



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 283 OF 2016

HATARI PETER GEORGE WAWERU.....PLAINTIFF

-VERSUS-

MEDIA MAX NETWORK LIMITED.....RESPONDENT

JUDGEMENT

The plaintiff herein has moved this court by way of a plaint dated the 30th day of June, 2016, in which he has sought the following remedies against the defendant.

- a. An order for unqualified apology to be published in the defendant's People Daily Newspaper or some other Newspaper of similar distribution and circulation.
- b. General damages.
- c. Aggravated damages
- d. Punitive damages.
- e. Costs of the suit and interest at court rates on (b) (c) and (d) above.

The plaintiff herein is a Judge of the High Court of Kenya working in Murang'a County within the Republic of Kenya and is the Resident Judge of Murang'a High Court. The defendant is a Limited Liability Company and a media house which is the publisher of the People Daily Newspaper.

The plaintiff's cause of action is contained in paragraph 3 of the plaint and the particulars are set out therein.

The plaintiff alleges that in the issue of Monday, 6th July, 2015 of the People Daily Newspaper, the defendant published the following page one banner – headline story by-lined

Judge owns illicit brew factory. Kabete MP Ferdinand Waititu says the official uses his position to ward off security agents, as NACADA's John Mututho and Bahati MP Kimani Ngunjiri seize 12.5 million rolls of counterfeit KRA labels in Nakuru.

And continuing at page 6 of the paper by-lined

Senior judicial official linked to killer drinks firm

“by people team”

(The full story has been set out in paragraph five of the plaint.)

The plaintiff averred that the main story as published was understood by all right thinking members of the public, particularly those working in the judiciary and the legal fraternity, to concern him in that;

- i. The plaintiff was and still is a Senior High Court Judge being the second in seniority in the High Court of Kenya by date of

appointment.

ii. The plaintiff was the only judge transferred towards the end of 2014 from the Civil Division at Milimani Law Courts, Nairobi who was, when the story was published, a Resident Judge in one of the counties (in this case Murang'a County).

He contended that the main story as concerned him was patently false and libelous of the plaintiff in that;

i. The plaintiff was not, and has never been, a stumbling block to the war against illicit brew.

ii. The plaintiff has never abused his supposed "powers" to thwart the war against illicit brew.

iii. The plaintiff has never operated any brewery, illicit or otherwise at Thika or anywhere else in the country, and has never been a manufacturer of any alcoholic drinks, illicit or otherwise.

iv. The plaintiff has never, while a judge of the High Court appointed in 1998, been engaged in any type of business, and his source of income has been, and is, his employment as a judge.

The plaintiff avers that the story complained of was published with malice and has set out the particulars of malice in paragraph 9 of the plaint. The ordinary and natural meaning of the words as are likely to be understood by the right thinking members of the public, particularly those in the judiciary and the legal fraternity in general, are set out in paragraph 6 of the plaint.

The plaintiff therefore contended that by the said publication, his reputation and character has been gravely injured both within the judiciary and the legal profession and also in the eyes of the general public. Damages were sought as set out in the plaint.

The defendant filed its defence on the 3rd day of August, 2016, in which it has admitted publishing the words alluded to in the plaint, but denies that the publication was defamatory of the plaintiff either as alleged or at all. The defendant averred that the publication did not identify the plaintiff and he was put to strict proof.

Further the defendant denied the meaning ascribed to the words complained of, and that the plaintiff's reputation has been injured as alleged and contends that the plaintiff is not entitled to damages for defamation or at all.

Without prejudice to the foregoing, the defendant averred that the words complained about were fair comment on a matter of public interest. The particulars of fair comment are set out in paragraph 8 of the plaint

The defendant contended that the plaintiff is not entitled to the remedies sought in the plaint and urged the court to dismiss the plaintiff's claim.

The plaintiff filed a reply to defence, on the 15th August 2016 in which he joins issue with the defendant upon its statement of defence dated the 29th day July, 2016. He reiterated the contents of paragraph 9 of the plaint and further pleaded the particulars of express malice as set out in paragraph 2 thereof.

At the hearing, the plaintiff gave evidence and called three witnesses in support of his case.

In his evidence, the plaintiff referred to the article wherein, Mr. Waititu made reference to a High Court Judge who worked in the Civil Division of the High Court at Nairobi until end of the year 2014. It was his evidence that he was stationed in the Civil Division Milimani High Court and was transferred to Murang'a in November, 2014 as a Resident Judge and later designated as a Presiding Judge. He stated that he did not know of any other judge who was transferred from Civil Division Nairobi to Murang'a, at the material time.

