



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO 394 OF 2014

JULIUS NDEGWA KARIUKI.....PLAINTIFF

VS

THE STANDARD GROUP LIMITED.....1ST DEFENDANT

GEOFFREY MOSOKU.....2ND DEFENDANT

JUDGMENT

1. In his Complaint dated 11th November 2014 and filed on 17th November 2014, the Plaintiff sought the following reliefs :-

- a. An injunction to restrain the defendant, their servants or agents from publishing defamatory words or articles relating to the plaintiff and in particular linking the plaintiff into legal approval and allocation of land.**
- b. General damages for libel.**
- c. Aggravated, punitive and exemplary damages for libel.**
- d. Costs of the suit.**
- e. Interest on (b), (c) and (d) above.**
- f. Any further order that this Honourable Court may deem fit to grant.**

2. The Defendants' Defence was dated and filed on 19th December 2014. Their List of Witnesses and the 2nd Defendant's Witness Statement were also dated and filed on the same date of 19th December 2014.

3. The Plaintiff's Reply to the Defendants' Defence was dated 23rd January 2015 and filed on 27th January 2015. He also filed a Witness Statement cross-referenced to his List of Documents dated 15th January 2015. They were both filed on 18th February 2015.

4. His Written Submissions and List of Bundle of Authorities were both dated 15th July 2015 and filed on 16th July 2015 while the Defendants' Written Submissions were dated 22nd July 2015 and filed on 29th July 2015.

LEGAL ANALYSIS

5. The Plaintiff's Statement of Agreed Issues was dated 1st September 2015 and filed on 28th January 2016. They were as follows:-

- a. Whether the defendants deliberately published and/or caused to be published and printed in the Standard Newspaper on Monday 4th August 2014 words of or concerning the Plaintiff where it was alleged that the Plaintiff approved an illegal allotment?**
- b. Whether the offensive article was defamatory?**

c. Whether the Plaintiff's story was ever sought?

d. Whether the Defendants in publishing the offensive article complained of in this suit were negligent and reckless?

e. Did the Defendants maliciously and knowing the same to be untrue, publish and/or cause to be published the defamatory words complained of in the suit which words were posted in the internet for worldwide circulation?

f. What was the meaning of the words published by the defendants in the ordinary and natural meaning and were understood to mean?

g. Was the Plaintiff in consequence gravely injured in his character, credit and reputation lowered in estimation of right thinking person's generally?

h. Whether the Plaintiff's feelings were brought into public scandal, odium, ridicule, contempt, hurt, embarrassment and distress?

i. Whether the Plaintiff was in contravention of any law in attending and participating in a council meeting, being a councilor thereof, and whether any illegal business was conducted at his instigation?

j. Whether by seconding the minutes of any council meeting, the Plaintiff can by any stretch of imagination, be deemed to be personally responsible for any resolutions thereof, irrespective of the nature of the business before the council?

k. Whether the defendants were duly served with letters of demand and subsequently, notice of intention to sue by the Plaintiff?

l. Whether the Plaintiff under the circumstances and in view of the foregoing, was entitled to damages as prayed in the Plaint?

m. Did the Honourable Court have jurisdiction to hear and determine this matter?

n. Who was to bear the costs of the suit?

6. The court determined the issues it deemed to have been placed before it under the distinct and separate heads shown hereinbelow.

I. PROOF OR OTHERWISE OF THE PLAINTIFF'S CASE

7. The Plaintiff's case was that on 4th August 2014, the 1st Defendant caused an Article to be written by the 2nd Defendant herein on page 8 of its Standard Newspaper titled "**Did Orengo, PS have a hand in Lamu scam?**" The published words were as follows:-

"Yesterday, it also emerged that the office of the President and Lamu West MP Julius Ndegwa at one stage approved the allotments...On the other hand, Ndegwa who was then a councilor, seconded minutes of the council meeting that resolved to allocate the land originally given to Mat International to three other companies including Rusken."

