINTIFF

BENEDICT OUNDO ONYANGO.....6TH PLAINTIFF

JOHN MURIGI NGUGI.....7TH PLAINTIFF

PETER KAMAU WARINGA.....8TH PLAINTIFF

PETER MUNGA TERESIA.....9TH PLAINTIFF

-VERSUS-

NATION MEDIA GROUP LIMITED.....DEFENDANT

JUDGEMENT

1. The plaintiffs herein filed a suit by way of the plaint dated 13th December, 2005 and sought for judgment against the defendant in the following manner:

a) General damages.

b) Aggravated damages.

c) An injunction to restrain the defendant and each of them by themselves, their servants and/or agents or otherwise howsoever from the publication of the said words or any of them or any similar words and/or any images of the plaintiffs herein.

d) Costs of the suit.

e) Interest on (a), (b), (c) and (d) above.

2. The plaintiffs pleaded in their plaint that on the 11th and 12th of July, 2005 during Prime Time News under the banner

“Undercover Story” at 9.00 p.m. the defendant falsely and maliciously caused to be published defamatory material relating to the plaintiffs by way of both photo clips and words to the effect that under the guise of selling watches, the plaintiffs were also secretly engaged in drug trafficking hidden within the watches being sold.

3. The plaintiffs further pleaded in their plaint that owing to the publications made on the aforesaid dates, they were arrested on 16th August, 2005 and that on the date of the said arrest, they were shown on the defendant’s televised station being bundled into police vehicles.

4. It was also pleaded by the plaintiffs in their plaint that as a result of the defamatory publications, their reputation and character have been subjected to ridicule and contempt by right thinking members of the society, and that their respective businesses have been negatively affected.
5. The defendant entered appearance upon service of summons and filed its statement of defence on 6th February, 2006 to deny the plaintiff's claim.
6. At the hearing of the suit, the 2nd, 3rd, 4th, 5th, 7th and 9th plaintiffs testified and called two (2) additional witnesses, while the defendant closed its case without summoning any witnesses.
7. The 9th plaintiff who was PW1 adopted his signed witness statement and stated that he used to operate a business in Kaunda Street in Nairobi, dealing in watches, wallets and gift items; but that he was forced to close down the business and change the nature of his work.
8. The 9th plaintiff testified that on the material dates, the defendant aired a news item to the effect that the plaintiffs were dealing in drugs and that he personally saw the news bulletin in the company of his wife.
9. It was the testimony of the 9th plaintiff that he did not appear on the T.V. clip but that they were later rounded up and taken to the police station for questioning and that on the material evening, another news clip containing their photographs was aired.
10. It was also his testimony that thereafter, when he would meet people on the streets, they would question whether he was truly selling drugs.
11. In cross-examination, the 9th plaintiff stated that he did not see his photograph on T.V. on 11th July, 2005 but that on 12th August, 2005 his photograph appeared next to the feature.
12. The 4th plaintiff who was PW2 similarly adopted his executed witness statement as evidence and went on to give evidence that he also used to work as a hawker selling watches, wallets and gifts and that on 11th July, 2005 he received a call from his brother to inform him that he was featuring on T.V. as a drug dealer and that the news item was repeated.
13. The 4th plaintiff also gave evidence that he and his colleagues were later arrested and their personal belongings ransacked but that no drugs were found to be in their possession.
14. It is his testimony that following the publications in question, he had to relocate residence.
15. In cross-examination, the witness stated that though he did not watch the news item for 11th July, 2005 at 7.00 p.m. the same news item was repeated at 9.00 p.m. featuring his image, and that he was able to understand that the same depicted him as a drug trafficker.
16. PW3 who was the 2nd plaintiff adopted the contents of his signed witness statement before stating that the news clip in question aired on 11th July, 2005 depicting him and his colleagues as drug dealers, and that an image of himself featured alongside the news clip.
17. The aforesaid plaintiff also stated that on 16th August, 2005 he and his co-workers were arrested and taken to Central Police Station by the Anti-narcotics police. He added that he was arrested several times thereafter.
18. It was his evidence that previously he was a chairman at the Anglican Church of Kenya (ACK) youth group but that he has since been stripped of his title as a result of the incident in question.
19. In cross-examination, the 2nd plaintiff testified that though his name did not appear on the news bulletin, his image was shown on three (3) separate occasions and that the news bulletin stated the manner in which hawkers were in the business of selling drugs under the guise of watches and related items.
20. He further testified that the news bulletin aired on 12th July, 2005 stated that the hawkers ran away from operating their business in Kaunda Street.
21. In re-examination, it was the evidence of the aforesaid plaintiff that though he has severally been arrested by the police in relation to the alleged drug trafficking, he has never been charged.
22. 5th plaintiff testified as PW4 and stated that they were alleged to be dealing in drugs going by the news bulletin and yet they were simply selling watches and that following the publications in question, he lost most of his customer base.
23. In cross-examination, the plaintiff testified that he was at home when the publication featured and that though his name was not mentioned, his photograph featured therein.
24. The plaintiff echoed the evidence of his counterparts regarding their arrest on 16th August, 2005.
25. The 7th plaintiff followed as PW5 and stated that following the impugned publications, his wife left him and that his business collapsed.