Further, it was his evidence that before he was appointed as a judge, he was an Advocate in private practice for 30 years and that after his appointment, he has not engaged in any other business. He was categorical that he has never engaged in the business of liquor brewing whether illicit otherwise and that the article seriously damaged his reputation.

Winnie Wanjiru Njoroge gave evidence as PW2. It was her evidence that at the material time the article was published, she was at Murang'a Court serving as the Plaintiff's court clerk. She stated that when she read the article, it gave her some indicators of who the judge referred therein was, as it referred to a judge who was in the Civil Division, Milimani, and who had been transferred to the county and that was the plaintiff. It was her evidence that she did not know of any other judge who fitted the description given in the article as the plaintiff was the only one who was transferred from Civil Division, Nairobi, at the material time.

Beatrice Nyawira Kamau gave evidence as PW3. She was based in Murang'a court at the material time and she was the plaintiff's secretary. She explained that before she was transferred to Murang'a she was stationed at Milimani in the Civil Division until 2013. She confirmed that the plaintiff was transferred in November, 2014, and at the material time, there were only two judges in the Civil Division being the plaintiff and justice Nyamweya.

Eunice Nyabio Moraa who testified as PW4 was by then a Legal Researcher with the judiciary based in Murang'a court. She confirmed having read the article on the said date and what attracted her was the headline and she wanted to know who the judge was. It was her evidence that on reading the article she was able to tell the article referred to the plaintiff as the description fitted him in that, he was working in the Civil Division, Nairobi, and had been transferred to the County Court.

On its part, the defendant called one witness namely Joseph Maina Muiruri who, at the time of giving evidence, was a private media practitioner but previously he was the imaging editor of the People Daily. He adopted his witness statement dated the 6th February, 2019. He stated that he was aware of the article but the same neither disclosed the identity of the High Court judge alluded to, nor specified the particular county in which the judge was a Resident Judge.

According to him, the article is on crackdown on illicit brew and second generation alcohol which was a matter of public interest and that for all intents and purposes, the article was not defamatory. He stated that the article was published innocently and that it was a fair comment on a matter of public interest without any intent to damage or injure the reputation of any person.

At the close of the case, both parties filed submissions in support of their respective positions which this court has considered, together with the pleadings, the evidence on record and the authorities relied on.

From the pleadings, the court identifies the following issues for determination;

1. Whether the article was published by the defendant
2. Whether the same refers to the plaintiff.
3. Whether the same was defamatory of the plaintiff.
4. Whether the publication was false and malicious.
5. Whether the defence of fair comment is available to the defendant.
6. Whether the plaintiff is entitled to damages and if so, the quantum thereof.
7. Who should meet the costs of the suit.

There is no doubt that the cause of action herein is based on defamation. In Kenya, the law of defamation is now well settled and its governed primarily by the Defamation Act Cap 36 Laws of Kenya which has a foundation in the Constitution and in particular Article 33 (3) which states;

“In exercise of the right to freedom of expression every person shall respect the rights and reputation of others.”

The tort of defamation is defined variously with not one agreed single definition that fits all. In the English case of Scott v Simpson (1982) 9BD Dave J defined it thus;

“A false statement about a man to his discredit”

In the well known work of Winfield, the definition is given as follows;

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

Another authority often cited as definitive on defamation is that of Thomas v. CBC (1981) 4WWR (29) as follows;

“The gist of the torts of libel and slander is the publication of a matter (usually words) conveying a defamatory imputation. A defamatory imputation is one to a man’s discredit or which tends to lower him in the estimation of others or to expose him to hatred, contempt or ridicule or injure his reputation in his office, trade or profession or to injure his financial credit. The standard opinion is that of the right thinking person’s generally. To be defamatory, an imputation need not have actual effect on a person’s reputation. The law looks into its tendency. A true imputation may still be defamatory although its truth may be a defence to an action brought on it. Conveying untruth alone does not render an imputation defamatory”

The test as to whether a statement is defamatory is an objective test. It is not dependent on the intention of the publisher but on what a reasonable person reading the statement would perceive.

In Halsbury’s Law of England 4th Edition, the author opines that;

“In deciding whether or not a statement is defamatory, the court must consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether under the circumstances in which the words were published; a reasonable man to whom the publication was made would be likely to understand them in a defamatory sense”

The elements of the tort of Defamation are well set out in the case of J. Kudwoli vs. Eureka Educational and Teaching Consultants & 2 others Hcc No. 126/1990 which are;

1. The matter of which the plaintiff complains were published by the defendant.
2. The publication concerned or referred to the plaintiff.
3. That it was defamatory in character.
4. That it was published maliciously.
5. That in slander subject to certain exceptions, the plaintiff has suffered special damages.

