



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 611 OF 2010

HON. KENNETH MARENDE.....PLAINTIFF

VERSUS

PEOPLE MEDIA GROUP LIMITED.....1ST DEFENDANT

CHRIS OYUGA.....2ND DEFENDANT

MAINA MUIRURI.....3RD DEFENDANT

JUDGMENT

1. *Hon. Kenneth Marende*, the plaintiff herein, instituted suit against three defendants, namely, *People Media Group Limited*, *Chris Oyuga* and *Maina Muiruri* seeking the following reliefs:

a. *Damages for libel.*

b. *Aggravated damages for libel.*

c. *Interest on (a) and (b) above.*

d. *An injunction restraining the defendants whether by themselves, their servants or agents from further publishing or causing to be published the words complained of or similar words which were defamatory of the plaintiff.*

e. *Costs of this suit.*

2. In his plaint dated 10th December 2010, the plaintiff, then a Member of Parliament and Speaker of the National Assembly of Kenya contended that by an article published in the 1st defendant's Saturday edition of 23rd October 2010 titled "*Marende faulted for poor leadership style*" the defendants wrote, edited and published words which were defamatory of the plaintiff.

3. The plaintiff complained that the article purported to be a report of proceedings of an in house meeting held on 19th October, 2010 between the Parliamentary Service Commission (PSC) and Parliament's Liaison Committee. The meeting had been convened by the plaintiff in his capacity as the chairman of the Parliamentary Service Commission. The lengthy article was reproduced in paragraph 5 of the plaint. It contained, *inter alia*, the following words:

"A HOUSEKEEPING meeting convened by National Assembly Speaker Kenneth Marende on Tuesday turned stormy when chairmen of various departmental committees took him head-on over his management style.

The meeting comprising members of Parliamentary Service Commission almost turned boisterous when the chairmen expressed concern over Marende's alleged hands off management style.

Just falling short of declaring a no confidence vote in Marende, the Chairperson of the more than 28 departments are also said to have been incensed by alleged biased budgetary allocation to them and lack of sound financial accountability.....MPs Ekwe Ethuro, (Energy, Communications and Information), Thomas Mwadeghu (Local Authorities and Funds Accounts) and Mohamed Affey (Equal Opportunities) are reported to have spearheaded the onslaught on the speaker, accusing him of allegedly failing in his administrative oversight duties and instead concentrating on "populism publicity through the media".

Other grievances raised by the MPs included alleged nepotism and favouritism on staff hiring and promotions, disquiet among staffers and misuse of financial resources on non-essentials. The meeting had been convened to address apparent operational issues but degenerated into a dressing down on Marende. Keynan who has already raised a heavy political storm with his report on the controversial purchase of a land on which Kenya's embassy in Tokyo, Japan was built, set the ball rolling when he told Marende to 'personally take charge of administrative issues in parliament'. He is reported to have described administrative matters in parliament as a "time bomb" only waiting to explode.

Of more concern to Keynan was the administration's failure to appoint a substantive director of finance and administration almost three years since the death of Irene Muraguri. The senior most officer Paul Onyango, a principal finance officer, has not been confirmed despite having held the position in acting capacity for more than three years....".

4. The plaintiff pleaded that in their natural and ordinary meaning, the words meant and were understood to mean that he was unfit, incompetent and undeserving to occupy the position of Chairman of the Parliamentary Service Commission and Speaker of the National Assembly or any other leadership position.

5. It was the plaintiff's further contention that by way of innuendo, the words meant and were understood to mean, *inter alia*, that he was not transparent or accountable in the way he undertook his duties; that he was irresponsible; that he lacked both leadership and management skills; that he lacked integrity; that he practiced cronyism and favouritism in hiring and promoting personnel and that he manipulated public opinion through the media.

6. The plaintiff further averred that the article contained falsehoods meant to malign and disparage his character and standing in society; that as a result of the publication, he had suffered distress, anxiety, embarrassment and his reputation had been seriously injured.

7. The plaintiff also pleaded that the defendants have failed to acknowledge liability or offer amends on terms acceptable to him despite having been served with a demand to do so.