8. He stated that the said Article was to the effect that he approved some allotment of land in Lamu illegally which portrayed him negatively in the eyes of those who knew him well and right thinking members of the society. It was his contention that the publication was reckless and malicious as the 2nd Defendant never sought his side of the story. He pointed out that despite demanding an apology from the Defendants, they had ignored to publish an apology.

9. He placed reliance on the definition of defamation as given in several cases and in the **Halsbury's Laws of England 4th Edition Volume 28**, which the Defendants also relied upon, where it is stated that:-

"A defamatory statement is a statement which tends to lower a person in the estimation of the right thinking members of the society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt ridicule to convey any imputation on him disparaging or injuries to him in office, profession, calling, trade or business."

10. He argued that proposing, seconding, voting for a motion or in any way supporting a motion/ resolution of the Lamu County Council where he was a Councilor in the defunct local government councils, did not amount to approving a motion or resolution. He was emphatic that as a Councilor, he did not have power to approve any resolution or even make a decision because resolutions were made by the county council and consequently, the 1st Defendant's publication that he approved the allotments was defamatory.

11. He submitted that in considering whether or not a statement was defamatory, a court had to consider what meaning the words conveyed to the ordinary man. He pointed out that the Defendants had not called any evidence to support their case. He therefore urged this court to find and hold that the said Article had been written with malice and ill will with intention to destroy his reputation. He therefore sought damages for libel as his reputation had been tarnished.

12. He relied on several cases amongst them the case of **Nelson Havi vs Headlink Publishers Limited [2018] eKLR** where the common

thread was that a plaintiff is entitled to his reputation and that a defendant has no right to publish any statements that are false, defamatory and accentuated by malice about that plaintiff.

13. Notably, despite having been granted an opportunity to call witnesses, the Defendants did not do so and closed their case. They placed reliance on several cases amongst them **Gibson Ombonya Shiraku vs British Airways Plc [2014] eKLR** where the common thread was that even where a respondent did not adduce evidence, the burden of proof continued to lie with the plaintiff as stipulated in Section 109 of the Evidence Act Cap 80 (Laws of Kenya) that provides that the burden of proof lies with that person who wishes the court to believe in the existence of a fact and that he who asserts a fact must prove, as provided in Section 107 of the Evidence Act.

14. They also argued that for a statement to be proved to be defamatory, a plaintiff has to demonstrate the following:-

- a. That the matter complained of was defamatory in nature;**
- b. That the defamatory statement was uttered to someone else other than the person who was said to have been defamed.**
- c. That the defamatory statement was published maliciously.**

15. They referred this court to the case of **SMW vs ZVM [2015] eKLR** where the Court of Appeal held that in determining the words for purposes of defamation, the court does not employ legal construction but rather, the words complained of must be construed in their natural and ordinary meaning.

16. They added that the Plaintiff had also not demonstrated that his character, reputation and/or profession had been injured. In this regard, they placed reliance on the case of **Phineas Nyaga vs Gitobu Imanyara [2013] eKLR** where it was held that defamation was not about publication of falsehoods against a plaintiff but rather, he must show that the published falsehood disparaged his reputation and lowered him in the estimation of right thinking members of society generally.

17. Further, they submitted that the Plaintiff did not prove malice as was held in the case of **Ann Wairimu Njogu vs Radio Africa Limited [2017] eKLR**, which malice could also be inferred. It was their submission that the comment they made was fair comment. They referred the court to the case of **Grace Wangui Ngenye vs Chris Kirubi & Another [2015] eKLR** amongst other cases.

18. It was evident that the parties were agreed on the law regarding defamation. The court did not therefore find it necessary to differentiate the cases that they had relied upon. Their departure was on whether the Plaintiff's case fell squarely within the parameters that had been set out in the cases cited hereinabove with a view to establishing if he had discharged his burden of proof on a balance of probability.

19. In the case of **Newstead vs London Express Newspaper Ltd [1940] 1 KB 377 [1939] 4 ALL ER 319**, it was held as follows:-

“Where the plaintiff is referred to by name or otherwise clearly identified, the words are actionable even if they were intended to refer to some other persons. It is not essential that the plaintiff must be named in the defamatory statement; where the words do not expressly refer to the plaintiff they may be held to refer to him if ordinary sensible readers with knowledge of the special facts could and did understand them to refer to him.”