The same principles were repeated in the case of *Wycliffe A. Swanya vs. Toyota East Africa Limited & Francis Massai Nairobi CA No. 70/2008*, which principles are in tandem with the issues for determination as set out earlier in this judgment.

Back to the case herein, it is not in dispute that the article complained of, was published by the defendant.

On whether the same refers to the plaintiff, it was the plaintiff's contention that the words meant and were understood to refer to him due to the undernoted;

- a. The plaintiff is a High Court Judge
- b. The Plaintiff is the only judge who up to the end of 2014 was working in the Civil Division at Milimani Law Courts and was posted to be the Resident Judge at Murang'a Law Courts.

On its part, the defendant submitted that a reasonable person could not have understood the article to refer to the plaintiff and that the plaintiff's indicators that supposedly identified him are completely at variance with the meaning of the words that were actually used in the publication which he alleges gives a pointer to who the judge was. The defendant drew the attention of the court to the case of *Mwangi Kiunjuri vs. Wangethi Mwangi* in that regard.

The defendant further submitted that the plaintiff was transferred in August, 2014 and reported to his new station in November, 2014 but the Judge referred to in the publication worked at Milimani upto the end of 2014 by which time the plaintiff had already left Milimani. The defendant urged the court not find in favour of the plaintiff without evidence that he worked at Milimani upto the end of 2014. In support of this contention, the defendant cited the case of *Jakoyo Midiwo vs Nation Media Group (2018) eKLR* in which the court held:

"The burden to prove that the implied statement was of and concerning the appellant rested with the appellant. He failed to discharge the legal and evidential burden on this issue"

In determining this issue, the court has perused the letter dated 27th August, 2014 which was produced as plaintiff's exhibit 6 and the High Court Judges posting, dated 1st September, 2014 which was produced as exhibit 5.

The letter of transfer indicates that the plaintiff was transferred to Murang'a Law Courts vide the letter dated 27th August, 2014 and he was to report to the new station on November, 1st, 2014. It was his evidence that he was the only judge who was transferred from Civil Division Milimani to Murang'a High Court as a Resident Judge which court is in Murang'a County. The article also talks of a Senior Judicial Officer. The plaintiff herein told the court that he was appointed as a judge of the High Court in the year 1998 and by all means, he is a Senior Judge.

In her testimony, PW2 stated that she knew as a matter of fact that, prior to his posting in Murang'a in November, 2014, the plaintiff was in the Civil Division at Milimani and she also knew that he is a Senior Judge. She told the court that she knew of no other judge who had been transferred from Civil Division Milimani at the end of 2014 and that it was very clear to her the article referred to the plaintiff. This evidence was corroborated by that of Beatrice Wawira who gave evidence as PW3 and by PW4 who was a Legal Researcher in the judiciary at the material time. All the witnesses were in agreement that when they read the article they did not have a problem identifying who the judge referred to in the article was.

The defendant did not deny the fact that the plaintiff was working in the Civil Division Milimani until November, 2014 when he was transferred to Murang'a Court. In my view, though the article did not name the plaintiff by name, a sensible reader of the article could only have understood the words to refer to the plaintiff herein. The description given was sufficient for any reader and especially members of the legal profession and the judiciary or any other ordinary man taking interest in what was happening in the judiciary to have known that the words referred to the plaintiff herein.

On whether the article was defamatory of the plaintiff, the plaintiff in his submissions referred to Articles 28, 33(3), and 35(2) of the Constitution. He contended that the defendant did not ascertain the accuracy of the information it published about him and he relied on the ordinary and natural meaning of the words published in the article. On its part, the defendant maintained that the article was not defamatory.

As stated earlier on in this judgment, in deciding whether or not a statement is defamatory, the court must consider what meaning the words would convey to the ordinary man. In paragraph 6 of the plaint, the plaintiff has set out the natural and ordinary meaning of the words. Looking at the article, a reasonable man would get the impression that the plaintiff is a criminal and criminally inclined in his practices by engaging in illegal practices of manufacturing illicit alcoholic drinks that are a bane to the lives of young and older people in the country.

The article also portrayed the plaintiff as a person who abuses his office as a Judge of the High Court to protect his illicit alcoholic drinks

manufacturing business implying that he was afool of Chapter six of the Constitution.

The defence witness, DW1, in cross-examination admitted that the article was published at a time when there was a public outcry about illicit brew and especially in Central Kenya and there were demonstrations and condemnations about the brew. He also admitted that the subject of illicit brew was very emotive at the material time as there were deaths of young people arising from the consumption of illicit brew. The article itself mentions that the judge manufactures the dangerous “Kanna brand” and he was making the war against the illicit brew very difficult. It goes on to say that the brewery in question produces some of the most lethal brands in the region namely, Kanna and Kanyori.