8. Upon being served with summons, the three defendants entered appearance and filed a joint statement of defence dated 19th January 2011. In their defence, the defendants admitted publication of the offending article but denied that it contained words that were defamatory of the plaintiff as alleged or at all and put the plaintiff to strict proof thereof.

9. The defendants maintained that the publication was privileged as it was a fair and accurate report of proceedings of a committee or body constituted and exercising functions under written law and that in any event, the article amounted to a fair comment on a matter of public interest.

10. The defendants also denied that the publication adversely affected the plaintiff's reputation or caused him distress or embarrassment and put him to strict proof thereof.

11. At the hearing, the plaintiff called three witnesses while the defendants called two witnesses in support of their respective cases.

12. In his evidence, the plaintiff who testified as PW 1 adopted his written statement dated 4th August 2016 as his evidence in chief. In the statement, he stated that the meeting in question had been convened to discuss the liaison committee's expenditure and related activities and that during the meeting, there was no confrontation between him and any other person present in the meeting; that issues of his leadership or management skills or hiring of staff were not discussed in the meeting in which journalists were not invited. He produced the documents in his list of documents dated 21st April 2016 which included minutes of the meeting and the offending article as exhibits 1, 2, 3 and 4.

13. Under cross examination, the plaintiff asserted that the minutes (exhibit 2) represented the truth of what transpired during the meeting. He explained that the minutes were unsigned because they were taken in an ad hoc (one off) meeting and no subsequent meeting was held in which they could have been confirmed and signed. He maintained that the publication caused him distress and adversely affected his reputation as he had to keep on reassuring people who called him after reading the article that the same was false.

14. The plaintiff further testified that following the publication and conclusion of his term as speaker, he was not appointed to serve in any public position until December 2014.

15. In re-examination, the plaintiff asserted that the allegations made against him in the publication would be equivalent to criminal offences like abuse of office, fraud or theft; that during his tenure as speaker, he was never accused of favouritism or nepotism and that the article destroyed his image.

16. In addition, the plaintiff testified that though as a speaker he kept his door open to all media houses, the defendants did not contact him to verify the content of the article before publishing it and that after the publication, they did not offer him any apology though they were given opportunity to do so.

17. PW 2, *Benard Lugado* who worked as a security officer attached to the plaintiff testified that on reading the article, he noted that it portrayed the plaintiff in bad light and brought it to his attention. He confirmed that he did not attend the meeting but only escorted the plaintiff to the meeting venue; that he had served the plaintiff since year 2009 and he had not heard any complaints regarding his leadership or management skills.

18. *David Ekwe Ethuro*, the Speaker Emeritus of the Senate testified as PW 3. He stated that at the time of the publication, he was a Member of Parliament and a member of the Liaison Committee. He confirmed having attended a meeting between the Parliamentary Service Commission and the Liaison Committee on 19th October 2010. He testified that the article published by the defendants was false since the

meeting was not stormy as alleged and no onslaught was made against the plaintiff by either himself or any other person.

19. PW 3 in addition stated that there were no accusations of nepotism, favouritism, mismanagement or misuse of financial resources made against the plaintiff in the meeting and that the minutes (exhibit 2) represented a true account of what was discussed in the meeting. He corroborated PW 1's testimony that the article was a fabrication meant to portray the plaintiff in negative light and to demean his image and standing as Speaker of the National Assembly in the eyes of the public. He testified that he knew and respected the plaintiff as a fair and honourable leader.

20. Turning to the defence case, the 2nd defendant who testified as DW 1 confirmed that he was a journalist working with the 1st defendant. He adopted his witness statement and admitted that he was the author of the article complained of by the plaintiff. He claimed that he received the information published in the article from two sources who were Members of Parliament who had attended the meeting and that he had published it in the public interest.

21. During cross examination, he confirmed that he did not seek to obtain a formal record of the proceedings of the meeting nor did he write to the plaintiff to seek verification of the information received from his sources before publishing it. And though admitting that the article accused the plaintiff of nepotism, favouritism and misuse of financial resources, he maintained that it was not defamatory of the plaintiff allegedly because it was a truthful account of the meeting's proceedings.

22. DW 1 also claimed that prior to publishing the article, he had tried to reach the office of the plaintiff through phone with the aim of seeking clarification on the story but he was not successful. He however conceded that he did not have any evidence to substantiate that claim. He admitted having received the plaintiff's demand letter and not taking any action on it.

23. The 3rd defendant, *Maina Muiruri*, testified as DW 2. He confirmed that at the time of the publication, he was working with the 1st defendant as a Managing Editor. He testified that he authorized the publication of the story after the reporter (DW 1) disclosed his sources and he was satisfied that they were credible. He asserted that the publication was made in the public interest since the plaintiff then held a high public office. He agreed with the view expressed by DW 1 that the minutes produced by the plaintiff were incomplete because according to their sources, they did not capture everything that transpired in the meeting. He maintained that the article was factual and accurate.

24. In his evidence under cross examination, DW 2 admitted that as the 1st defendant's editor, his job description entailed ensuring the accuracy of his employer's publications; that he did not conduct any independent investigation and he did not contact the plaintiff to verify the truth or otherwise of the information in the article before he authorized its publication. In his view, verification would have delayed publication and the story needed to be published immediately otherwise it would have stopped being news; that news was a perishable commodity.

25. DW 3 similarly admitted having received a demand letter and having been shown by his lawyers a request for particulars from the plaintiff which he allegedly responded to through his witness statement. He also stated in cross examination that before publishing the story, he sought to establish its veracity from their sources whose response was that "*there is nothing permanent in politics*". He claimed that in publishing the story, he never intended to damage the plaintiff's reputation.

26. After both parties closed their respective cases, they each filed written submissions buttressing their different positions. Those of the plaintiff were filed on 18th June 2019 while those of the defendants were filed on 31st July 2019. The submissions were highlighted before me on 18th December 2019 by learned counsel *Mr. Mbaluto* for the plaintiff and learned counsel *Mr. Omulama* for the defendants.

27. I have carefully considered the pleadings, the evidence adduced by the parties in its entirety, the written and oral submissions made on behalf of the parties and all the authorities cited.

Having done so, I find that it is not disputed that the offending article was published by the defendants on 23rd October 2010 in reference to the plaintiff. What is disputed is whether the words contained therein were defamatory of the plaintiff.

28. Arising from the above, I find that only four issues emerge for my determination in this case. These are:

- i. Whether the words contained in the article were defamatory of the plaintiff?
- ii. Whether the defence of qualified privilege and fair comment on a matter of public interest are available to the defendants?
- iii. Whether the plaintiff is entitled to the reliefs sought?
- iv. What order should be made on costs?

29. Turning to the first issue, defamation is defined in *Blacks Law Dictionary 8th Edition* at page 448 as:

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

30. A defamatory statement is defined in *Halsbury's Laws of England 4th Edition Vol 28 paragraph 10* as:

“... a statement which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or to convey an imputation on him disparaging or injurious to him in his office, profession calling, trade or business.”

31. The Court of Appeal in SMW V ZWM, [2015] eKLR and in Musikari Kombo V Royal Media Services Limited, [2018] eKLR defined a defamatory statement in the following terms:

“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.”

32. From the foregoing, it is clear that the test for determining whether or not a statement is defamatory is an objective one. The test is based on what an ordinary reasonable man would understand the statement to mean and not the intention of the publisher.

33. In Wycliffe A. Swanya V Toyota East Africa & Another, [2009] eKLR the Court of Appeal laid down elements of the tort of defamation which a plaintiff must prove before succeeding in his claim. The plaintiff has to prove the following:

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

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

iii. That it was published maliciously.

34. In his submissions, the plaintiff relying on the cases of Simeon Nyachae V Lazarus Ratemo Musa & Another [2007] eKLR and Hezekiel Oira V Standard Limited & Another, [2016] eKLR contended that the article published by the defendants was defamatory in the sense that it was false and malicious and it disparaged his reputation and standing in society given that it portrayed him as irresponsible, corrupt, incompetent and a poor leader who was unfit or undeserving to occupy the position of Chairman of the Parliamentary Service Commission and Speaker of the National Assembly or any other leadership position.