20. A careful perusal of the Article showed that:-

- a. The Plaintiff herein had been referred to by name. The question of his identification did not therefore arise.**
- b. He had been a Councilor at the Lamu County Council;**
- c. He seconded minutes of a Council meeting that resolved to allocate land to some companies.**

21. The Defendants did not adduce any evidence to show that the Plaintiff acted outside his mandate as a Council member when seconding minutes of the County Council. They failed to demonstrate that the Plaintiff acted alone to the exclusion of other Council members in approving allocating of the land, if at all. Their failure to adduce evidence denied this court the opportunity to interrogate why the Plaintiff was the only one who was targeted, yet it was normal to expect that there was another Council member who proposed the minutes before the Plaintiff herein seconded the same. Indeed, there was no evidence that was adduced to show that the Plaintiff approved an illegal allotment.

22. The Article was recklessly made, negligent and in their ordinary and natural meaning, the words complained of were understood to mean that the Plaintiff was dishonest, immoral, unethical, corrupt and had abused his office thus making him unsuitable or unfit to hold a public office. There was no doubt that his image was lowered in the estimation of people who knew him and others who read the Article that was carried in a newspaper that had wide circulation within and outside Kenya.

23. Further, in view of the fact that the Defendants did not call any witnesses to rebut the evidence that the Plaintiff adduced, this court had no option but to accept his evidence that the words published in The Standard Newspaper were false, defamatory and malicious as his testimony remained uncontroverted and that the Defendants did not seek his side of the story.

24. This court was therefore not persuaded to find and hold that the Defendants were entitled to the defence of unintentional defamation as provided for under Section 13 of the Defamation Act Cap 36 (Laws of Kenya). The same provides as follows:-

“1. A person (in this section referred to as the defendant) who has published words alleged to be defamatory of another person (in this section referred to as the plaintiff) may, if he claims that the words were published by him innocently in relation to the plaintiff, make an offer of amends under this section, and in any such case-

a. if the offer is accepted by the plaintiff and is duly performed, no proceedings for libel or slander shall be taken or continued by the plaintiff against the defendant in respect of the publication in question (but without prejudice to any cause of action against any other person jointly responsible for that publication);

b. if the offer is not accepted by the plaintiff, then, except as otherwise provided by this section, it shall be a defence, in any proceedings by him against the defendant in respect of such publication, to prove that the words complained of were published by the defendant innocently in relation to the plaintiff and that the offer was made as soon as practicable after the defendant received notice that they were or might be defamatory of the plaintiff, and has not been withdrawn.

2. An offer of amends under this section must be expressed to be made for the purposes of this section, and must be accompanied by an affidavit made by the defendant specifying the facts relied upon by him to show that the words in question were published by him innocently in relation to the plaintiff, and for the purposes of a defence under paragraph (b) of subsection (1) of this section no evidence other than evidence of facts specified in such affidavit shall be admissible on behalf of the defendant to prove that the words were so published.

3. An offer of amends under this section shall be understood to mean an offer-

a. in any case, to publish or join in the publication of a suitable correction of the words complained of, and a sufficient apology to the plaintiff in respect of those words;

b. where copies of a document or record containing such words have been distributed by or with the knowledge of the defendant, to take such steps as are reasonably practicable on his part for notifying persons to whom copies have been so distributed that the words are alleged to be defamatory of the plaintiff.

4. Where an offer of amends under this section is accepted by the plaintiff—

a. any question as to the steps to be taken in fulfillment of the offer as so accepted shall, in default of agreement between the parties, be referred to and determined by the High Court, whose decision thereon shall be final;

b. the power of the court to make orders as to the costs in proceedings by the plaintiff against the defendant, or in proceedings in respect of the offer under paragraph (a) of this subsection, shall include power to order the payment by the defendant to the plaintiff of costs on an indemnity basis and any expenses reasonably incurred or to be incurred by the plaintiff in consequence of the publication in question, and if no such proceedings are taken, the High Court may, upon application made by the plaintiff, make any such order for the payment of such costs and expenses as could be made in such proceedings.