26. In cross-examination, it was his evidence that he had a valid license to operate his business at the time and that though his name did not feature in the publication, he was arrested three (3) days thereafter, whereas some of his counterparts were arrested on 16th August, 2005.

27. The 3rd plaintiff who was PW6 gave evidence that he also suffered an arrest following the impugned publications and that he relocated his business from Kaunda Street to Jivanjee Gardens.

28. In cross-examination, PW6 testified that part of his physique was featured in the impugned publications and that he personally saw them.

29. Anne Wangari Thuo who was PW7 testified that she is a wife to the 2nd plaintiff and a business lady operating electronics.

30. She further testified that she watched the feature made on 11th July, 2005 regarding the sale of drugs by hawkers along Kaunda Street and that the photograph of her husband appeared thereon.

31. It was her evidence that following the impugned publications, she and her family were shunned as drug peddlers.

32. In cross-examination, the witness stated that her husband operated as a hawker at Kaunda Street at all material times and that he and his counterparts were operating in the same area at the time.

33. The witness further stated that her husband was arrested on 16th August, 2005 in connection with the feature and alleged drug dealing.

34. Shiphrah Nyaguthii who was PW8 testified as the last witness, equally gave evidence that she saw her husband featuring on the bulletin aired on 11th July, 2005 together with other hawkers and that they were being linked to drug peddling.

35. In cross-examination, the witness stated that her husband's name was not mentioned in the impugned publications.

36. At the close of the hearing, this court called upon the parties to file and exchange written submissions.

37. On their part, the plaintiffs through their original and supplementary submissions contend that they have proved the elements associated with the tort of defamation and that their claim being in the nature of libel is actionable per se, as shown in the case of **Peter Maina Ndirangu v Nation Media Group Limited [2014] eKLR** when the court acknowledged that an action of libel is actionable per se which is to say that damage suffered need not be proved.

38. On general damages, though the plaintiffs did not offer any proposal on awards, they have cited *inter alia*:

a) The case of **Hon. Amb. Chirau Ali Makwere v Nation Media Group Limited and Wangethi Mwangi [2009] eKLR** where the court awarded Kshs.8,000,000/ on general damages; Kshs. 1,000,000/ on aggravated damages; and Kshs. 1,000,000/ on punitive damages.

b) The case of **Ken Odondi & 2 others v James Okoth Omburah T/A Okoth Omburah & Company advocates [2013] eKLR** in which the Court of Appeal awarded the sums of Kshs. 4,000,000/ on general damages for libel and Kshs. 500,000/ on aggravated damages.

39. In reply, the defendant submits that the plaintiffs ought to have set out the particulars of the alleged defamatory words but they did not, and hence their claim ought to fall on that basis. The defendant relied upon the case of **Hon. Nicholas Kipyator Kiprono Biwott v Hon. Paul Kibugi Muite & Another Nairobi HCCC No. 1369 of 2003**, where it was held that the law requires the actual alleged defamatory words to be set out, in the absence of which a claim must fail.

40. I have considered the evidence tendered alongside the contending submissions and authorities relied upon. The following are the issues arising for determination:

i. Whether the plaintiffs have made a case for defamation against the defendant; and

ii. Whether the plaintiffs are entitled to the reliefs sought.

41. On the *first* issue, I borrow from the **Black's Law Dictionary, 8th edition** definition of the term 'defamation' as follows:

"the act of harming the reputation of another by making a false statement to a third person."

42. The ingredients of a defamatory claim were laid out by the Court of Appeal in the case of **Raphael Lukale v Elizabeth Mayabi & another [2018] eKLR** and are that:

i. The statement must be defamatory.

ii. The statement must refer to the plaintiff.

iii. The statement must be published by the defendant.

iv. The statement must be false.

43. In respect to the second and third ingredients which I wish to begin with, from my evaluation of the oral evidence tendered by and on behalf of the plaintiffs, I established that the publications in question were made by the defendant and made reference to the plaintiffs. In its pleadings, the defendant admitted to making the said publications and did not deny that the same related to the plaintiffs herein.

44. I am therefore satisfied that the plaintiff has established the two (2) referenced ingredients on defamation.

45. This brings me to the first ingredient to do with whether the impugned publications are defamatory of the plaintiffs.

46. At the heart of a defamatory statement lies its tendency to lower the reputation of the claimant in question. This was the position held by the Court of Appeal in the authority of **S M W v Z W M [2015] eKLR** and restated in the case of **Joseph Njogu Kamunge [2016] eKLR** thus:

“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.”

47. The legal position is that in order to determine whether a statement or publication is defamatory, one must seek to understand the meaning conveyed by the words in question to an ordinary/reasonable person.

