



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 46 OF 2017**

**PR. PAUL OWUOR.....PLAINTIFF**

**-VERSUS-**

**THE STAR PUBLICATION LIMITED.....DEFENDANT**

**JUDGMENT**

1. Pastor Paul Owuor, the plaintiff herein, filed a suit by way of the plaint dated 1<sup>st</sup> March, 2017 and amended on 27<sup>th</sup> April, 2017 in which he sought for judgment against the defendant in the following manner:

*a. General and aggravated damages.*

*b. An order directing the defendant to remove from online sources, within such time as the court shall direct, the entire offensive story and all references to the offensive story.*

*c. Costs of the suit.*

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

*e. Any other and further reliefs that the court may deem fit to grant.*

2. The plaintiff pleaded in his plaint that on or about the 29<sup>th</sup> day of October, 2016 and the 30<sup>th</sup> day of October, 2016 the defendant through its weekend edition of the Star Newspaper published the following words concerning the plaintiff under the title-

**“Beautiful and Young. Protect me from Randy Pastor-Nairobi Congregant Urges Church:**

**“A female congregant has appealed to her church headquarters for protection after her home church allegedly failed to act on her complaint of alleged sexual harassment by a Pastor.**

**PO filed an affidavit accusing Pastor Paul Owuor of the [particulars withheld], Nairobi East, of sexually harassing her. The complainant who also works as a teacher at a school sponsored by the church at which the pastor is also based, said efforts to get support from church elders have been unsuccessful.**

**But when contacted, Pastor Owuor denied the allegations saying “the woman is out to taint my image” He also denied allegations that she reported the matter to the church’s management. O alleged Owuor summoned her to his office at around 8.30 a.m on September 30. “He told me I am beautiful, young and good looking and he would be happy to go out with me,” she said.**

**O said Owuor said she would get allowances, a salary increment and a permanent employment if she gave in”**

3. The plaintiff pleaded that the aforementioned words published are defamatory to the plaintiff and are accessible to the general public both locally and globally through the online platform.

4. It was also pleaded by the plaintiff in his amended plaint that as a result of the defamatory publication, his reputation and character have been subjected to ridicule and contempt by right thinking members of the society.

5. The defendant entered appearance and put in a statement of defence to deny the plaintiff's claim.
6. The defendant pleaded that while the publication is admitted, the same was true in substance and fact by setting out the particulars thereof in its defence.
7. It was further pleaded by the defendant that the abovementioned publication was made under the honest belief that the allegations raised by Ms. Ondara ("*the complainant*") in her affidavit were truthful.
8. The defendant also denied the particulars of innuendo pleaded in the plaint.
9. When the suit came up for hearing, the plaintiff testified and called four (4) other witnesses to give evidence in support of his case. The defendant relied on the testimony of one (1) witness.
10. During his testimony, the plaintiff adopted his witness statement and his complete list and bundle of documents filed. The plaintiff testified that following the publication, both his ministry and family life suffered negatively.
11. It was the evidence of the plaintiff that he received a phone call from an employee of the defendant to inform him of the sexual harassment complaint and that he told such employee to advise the complainant to follow the proper channels.
12. The plaintiff further gave evidence that the church board held an emergency board meeting to discuss the complaint and the church arrived at the conclusion that the complaint was unfounded.
13. In cross-examination, the plaintiff stated that the complainant swore an affidavit in respect to the allegations of sexual assault, the contents of which were published by the defendant on the dates pleaded in the plaint.
14. On being re-examined, the plaintiff stated that when he received the call from the defendant's employee, he was not informed that the complainant had sworn an affidavit in that regard.
15. The plaintiff further testified that the complainant was summoned by the church board and gave evidence, and insisted that the allegations were false.
16. Christopher Wadoyi who was PW2 gave evidence that he is an elder at [*particulars withheld*] Nairobi East and he confirmed that the church board held an emergency meeting to deliberate on the allegations made against the plaintiff, resultantly dismissing the said allegations.
17. This witness stated that the publication negatively affected the plaintiff as he constantly received calls from the congregation.
18. During cross-examination, PW2 indicated that the plaintiff did not chair the church board owing to the sexual harassment allegations and further indicated that the complainant made a similar complaint to the church.
19. The witness added that allegations of such nature are a matter of public interest though he stated that the plaintiff, being well known to him, could not have done such a thing.
20. In re-examination, it was the evidence of PW2 that he did not believe the truth of the allegations made against the plaintiff.
21. Evans Chacha, a fellow elder and member of the church board at the same church as PW2, testified as PW3 echoed the statements of the earlier witnesses concerning the complaint against the plaintiff and its impact on the plaintiff and the church at large.
22. During cross-examination, the witness gave evidence that the complainant was an employee of the church and a Headmistress of the church school.
23. He stated that the plaintiff was still serving in his capacity as a pastor in [*particulars withheld*] Church and added that the complaint/publication was a matter of public interest.
24. PW4 introduced himself as EJO and stated that he is an accountant by profession and the husband to the complainant.
25. The witness stated that he learnt of his wife's affair with one Mr. Mosoti who is an elder at the church and reported the issue to the plaintiff.
26. According to the witness, he and his wife testified before the church board in respect to the complaint and stated that the complaint was

