



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 261 OF 2015

ALICE ATIENO ODERAPLAINTIFF

VERSUS

RADIO AFRICA LIMITED1ST DEFENDANT

NWASANTHE KHASIANI

alias **CHIM KASIANI**

alias **CHIMWANI OBIANJULU**

alias **UNCLE CHIM TUNA2ND DEFENDANT**

JUDGMENT

1. The Plaintiff, instituted this suit seeking judgment against the Defendants jointly and severally as follows:

- (a) An order to compel the Defendants to pull down all defamatory statements published by them or caused to be published by them online against the Plaintiff.**
- (b) General damages.**
- (c) Exemplary damages.**
- (d) Punitive damages.**
- (e) Interest on (b), (c) and (d) above,**
- (f) Costs of this suit.**
- (g) And any other or further relief as this honourable court may deem fit to grant.**

2. The Plaintiff's claim is that the 1st Defendant being the proprietor and publisher of "Mpasho News", an online publication, and the 2nd Defendant who is an employee of the 1st Defendant published a defamatory article concerning her. That the said article which included her photograph was published on 17th September, 2014 and was titled: **"8 Kenyan celebrities who have been investigated for crimes ranging from murder to prostitution"** and read as follows:

"Its crime time! I have always wanted to say that! I have compiled a list of 5 Kenyan A-List celebrities who have linked(sic) to investigations ranging from murder cases to simple fraud to prostitution.

Check out the gallery below and enjoy. Also please feel free to suggest new additions to the list that I might have overlooked:

"5 of 8:- Alice Odera was allegedly arrested and investigated in New York on suspicion that she was a commercial sex worker

and/or stripper before she was deported.”

3. The Plaintiff's contention is that the said words in their natural and ordinary meaning and by innuendo reflected her as a deportee, prostitute, immoral, a criminal and a promiscuous person and thereby injured her standing in society. That the said words exposed her to contempt, ridicule, psychological stress and caused her to be shunned and also to lose lucrative contracts.
4. The Defendants filed a joint statement of defence and denied the Plaintiff's claim. The Defendants averred that the Plaintiff was offered a right of reply which she failed to exercise.
5. The Plaintiff's filed a reply to the Defence, reiterated the contents of the Plaintiff and joined issues with the Defence. The Plaintiff stated that the Right of reply was not exercisable as it came after six months of the publication complained of.
6. During the hearing of the case, the Plaintiff (PW1) testified and called three witnesses. The Plaintiff described herself as a Marketing and Communications Professional who had worked with Fleet N.A. and Bank of America in New York and in Kenya as a Branch Manager, Haco Industries, Royal Media Services as a News Anchor on Citizen TV, Radio Host, Head of Corporate Communication at Kenya Airways Ltd, own business as an image and beauty consultant, paid Host and Master of ceremonies in public events and has also been involved in Charities, National causes, Leadership and Mentorship.
7. The Plaintiff described her shock at the article in question and stated that she received many telephone calls and text messages from family, friends and colleagues who had read the publication. That the article made her a target of shaming, cyber bullying, harassment and attacks on the web and tainted her personal and professional reputation. The Plaintiff further testified that the 1st Defendant's media house twitter handle linked her and her 8,642 followers on her social media to the said article and shared the article on various social media platforms. That as a result of the article the Plaintiff was bullied on social media and suffered emotionally and physically. She stated further that the article damaged her career including loss of contracts and ability to procure work. The Plaintiff asserted that the Defendants did not seek her clarification and that the publication of the article was malicious and aimed at profit making while damaging her reputation permanently on the world wide web.
8. PW3 Thomas Abilla and PW4 Felgonah Oyuga Owiro testified that they have known the Plaintiff for a long time and narrated to the court that they read the article in question which they stated cast aspersions on the Plaintiff's character. PW3's evidence is that he did not believe the Plaintiff's explanation as the story came from a reputable media house. PW4 on the other hand further testified that the publication negatively affected the Plaintiff including loss of business.
9. Dr. Rachel N. Kangethe (PW2), a Consultant Psychiatrist, produced her medical report and testified that she examined the Plaintiff who consulted her on 20th May, 2015. The doctor's findings were that the Plaintiff had developed Post-Traumatic Stress Disorder due to the psychological trauma caused by the effects of the publication in question and further stated that the Plaintiff was under treatment. The doctor however admitted during cross-examination that her evaluation of the Plaintiff was based on the history given by the Plaintiff and the referral by the lawyer in the context of the intended suit. It is further noted that the doctor admitted that her report does not reflect any form of treatment nor recommend any.
10. The Defendant's side closed their case without the calling of any witnesses. The parties then filed written submissions.
11. Defamation is defined in **Winfield in J.A. Jolowicz and T. Ellis Lewis – Winfield on Tort 8th Edition**, thus:
- “”Defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of the society generally, or which tends to make them shun or avoid that person.”**
- A defamatory statement, according to Gatley on Libel and Slander 8th Edition by Phillips Lewis paragraph 4 page 5 discredits a man or tends to lower him in the estimation of others or to expose him to hatred, contempt or ridicule or to injure his reputation in his office trade or profession or to injure his financial credit.”**
12. This is a suit founded on the tort of defamation. The Court of Appeal in the case of **Wycliffe A Swanya v Toyota East Africa Limited & another Nairobi CA No. 70 of 2008** set out the elements of defamation thus:
- “It is common ground that in a suit founded on defamation the plaintiff must prove:-**
- (i) That the matter of which the plaintiff complains is defamatory in character.**
 - (ii) That the defamatory statement or utterance was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.**
 - (iii) That it was published maliciously.**
 - (iv) In slander subject to certain exceptions that the plaintiff has suffered special damages.”**
13. It is not in dispute that the article was published. The article refers to the Plaintiff and her photograph juxtaposed to the article. The heading of the article which refers to celebrities linked to crimes like murder, fraud and prostitution is sensational and attention grabbing. Stating that the Plaintiff was arrested and investigated in New York on suspicion that she was a commercial sex worker and/or stripper