35. On the issue of malice, the plaintiff submitted that the defendants published the article recklessly and maliciously firstly because they did not bother to verify from the record of the proceedings of the meeting or from the plaintiff whether the story was true before publishing it and secondly, even after being notified that the article was false, they showed no remorse and rejected an opportunity to make amends or issue an apology.

36. To support these submissions, the plaintiff relied on the authorities of Hezekiel Oira V Standard Limited & Another, [supra] and Grace Wangui Ngenye V Wilfred D. Kiboro & Another, [2009] eKLR for the proposition that failure to verify the truthfulness of the words complained of before publication and failure to offer an apology where the same was demanded is evidence of malice.

37. On their part, the defendants denied that the publication was defamatory of the plaintiff and maintained that the words were privileged under *paragraph 7 of part 11* of the *Schedule* to the *Defamation Act* as in their view, they were a fair and accurate report of proceedings of a meeting or sitting in Kenya of a committee or body constituted by and exercising functions under a written law.

38. It was the defendants' contention that the plaintiff had failed to prove that the article was false since the minutes produced as evidence of what transpired during the meeting were not signed. Relying on several authorities which included the case of Republic V Cabinet Secretary, Ministry of Transport and Infrastructure & 4 Others ex parte Ali Golle & Another, [2018] eKLR, the defendants submitted that unsigned minutes lacked credibility as it was impossible for the court to establish their authenticity.

39. It was the defendants' further submission that as members of the media, they had a moral and social duty to publish matters which were of public interest.

40. On malice, the defendants urged this court to find that they were not driven by malice and invited the court to be guided by the authority of Martin Tindi Khaemba V Standard Newspapers, [2008] eKLR where the court noted that:

“Malice can be inferred where the defendant in publishing the information knows the statement to be false or did not care whether it be true or false and regard is to be had to the defendants conduct and the information available to him.”

41. On my part, I find that a reading of the publication holistically shows that the plaintiff who had convened the subject meeting in his capacity as Chairman of the Parliamentary Service Commission was given a dressing down by members of the Liaison Committee who were supposed to be his subjects in Parliament; that the members were incensed by his lack of leadership and management skills; lack of financial accountability and transparency; incompetence in the discharge of his administrative duties; favouritism and nepotism in hiring and promotion of staff that they fell very short of declaring a vote of no confidence in his leadership.

42. The evidence of PW 1, PW 2 and PW 3 which was not shaken by the defence during cross examination and was not controverted by any other evidence to the contrary proved on a balance of probabilities that the publication was actually false. PW 3 who attended the meeting corroborated PW 1's evidence that the meeting proceeded smoothly and was not stormy as reported and that the issue of the plaintiff's leadership and management style, alleged incompetence and lack of integrity did not arise in the meeting.

43. I have perused the minutes of the meeting produced in evidence by PW 2 and note that indeed they are neither dated nor signed. While agreeing with the defendants' submissions that the authenticity of minutes or documents which are undated and unsigned is questionable and that such documents cannot by themselves be relied upon by a court to make a finding of fact, I find that in this case, PW 1 and PW 3 who attended the meeting confirmed in their evidence that the minutes were actually a true representation of what transpired during the meeting only that no subsequent meeting was held in which they could have been confirmed and signed.

44. It is noteworthy that it is not disputed that the plaintiff chaired the meeting and he is therefore the same person who would have signed the minutes had there been a subsequent meeting. Even if the court were to find that the minutes had no probative value as they were undated and unsigned as submitted by the defendants, that finding would not adversely affect the plaintiff's case given that the minutes were just a piece of the evidence relied upon by the plaintiff in support of his case.

45. The plaintiff also relied on his oral testimony and that of PW2 and PW3. PW 1 and PW 3 were consistent in their assertions that what was reported in the publication was entirely false. As noted earlier, their evidence was not controverted by any evidence to the contrary as the defendants alleged sources did not testify in support of the defence case. In the premises, I find that the plaintiff has proved to the required standard that the content of the publication was false.