DW1 also admitted that the accusation was very serious and it shows moral depravity on the part of the judge and insensitivity to human life. Though in his evidence he stated that the defendant was only reporting what Mr. Waititu said in public, the defendant did not produce any evidence by way of a clip recording or otherwise to prove that allegation. I therefore find that the article was defamatory of the plaintiff. Serious allegations were made about him and as a holder of an office of a High Court Judge, that requires such a holder to be bound by Chapter 6 of the Constitution, the article must have caused serious damage to his reputation as he stated in his evidence.

On whether the publication was false and malicious, it is trite law that, a defamatory statement is considered as false unless the contrary is proven. The plaintiff denied the contents of the article, he stated that since he was appointed a Judge of the High Court, he has never engaged himself in any other business let alone the alleged one of manufacturing of illicit brew. The defendant did not bring any evidence to prove that the allegations were true. Their only defence was that it did not refer to the plaintiff and that, the article was a fair comment on a matter of public interest. In absence of any evidence from the defendant to prove the truthfulness of the article, I find that the same was false.

On whether there was malice, it is trite law that malice can be express or can be inferred from the language of the publication or from the circumstances of the case. In the case of *Phineas Nyaga vs. Gitobu Imanyara (2013) eKLR* Odunga J. stated;

“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..... malice may also be inferred from the relations between the parties..... the failure to inquire into the facts is a fact from which inference of malice may properly be drawn”.

On the other hand, malice can be assumed if what is stated in the publication is false and defamatory. See the case of *Gideon Mose Onchwati vs. Kenya Oil Company Limited & Another (Civil suit no. 148/2008)*

In the case of *Joseph Njoroge Kamunge*, the court was also of the view that malice does not necessarily mean spite or ill will but there must be lack of justifiable cause to utter the words complained of. Evidence showing that the defendant knew the words complained of were false or did not care to verify can be evidence of malice.

In this regard, the court has perused the article complained of, and has noted that the article was done in a sensational manner and especially in its introductory part to wit;

“A High Court Judge was yesterday sensationally named a major player in the manufacture of second generation brews and being a stumbling block in the campaign to eradicate the illicit liquor.....”

It goes on to say;

“Kabete member of parliament Ferdinand Waititu stunned a congregation, which included president Kenyatta, when he said that the Judge, who runs a brewery in Thika, had become a stumbling block in the fight against the sale of illicit brews as he was using his powers to keep off security agencies....”

Pw4 in her evidence stated that she was attracted to the article by the heading and she became interested to read the same.

Though DW1 admitted that the allegations made in the publication were very serious, he did not call anyone in the judiciary to seek any clarification. Instead, he argued that the story did not originate from them. If indeed the defendant was interested in finding out who the Judge was, so that they could contact him, it was very easy for them to do so through the judiciary but to the contrary they went ahead to publish the story without bothering to know if the facts were true or not.

In the circumstances, I find that there was malice on the part of the defendant in publishing the article.

On whether the defence of fair comment is available to the defendant, it is trite law that a defamatory statement is taken to be false and it is the duty of the defendant to prove such allegations are true.

The court while dealing with the defence of fair comment in the case of *Samuel Ndung’u Mukunya vs. Nation Media Group Limited & Another (2015) eKLR* observed;

“If the words complained of contain allegations of fact the defendant must prove such allegations of fact to be true. It is not sufficient to plead that he bonafide believed them to be true. The defence of fair comment does not extend to cover misstatement of facts, however, bonafide”

In the case of *Hunt vs. Star Newspaper Company Ltd (1908) 2 K.B 309* the court had this to say regarding the defence of fair comment;

The comment must not mistake facts which are not truly stated, and, further, it must not convey imputation of an evil sort, except as far as the facts, truly stated, warrant imputation.

Similarly in the case of **Kemsley vs. Foot & others (1951) 2KB 34** the court stated;

“in my opinion, these words apply to every defence of fair comment, however pleaded, and were intended to mean what is now universally accepted that, if a comment is made of facts, the facts, however ascertained, must be true fact. To falsify or distort facts and then comment on them as though they were true facts would mean that the comment could not possibly be fair.....”

In view of the foregoing, this court is persuaded by the plaintiff’s submissions that the defence does not lie in favour of the defendant because the publication was not factually true. Though DW1 stated that the publication was made based on comments made by a politician during a public rally, no audio recording was produced to confirm that indeed the words were uttered by the politician as alleged by the defendant nor did they call that politician as a witness to shed some light on where the offending story emanated from.

Having found that the article was defamatory, it follows that the plaintiff is entitled to an award of damages. The claim herein is based on libel which is actionable per se. In addition, the plaintiff must have suffered damages to the reputation and this can be discerned from his own testimony and that of his witnesses who stated that they changed their view of him and held him in bad light.

As the court held in the case of **Nation Media Group Limited & 2 others vs. Joseph Kamotho & 3 others;**

“In actions of defamation and in any actions where damages for loss of reputation are involved, the principle of restitution in integrum has necessarily or even more highly subjective element. Such actions involve money award which may put the plaintiff in a purely financial sense in a much stronger position that he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, but, in the case of libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by the jury sufficient to convince a bystander of the baselessness of the charges.... Emphasis ours.

The basis for awarding general damages in a defamation suit was laid in the case of **Mikidadi versus Khaigan & Another (2004) eKLR** where the court stated;

“A successful plaintiff in a defamation action is entitled to recover as general compensation damages such sum as will compensate him for the wrong he has suffered. That sum must compensate him for the damages to his reputation, vindicate his good name and take account of the distress, hurt and humiliation which the defamatory publication has caused.”

In awarding damages, the court has absolute and wide discretion in assessing the quantum of damages. The court in the case of **Jones vs. Pollard** sets out a checklist of compensatable factors in libel actions 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’s feeling not only the prominence itself but from the defendants 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.

Being guided by that checklist, I have considered that the plaintiff is a Senior High Court Judge being the second in seniority in the High Court by date of appointment, the medium of circulation of the newspaper in which the article was circulated and more particularly that it is given for free and thus reaching a wider circulation and the damage the article caused to the plaintiff. The court has also perused the authorities relied on by the plaintiff being that of **Alnashir Visram vs. Standard Group Limited (2016) eKLR** where Kshs. 18 million was awarded, that of **Samuel Ndung’u Mukunya vs. Nation Media Group Limited & Another (2015) eKLR** and that of **Henry Onyancha Obwocha vs. Head Link Publishers Limited (204) eKLR** where a sum of Kshs. 15 million and 18 million respectively, was awarded in both cases as general damages respectively.

On its part the defendant has urged the court to award Kshs. 4,000,000/= and has relied on the case of **Jakoyo Midiwo vs. Nation Media Group** where Kshs. 2,500,000/= was awarded and that of **Ahmednassir Maalim Abdullahi vs. Star Publications Limited (2019) eKLR** where kshs. 3,500,000/= was awarded.

I find that the authorities cited by the plaintiff are abut on the higher side while those relied on by the defendant are on the lower side. In my view, an award of kshs. 8,000,000/= is reasonable taking into account all the circumstances of this case and the principles in **Jones vs Pollard** (supra).

On aggravated and punitive damages, the plaintiff has urged the court to award Kshs. 15,000,000/= and has relied on the case of **Alnashir Visram**(supra).

On its part, the defendant has submitted that the plaintiff did not prove that he is entitled to the same. In the alternative and without prejudice the court has been urged to award Kshs. 500,000/=. In justifying the award of both aggravated and punitive damages, the plaintiff submitted that the defendant acted with outright malice and that the defendant used a banner headline on page one and six to draw maximum attention to the story and to boost defendant's advertisement revenues. Further, it was submitted that the defendant has refused to retract the offensive publication notwithstanding its knowledge of correct facts.

The court has considered the aspect of aggravated and punitive damages.

In the case of *Dr. Juma Mikidadi vs. Alikhalfan & another, (Hcc No. 3368/1994)* at Nairobi, the court set out the factors that tend to increase or aggravate damages as outlined in *Halsbury's laws of England 4th Edition* as follows;

- i. Manner of publication and extent of circulation
- ii. Defendant's actual malice
- iii. Defendant's subsequent conduct
- iv. Failure to apologize
- v. Justification.
- vi. Conduct of the defence case.

The court finds that the plaintiff herein is entitled to an award on aggravated and punitive damages in the sum of Kshs. 2 million under both heads that is to say Kshs. 1 million under each head.

The court also grants an order for unqualified apology to be published in the defendant's People Daily Newspaper or some other newspaper of similar distribution and circulation. The apology to be similar headlined and bannered as the story complained of.

The plaintiff is also awarded the costs of this suit. General, aggravated and punitive damages to earn interest from the date of this judgment until payment in full.

Dated, Signed and Delivered at Nairobi this 7TH day of MAY 2020.

.....

L. NJUGUNA

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Respondent