48. On their part, the plaintiffs under paragraphs 4, 5 and 6 of their plaint pleaded that the words complained of in the impugned publications were defamatory of them in the sense that they could be inferred in their ordinary and natural sense to imply that they are inter alia, drug dealers and criminals masquerading as hawkers. The plaintiffs also pleaded and testified that as a result of the impugned publications, each of their reputations was lowered. This evidence was supported by that of PW7 and PW8 who were both independent witnesses.

49. At the submissions stage, I note the argument by the defendant that the plaintiff's claim ought to fail for failure to set out the defamatory words verbatim or to give specific particulars of the same.

50. I also note that the defendant on its part did not call any evidence to refute the claim by the plaintiffs or raise the above issue at the preliminary stages of the suit and cannot therefore be heard to argue its case through their submissions.

51. That notwithstanding, I am satisfied that though the plaintiffs did not set out verbatim the words published concerning them, they were able to set out the title of the said publications and describe in fair detail the nature of the publications made, as well as particularize their meaning in the ordinary and natural sense.

52. Upon considering the aforementioned particulars of defamation and innuendo pleaded in the plaint and in the absence of any contrary evidence, I conclude that the words published would ordinary sense be taken to have the meaning pleaded in the plaint.

53. Concerning the reputation of the respective plaintiffs, credible evidence was tendered to support the claim that following the impugned publications, their reputation was negatively affected.

54. Further to the foregoing, I am alive to the existing legal principle that in instances of libel, the law presumes damage so long as a party has shown that the defamatory material was written or printed or in some permanent form. This was the position taken by the court in the case of **Peter Maina Ndirangu v Nation Media Group Limited [2014] eKLR** cited in the plaintiffs' submissions, where the court stated that in an action of libel damage suffered need not be proved. Such position was restated in the case of **Alnashir Visram v Standard Limited [2016] eKLR**.

55. In the premises, I am satisfied that the plaintiffs have shown that the publications in question are defamatory of them.

56. On the ingredient touching on malice, the court in the case of **Phinehas Nyagah v Gitobu Imanyara [2013] eKLR** was of the view that malice is not restricted to spite or ill will but may extend to reckless actions drawn from the publication in question.

57. Upon considering the nature, frequency and circumstances of the impugned publications coupled with the impact namely the arrest of the plaintiffs going by the evidence tendered, it is my view that the plaintiffs have proved malice against the defendant. It is noteworthy that malice was not refuted by the defendant by way of evidence.

58. In respect to the ingredient to do with whether the publication was false, the court in the case of **Joseph Njogu Kamunge** (supra) reasoned that a defamatory statement is presumed to be false unless and until the same is shown to be true by a defendant.

59. In the present instance, I am satisfied that the plaintiffs brought credible evidence to demonstrate the false nature of the impugned publications and which evidence was not countered by the defendant at the trial. Furthermore, while I note that the defendant pleaded the defence of fair comment on a matter of public interest, it did not tender any evidence at the trial to support such defence. To my mind therefore, the plaintiffs have shown that the impugned publications were untrue.

60. In view of the foregoing, I am satisfied that the plaintiffs have established a claim for defamation against the defendant on a balance of probabilities.

61. This brings me to the second issue touching on whether the plaintiff is entitled to the reliefs being sought.

62. On **general damages**, the plaintiffs testified that they were at all material times engaged in business.

63. I note that the authorities cited by the plaintiffs in their submissions concern persons of different professional standing from themselves.

64. I therefore considered the case of **Josphat Kithembe Kyalo v Webster Muema Kyalo [2019] eKLR** in which the High Court sitting on appeal upheld an award of Kshs.700,000/ on general damages given to a businessman and the case of **Mary Koli Kitonga v Ghetto Radio Limited [2020] eKLR** where a similar award was made to a business person. In both instances, the respective plaintiffs were of comparable societal status to the plaintiffs herein.

65. In the circumstances, I find an award of Kshs.700,000/ to suffice for each plaintiff in the present instance.

66. On **aggravated damages**, I considered the repetitive nature of the publication and the lack of an apology by the defendant. Having done so, I find a sum of Kshs.300,000/ to be a suitable award to each plaintiff, relying on the case of **Standard Limited & another v Jonathan Abraham Chelule [2018] eKLR** where a similar award was made under that head.

67. Concerning the prayer for an injunction, I note that though the plaintiffs prayed for the same, they made no mention of it at the evidence stage or in their submissions, thereby making it unclear whether the prayer was eventually abandoned. On that basis, I am not convinced to grant the same.

68. In the end and having considered the evidence before this court, the submissions from the parties and the law applicable, I hereby enter judgment in favour of the plaintiffs and against the defendant in the manner hereunder:

a) General damages Kshs. 700,000/ per plaintiff

b) Aggravated damages Kshs.300,000/ per plaintiff

c) In view of the awards made in a) and b) above, the total award is Ksh.1,000,000/ to each plaintiff.

d) The plaintiffs shall each have costs of this suit and interest on their respective total awards of Ksh.1,000,000/ from the date of judgment until payment in full.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 8TH DAY OF OCTOBER, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiffs

..... for the Defendant