eventually dismissed.

27. During cross-examination, it was the evidence of PW4 that the publication by the defendant constituted the contents of the allegations made by the complainant.

28. EO in her evidence as PW5 disclosed that she is a daughter to the plaintiff and like the witnesses who came before her, adopted her signed witness statement.

29. It was her testimony that upon reading the publication both in print and through electronic media, she was embarrassed and annoyed, and added that the publication affected the entire family.

30. In the course of cross-examination, PW5 testified that the plaintiff continued to minister in the same church even after the publication.

31. For the defence, Alphonse Mung'ahu gave evidence as DW1 and stated that he was the author of the publication in question.

32. In cross-examination, he stated that the term 'Randy' used in the title of the publication refers to someone who is immoral or unfaithful.

33. The witness stated that he contacted the plaintiff on receiving a copy of the affidavit from the complainant and that the publication was based on the contents of the affidavit.

34. DW1 testified that the person who gave him the story did not disown it and further testified that the story was true since it was a report of the information received.

35. At the close of the hearing, this court called upon the parties to file and exchange written submissions. The plaintiff submitted that the publication was not only false but malicious in every sense of the word and cited the case of **Richard Otieno Kwach v Standard Limited & Another [2007] eKLR** in which the court held as follows:

***“Gatley on Libel and Slander (supra) states that “words are defamatory if they involve a reflection upon the personal character or official .....reputation of the Plaintiff.” ”***

36. The plaintiff went on to submit that the publication was malicious in the sense that the defendant did not seek to verify the truthfulness of the information presented to it before relying on its contents in making the publication.

37. It was also the contention of the plaintiff that his reputation and standing in society as a pastor was brought to disrepute following the publication, in addition to the reputation of his family members and the church as a whole.

38. The plaintiff further argued that the defendant cannot rely on the defence of privilege since the affidavit had never been heard before any court neither was the publication a fair and accurate report of the contents of the affidavit. The plaintiff borrowed from the following analysis in the case of **George Oraro v Wangethi Mwangi & Another Nairobi Civil Case No 1205 of 1993**:

***“At any rate there is no right for a newspaper to report to the public the contents of pleadings filed in court but which have not become the subject matter of open court proceedings. There cannot be any privilege extended to such reports.”***

39. On damages, the plaintiff sought for general damages in the sum of Kshs.11,000,000/ and aggravated damages in the sum of Kshs.4,000,000/ and relied on the judicial authority of **Abdi Mohamed Farah v Nairobi Star Publication Ltd & another [2015] eKLR** in which the court awarded the respective sums of Kshs.3,000,000/ and Kshs.1,000,000/ on general and aggravated damages.