before she was deported is clearly defamatory. The Plaintiff's evidence is that the contents of the article were not true. There is no evidence adduced by the Defendants to establish the truth of the contents of the publications.

14. A reasonable man reading the publication complained about would perceive it as defamatory. As espoused by the Court of Appeal in the case of **Miguna Miguna v The Standard Group Ltd & 4 others [2017] eKLR**:

“It has been held in various cases in Kenya and elsewhere that the test whether a statement is defamatory is an objective one and is not dependent on the intention of the publisher but is dependent on what a reasonable person reading the statement would perceive of it”

15. A Plaintiff is entitled to general damages to compensate her for the harm caused to her reputation and the distress and humiliation caused by the defamatory publication (See for example **Ken Odondi & 2 others v James Okoth Omburah T/a Omburah & Co. advocates [2013] eKLR**; **Standard Ltd v G. N. Kagia T/a Kagia & Co. Advocates [2010] eKLR**).

16. The Plaintiff testified that she was affected by the article both emotionally and physically. Her evidence in this regard was corroborated by her three witnesses. There was however no documentary evidence in respect of the loss of employment and business opportunities. Although the Plaintiff referred to herself as a Marketing and Communications Professional, she admitted during cross-examination that she had no academic qualifications in that regard. However, I would agree with the Plaintiff's evidence that anybody carrying out a search on her name would come across the publication in question and may view her negatively.

17. The Plaintiff's counsel submitted for an award of Ksh.6,000,000/= as general damages and an award of Ksh.1,500,000/= aggravated damages. He referred the court to the case of **Andrew Mukite Musangi & another v Standard Group Limited [2009] eKLR** and the case of **Gideon Mose Onchwati v Kenya Oil Co. Ltd & another [2005] eKLR** an award of Ksh.3,000,000/= as general damages was made in each of the said cases. The Defendant's side did not propose any figure.

18. The principles to be considered by the court in awarding damages in a defamation suit were set out by the Court of Appeal in the case of **Johnson Evan Gicheru v Andrew Morton [2005] eKLR** while quoting from the English decision of **Jones v Pollard [1997] EMLR 233,243** 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 feelings not only from the prominence itself but from the Defendant's 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.”

19. In the case of **Johnson Gicheru (supra)** where the Court of Appeal held that compensation is a solatium more than a monetary recompense for harm measurable in money.

20. Having considered the submissions and the authorities cited, I award the sum of Ksh.1,500,000/= as general damages.

21. Exemplary damages go beyond compensation. They are meant to punish the wrongdoer and act as a deterrent from similar conduct in future (See for example **Ken Odondi (supra)** and **Standard Ltd (Supra)**).

22. Punitive or exemplary damages are awardable only under two circumstances, namely (i) where there is oppressive, arbitrary or unconstitutional action by the servants of the government; and (ii) where the Defendant's action was calculated to procure him some benefit not necessarily financial, at the expense of the plaintiff. (See the Court of appeal exposition in **Obongo & another v Municipal Council of Kisumu [1971] EA 91**)

23. The Plaintiff described the **“Mpasho”** social media platform as very popular with a readership of about 760,858 people with an additional over 200 republications. This evidence remains uncontroverted. There is therefore the financial gain aspects of the publication. The right of reply was not exercised by the Plaintiff who testified that the offer came about seven months later which was rather late. I agree with the Plaintiff's position that publishing the right of reply after so many months would not have been of any help. The Plaintiff further explained that she was not contacted by the Defendant's before the publication to give her side of the story and that due to the trauma suffered and financial constraints she did not take any steps in time. That eventually when she wrote to the Defendants to pull down the story, they failed to do so. The Defendants have also stood with their story up to the end without any apology or retraction of the article. The Plaintiff is entitled to exemplary and/or punitive damages. I assess the same at Ksh.500,000/=.

24. With the foregoing, I enter judgment for the Plaintiff against the Defendants jointly and severally for a total sum of Ksh.2,000,000/= interest and costs. The Defendants are hereby ordered to pull down the publication in question.

Date, signed and delivered at Nairobi this 16th day of July, 2020

B. THURANIRA JADEN

JUDGE