46. Turning now to the issue of malice, I wish to start by pointing out that malice can be established in various ways. It can be discerned from the publication if the language used is beyond or disproportionate to the facts or it can be inferred from the relations between the parties before or after publication or in the conduct of the defendant in the proceedings.

47. Malice can also be inferred from a deliberate or reckless failure to enquire or verify the truth of facts before their publication. See: *Phineas Nyagah V Gitobu Imanyara [2013] eKLR; Stanbic Limited V Consumers Federation of Kenya, [2014] eKLR; Machira V Mwangi & Another, [2001] eKLR.*

48. In this case, the defendants admitted through the evidence of

DW 1 and DW 2 that they did not obtain any clarification from the plaintiff regarding the truth or otherwise of the information received from their sources prior to its publication. They alleged that verification would have caused delay that would have made the story stale or unnewsworthy. DW 2 admitted that on contacting their sources with a view to verifying the story, they told him that nothing in politics was permanent but he still proceeded to publish the story notwithstanding the fact that even his sources had declined to verify its authenticity. This leaves no doubt in my mind that the defendants recklessly published the article without caring whether it was true or false which by itself is evidence of malice.

49. It is also important to note that after being served with a demand letter, the defendants did not offer any apology nor did they retract the publication as directed in the letter. This was further evidence of malice as held in *Grace Wangui Ngenye V Wilfred D. Kiboro & Another, [supra].*

Given the foregoing, I have no hesitation in finding that the publication of the article was both reckless and malicious.

50. In my view, any reasonable right thinking member of the public who knew the plaintiff and who read the article was bound to have a negative view of the plaintiff given the way he was portrayed in the article. It portrayed him as a person who lacked integrity, a leader who was incompetent and who practiced the art of hiding his incompetence through media manipulation; a leader who could not be trusted with proper management of public funds; a leader who did not believe in merit in the recruitment and promotion of staff and who had completely failed in his oversight administrative duties as Speaker of the National Assembly.

51. Having found as I have above, I am satisfied that the content of the article lowered the plaintiff in the estimation of right thinking members of society and seriously injured his reputation and standing as a national leader in the eyes of the public. As I have already found that the publication was false and malicious, I am convinced that the publication was defamatory of the plaintiff and I so find.

52. The defendants pleaded the defence of qualified privilege and fair comment on a matter of public interest. Though I agree with the defendants that proceedings of a meeting touching on the leadership and management of Parliament and the Parliamentary Service Commission is a matter of public interest, for the above defences to apply, the defendants had to prove that the publication was a fair and accurate report of the meeting or a fair comment made on the basis of facts which were true or substantially true and that the publication was not actuated by malice. This is the import of *Section 7 (1)* and *Section 15* of the *Defamation Act* as well as *Section 7* of Part 11 of the schedule to the *Defamation Act*.

53. *Section 7 (2)* of the *Defamation Act* expressly provides that the defence of qualified privilege will not apply where a defendant has been requested to publish a retraction of the offending publication and has failed to do so.

54. As demonstrated earlier, the publication in this case was a false reporting of the proceedings of the meeting of 19th October 2010 and cannot therefore be said to have been fair or accurate. I have also made a finding in paragraph 49 above that the article was published maliciously. The defendants also admitted in their evidence that they did not retract the publication even after receiving a demand letter in which the plaintiff directed them to do so.

55. The defendants claimed that they had a moral and social duty to publish information which was of public interest. This is indeed true but this duty is limited to truthful, accurate and fair reporting. In exercising their freedom of expression and the right to disseminate information to the public under *Article 34 (1)* of the *Constitution*, the defendants had an obligation to respect the rights and reputation of all persons including the plaintiff. In the circumstances, I am satisfied that the defendants have failed to prove that the defences of qualified privilege and fair comment on a matter of public interest were available to them in this case.

56. The above finding now brings me to a consideration of whether the plaintiff is entitled to the reliefs sought. Having found that the publication was defamatory of the plaintiff, I find that the plaintiff is entitled to an award of damages. The award of general damages for libel is at large but in considering such awards, the court is guided by several principles which have been enunciated in various authorities. In Johnson Evan Gicheru V Andrew Morton & Another, [2005] eKLR, the Court of Appeal adopted the principles set out in Jones V Pollard, [1997] EMLR 233; 243, which listed those principles as follows:

i. The objective features of the libel itself such as its gravity, its province, the circulation of the medium in which it is published, any repetition;

ii. The subjective effect on the plaintiff's feelings not only from the prominence itself but from the defendant's conduct thereafter both upto and including the trial itself;

iii. Matters tending to mitigate damages, such as the publication of an apology;

iv. Matters tending to reduce damages; and

v. Vindication of the plaintiff's reputation past and future.

57. Applying the above principles to this case, it is common knowledge that the publication was made as a banner headline in a newspaper that has national circulation. The plaintiff at the time was not only a Member of Parliament but also held the position of Speaker of the National Assembly. He was no doubt a respected national leader. The plaintiff testified that his reputation and image was tarnished by the publication and it caused him distress, anxiety and embarrassment.

58. In addition to the two authorities cited by the plaintiff, namely Hon. Uhuru Muigai Kenyatta V Baraza Limited, [2011] eKLR in which the plaintiff was awarded a global sum of KShs.7,000,000 and the case of Christopher Ndarathi Murungaru V John Githongo, [2019] eKLR where the plaintiff, a former Member of Parliament and Cabinet Minister was awarded KShs.20,000,000 in general damages, I have considered other cases in which the plaintiffs were prominent public figures. In Arthur Papa Odera V Peter O. Ekesa, [2016] eKLR, Hon. Justice Mbogholi awarded the plaintiff who was a Member of Parliament a composite sum of KShs.5,000,000. In Kimani Ngunjiri V Standard Group Limited & 3 Others, [2019] eKLR, the plaintiff also a Member of Parliament was awarded general damages in the sum of KShs.4,000,000.

59. In this case, considering that the plaintiff was not only a Member of Parliament but was also the Speaker of the National Assembly of Kenya and Chairman of the Parliamentary Service Commission, I find a sum of KShs.7,000,000 in general damages reasonable and appropriate and the same is hereby awarded to the plaintiff.

60. The plaintiff also prayed for aggravated damages and orders of injunction to restrain the defendants from further publishing or causing to be published material that was defamatory of him. In Ken Odondi & 2 Others V James Okoth Omburah T/A Okoth Omburah & Company Advocates, [2013] eKLR, the Court of Appeal in differentiating between exemplary and aggravated damages cited with approval the decision of the English Court of Appeal in John V MGN Limited, [1996] 1 All 36 and expressed itself as follows :

“Exemplary damages on the other hand had gone beyond compensation and are meant to ‘punish’ the defendant. Aggravated damages will be ordered against a defendant who acts out of improper motive eg. where it is attracted by malice, insistence on a flurry defence of justification or failure to apologise.”

61. In this case, the defendants recklessly published the offending article and refused to retract it or apologise after being served with the plaintiff's demand letter. It is therefore my finding that the plaintiff is entitled to aggravated damages. I find a sum of KShs.1,000,000 reasonable under this head and the plaintiff is awarded the said amount.

62. On the prayer for injunctive relief, none of the parties addressed it in their respective submissions. Considering the time that has passed since the date of the publication and the fact that there is no evidence that the defendants have subsequently persisted in publishing defamatory material in reference to the plaintiff, I find that granting such a prayer would not serve any useful purpose. The prayer is accordingly rejected.

63. The upshot of this judgment is that judgment is entered in favour of the plaintiff against the defendants jointly and severally as follows:

General damages - KShs.7,000,000

Aggravated damages - KShs.1,000,000

Total - Kshs.8,000,000

The damages will attract interest at court rates from today's date until payment in full.

64. As costs follow the event, the plaintiff is awarded costs of the suit.

It is so ordered.

DATED, SIGNED and DELIVERED at **NAIROBI** this 30th day of April 2020 through electronic mail with the written consent of the

parties in compliance with the practice directions issued by the Honourable Chief Justice aimed at mitigating the spread of the COVID-19 pandemic.

C. W. GITHUA

JUDGE