40. In reply, the defendant submitted that the plaintiff did not prove the ingredients for defamation laid out in the case of **Phinehas Nyagah v Gitobu Imanyara [2013] eKLR** as follows:

***“The elements of the tort of defamation are that the words must be defamatory in that they must tend to lower the plaintiff's reputation in the estimation of right-minded persons, or must tend to cause him to be shunned or avoided...Secondly, the words must refer to the plaintiff...Thirdly, the words must be malicious.”***

41. The defendant argued that the impugned publication is true in substance and in fact, and that the plaintiff's side of the story was taken into consideration prior to releasing the publication out to the public. The defendant drew this court's attention to the judicial authority of **Fraser v Evans & Another [1969] 1ALL ER 8** where the court stated that:

***“...there are some things which are of such public concern that newspapers, the press and indeed everyone is entitled to make known the truth and make fair comment on it...”***

42. In further relying on the defence of fair comment on a matter of public interest, it was the contention of the defendant that the publication contained allegations of immorality in the church which makes it a matter of public interest hence the defence can stand in this instance.

43. The defendant urged this court to fairly balance the public and private interests.

44. On quantum, it was the submission of the defendant that the plaintiff is not entitled to an award of general damages in the absence of proof of any damage to his reputation.

45. The defendant further argued that in the absence of any additional injury, there is no basis on which this court should grant an award under the head of aggravated damages.

46. 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 publication in question is defamatory against the plaintiff;*

*ii. Whether the defences of truth/justification and/or fair comment on a matter of public interest are available to the plaintiff; and*

*iii. Whether the plaintiff is entitled to the reliefs being sought.*

47. In addition to the authorities cited by the parties, I also considered the ingredients of a defamatory claim laid out in the recent case of **Daniel Muthee Ngeera v Nation Media Group Limited & another [2019] eKLR** with reference to **J Kudwoli & another v Eureka Educational and Training Consultants & 2 others [1993] eKLR** in the following order:

*a. Whether the matter complained of was published by the defendant.*

*b. Whether the publication in question referred to the plaintiff.*

*c. Whether the publication is defamatory in nature.*

*d. Whether the publication is malicious.*

48. Going by the pleading and evidence tendered in court, I note that the first and second ingredients are uncontroverted.

49. This brings me to the question to do with whether the publication was defamatory. The plaintiff pleaded in his amended plead that the wording of the publication complained of would by imputation and innuendo be understood to mean that the plaintiff is *inter alia*, a person who lacks respect for women and morally unfit to lead in the capacity of a pastor.

50. From the evidence of the plaintiff and his witnesses, it is apparent that while numerous calls were made following the publication, the plaintiff did not demonstrate any specific ways in which his reputation was brought to disrepute.

51. If anything, the plaintiff's witnesses were convinced that the allegations were false and according to their evidence, the plaintiff continued to serve in his capacity as a pastor.

52. In the premises, I find that the plaintiff did not prove to the required standard, the manner in which his reputation was lowered in the eyes of right thinking members of society.

53. On the ingredient of malice, The court in the case of **Phinehas Nyagah v Gitobu Imanyara [2013] eKLR** which the defendant cited sought to define the term 'malice' in the context of defamation in the manner hereunder:

***“Malice here does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice. 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 but the law does not weigh in a hair balance and it does not follow merely because the words are excessive, there is therefore malice. Malice may also be inferred from the relations between the parties before or after publication or in the conduct of the defendant in the course of the proceedings. Malice can be founded in the publication itself if the language used is utterly beyond the facts. The failure to inquire into the facts is a fact from which inference of malice may properly be drawn.”***

54. The plaintiff in his oral evidence stated that an employee of the defendant contacted him to bring to his attention the existence of the affidavit sworn by the complainant, a fact which the plaintiff was admittedly previously unaware.

55. The plaintiff's witnesses were also in agreement that sexual harassment allegations had been made by the complainant and against the plaintiff, which allegations the church board heard to conclusion.

56. The above position was confirmed in the testimony of DW1 who went ahead to state that he recorded the response of the plaintiff and read it to the said plaintiff.

57. From the foregoing, it is apparent that not only did the defendant seek to hear the side of the plaintiff prior to making the publication, but the publication was based on allegations within the knowledge of the plaintiff and the church in which he served.