5. For the purposes of this section, words shall be treated as published by the defendant innocently in relation to the plaintiff if and only if the following conditions are satisfied—

a. that the defendant did not intend to publish them of and concerning the plaintiff, and did not know of circumstances by virtue of which they might be understood to refer to the plaintiff; or

b. that the words were not defamatory on the face of them, and the defendant did not know of circumstances by virtue of which they might be understood to be defamatory of the plaintiff, and in either case that the defendant exercised all reasonable care in relation to the publication; and any reference in this subsection to the defendant shall be construed as including a reference to any servant or agent of his who was concerned with the contents of the publication.

6. Paragraph (b) of subsection (1) of this section shall not apply in relation to the publication by any person of words of which he is not the author unless he proves that the words were written by the author without malice.

25. It was clear from the circumstances of this case that the Defendant did not make any amend under the Section 13 despite the Plaintiff having asked it to retract the publication vide his letter to the 1st Defendant dated 4th August 2018. The Defendants did not prove justification or fair comment under Section 14 and Section 15 of the Defamation Act.

26. It was therefore the considered view of this court that the Plaintiff proved his case against the Defendants herein on a balance of probability.

II. QUANTUM

27. The Plaintiff submitted that at the time of publication of the Article, he was a Member of Parliament of Lamu West. The said publication must have caused him unwarranted loss of reputation damage as his nature of work at the time demanded that he remain as clean as wool to persuade mature constituents to vote for him in an elective post. There is no doubt in the mind of this court that without any amends by the Defendants, the electorate will always consider him as a person who is unfit to hold public office as he had been engaged in dubious dealings

in the Lamu County Council.

28. As the words published in the Article could be deduced to mean that he was not a person of no integrity, his reputation and/or image must have been lowered in the eyes and minds of right thinking members of the society and particularly in the eyes of those who knew him personally. He was, therefore definitely entitled to an award of damages. Unfortunately, he did not opine on what would be adequate and/or reasonable compensation.

29. On the other hand, this court noted that the Defendants averred that in the event the court was inclined to find that he proved his case on a balance of probability, then the court should award him Kshs 1,000,000/= general damages and Kshs 500,000/= exemplary damages as he did not call any witness to testify whether his reputation had been damaged.

30. They placed reliance on the cases of **C A M vs Royal Medial Limited [2013] eKLR** and **Mwangi Kiunjuri vs Wangethi Mwangi & 2 Others [2016] eKLR** where a Cabinet Minister and politician were awarded Kshs 500,000/= and Kshs 1,000,000/= as exemplary damages respectively.

31. It was the considered view of this court that a sum of Kshs 3,500,000/= general damages was adequate compensation to the Plaintiff for the damage of reputation that he suffered.

32. In arriving at the said figures, this court had due regard to the case of **Phineas Nyagah vs Gitobu Imanyara [2013] eKLR** where Odunga J held that he would have awarded the plaintiff therein Kshs 3,000,000/- general damages had he succeeded because he did not call any witness to testify that he had been injured by the spoken words. It also relied on the case of **Ahmednasir Maalim Abdullahi v Star Publications Limited [2019] eKLR** where it awarded the Plaintiff therein a sum of Kshs 3,500,000/= general damages for defamation.

33. Whereas the Defendants had proposed that the court could award the Plaintiff Kshs 500,000/= as exemplary damages, this court was not persuaded that it should do so for the reason that the Plaintiff did not call any other witness to demonstrate that he was entitled to aggravated and/or exemplary damages.

DISPOSITION

34. Accordingly, having considered the evidence that was tendered by the Plaintiff, this court came to the firm conclusion that his case was merited and in the circumstances herein, it is hereby directed that judgment be and is hereby entered in favour of the Plaintiff against the Defendants, jointly and severally for the sum of Kshs 3,500,000/= general damages for defamation plus interest thereon at court rates from the date of this judgment and costs.

35. It is so ordered.

DATED and DELIVERED at NAIROBI this 13th day of February 2020

J. KAMAU

JUDGE