58. I therefore take the view that the plaintiff did not prove that the publication was malicious.

59. Drawing from the above, I find that the plaintiff has not established the ingredients of defamation against the defendant.

60. This brings me to the second issue to do with the defences pleaded by the defendant. As concerns the defence of justification, I will first seek to define the term with reference to the case of **Joseph Njogu Kamunge v Charles Muriuki Gachari [2016] eKLR** as follows:

*“In Hon. Uhuru Muigai Kenyatta v Baraza Limite Rawal J (as she then was) observed the information that causes the defamation, will be assumed to be untrue until the defendant proves otherwise. The learned judge stated:-*

*“...While taking defence of justification or qualified privilege in the Defamation Case, the Defendant was required by law to establish the true facts and the Plaintiff has no burden to prove the defence raised by the Defendant.....”*”

61. The above was further defined by the Court of Appeal in the authority of **Raphael Lukale v Elizabeth Mayabi & another [2018] eKLR** when it held that the defence of justification is available to a defendant if he or she can prove the truthfulness of the statement or publication made.

62. From the evidence which I have already laid out, the allegations of sexual harassment were confirmed as being in existence. Further to this, both parties filed various documentations, including the affidavit by the complainant; correspondences in that respect and the discussions by the church board which followed.

63. DW1 stated that he was approached by the complainant and that the publication made was in reliance to the information given to him by the complainant and was also based on the contents of her affidavit.

64. According to the defendant, the allegations were believed to be true hence the publication.

65. In view of the foregoing, I am satisfied that the defendant proved the defence of justification.

66. On the alternative defence of fair comment on a matter of public interest, the High Court in the case of **Jacob Mwanto Wangora v Hezron Mwando Kirorio [2017] eKLR** described what amounts to fair comment thus:

*“In Peter Carter – Rucks Treatise on Libel and Slander stated as follows:*

*“...For the defence of fair comment to succeed it must be proved that the subject matter of the comment is a matter of legitimate public interest; that the facts upon which the comment is based are true and that the comment is fair in the sense that it is relevant to the facts and in the sense that it is expressed of the honest opinion of the writer.”*

67. The plaintiff and his witnesses admitted that the publication concerned a matter of public interest. Moreover, the defendant took the position that the publication was merely a comment on the allegations made against the plaintiff.

68. Upon looking at the impugned publication, I am of the view that the publication was extracted from the affidavit and any additional comments were drawn from the allegations made. Also, the defendant managed to satisfy me that the nature of the allegations were such that it was in the public interest for the publication to be made, notwithstanding whether the allegations were eventually verified by the church board or not. In any event, there is nothing to indicate that the affidavit was the subject of any pending court proceedings as the plaintiff claimed.

69. In the premises, I am convinced that the alternative defence of fair comment would stand.

70. Going by the above, I restate my finding that the plaintiff did not prove his case for defamation against the defendant and is therefore not entitled to the reliefs sought. I am enjoined by law and practice to make an assessment of damages I would have awarded in the event that the plaintiff succeeded on his case.

71. On general damages, I considered the sum proposed by the plaintiff and find it to be on the higher side. I therefore considered awards made under this head to persons holding positions similar to that of the plaintiff herein. In the case of **Stephen Onyando v Zachary Onsongo Mosei [2017] eKLR** and the case of **DDO & another v East Africa Magazine Limited & 2 others [2020] eKLR** the respective plaintiffs who held official positions in church were awarded sums of Kshs.500,000/ in both instances. I would therefore have awarded a

similar sum under this head.

72. In respect to aggravated damages, having established that the plaintiff did not prove malice against the defendant or deny that the defendant reached him for purposes of comments, I would not have awarded any damages under this head.

73. Furthermore, I would not have awarded prayer (b) above in the amended plaint as the plaintiff did not advance any evidence to demonstrate his entitlement to such prayer.

74. In the end, the plaintiff's suit is hereby dismissed with costs to the defendant.

**Dated, signed and delivered at Nairobi online via Microsoft Teams this 6<sup>th</sup> day of May, 2020.**

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**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant