



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CIVIL SUIT NO. 3 OF 2017

ELIZABETH C. LANGAT.....PLAINTIFF

VERSUS

HIS EXCELLENCY ISAAC RUTO.....1ST DEFENDANT

THE STANDARD GROUP LIMITED.....2ND DEFENDANT

JUDGMENT

1. The hearing of this case proceeded before Hon. Justice Martin Muya and I took it over at judgment stage. The Plaintiff by a plaint dated 22nd March, 2017 and filed on 23rd March, 2017 brought this suit against the 1st and 2nd Defendants for defamation and sought the following orders:

- a) An apology and retraction of similar prominence as the defamatory letter and publication;
- b) General damages for libel;
- c) General damages for malicious falsehood;
- d) Exemplary damages;
- e) Damages for psychological and emotional distress;
- f) Costs of this suit together with interest thereon; and
- g) Any other remedy that this Honorable Court may deem fit to award.

2. It was the Plaintiff's claim that she was defamed by the 1st Defendant at a press conference where he termed her as being incompetent and a non-performing member of the County Executive Committee. On the other hand, the 2nd Defendant published a defamatory article in the standard newspaper where it read inter alia;

“In the letter, Ruto accused Langat of poor performance, failure to attend to duties, misconduct in handling staff matters and misuse of a county government vehicle.”

3. On 11th April, 2017 and 31st May, 2017 respectively, the 1st and 2nd Defendants filed their statements of defence denying each and every allegation presented by the Plaintiff.

4. Subsequently, on 17th May, 2017, the Plaintiff filed her reply to the 1st Defendant's defence denying the averments made. The Plaintiff went further to insist that the 1st Defendant's words were libelous, malicious and defamatory in the eyes of the right thinking members of the society and most importantly false.

5. The matter proceeded for hearing whereby the Plaintiff called in two (2) witnesses. It was the Plaintiff's testimony that on 30/3/2016 she was defamed and sacked during a press conference called in by the 1st Defendant. She further proceeded to state that she was dismissed for reasons of incompetency, non-performance and absenteeism from duties. Reasons in which she strongly believed were not true as she is academically qualified for the position as the County Executive member in charge of Public Health and Environment. She produced her credentials to show her qualifications.

6. The Plaintiff proceeded to state that the 2nd Defendant on the other hand went ahead to publish an article to that effect without seeking clarification or without getting the Plaintiff's side. The Plaintiff produced her termination letter and the article from standard newspaper reflecting the same.
7. It was the Plaintiff's evidence that since the press conference and the publication thereafter, she has been called for various job interviews all in which she has not been successful. It is her testimony that her reputation has been damaged.
8. The plaintiff called two witnesses; Mr. Benard Kipkemoi Kitur (PW2) and Richard Kalya (PW3) who gave testimonies of their relationship with the plaintiff and how they knew her. It was both their evidence that they read about the Plaintiff's dismissal from the newspaper and saw the defamatory statement and they knew it was untrue.
9. Finally, she stated that she took action for her dismissal which was successful and was awarded a sum of Kshs. 4.56 million as damages. She went ahead to produce a copy of the judgment delivered on 23rd September, 2016 at the Employment and Labour Relations Court at Nakuru.
10. The matter was later canvassed by way of written submissions.

PLAINTIFF'S SUBMISSION

11. On 8th October, 2018 the Plaintiff filed her submissions.
12. The Plaintiff relying on a 1970 British Columbia Court of Appeal decision of **Murphy V. LaMarsh** where defamation was defined as a shameful action attributed to a man (he stole my purse), a shameful character (he is dishonest), a shameful course of action (he lives on the avails of prostitution) or a shameful condition (he has smallpox). Such words are deemed defamatory because they tend to bring the man named into hatred, contempt or ridicule. In modern terms, defamation is words tending to lower the Plaintiff in the estimation of right thinking member of society generally.
13. On elements of defamation, the counsel quoted the case of **Joseph Njogu Kamunge V. Charles Muruiki Gachari (2016) eKLR** where it was established that for words to be defamatory; it must tend to lower a person's reputation in the estimation of right minded members of society or, must tend to cause the Plaintiff to be shunned or avoided by other persons.
14. In addition, the words must be malicious and not necessarily spiteful. However, there must be evidence of malice and lack of justifiable cause to utter the words complained of.
15. It was submitted that since the press conference held by the 1st Defendant, the Plaintiff bears a reputation of an incompetent, unaccountable, and non-performing person not worthy of holding office as a County Executive Committee Member in the County of Bomet.
16. Further, it was submitted that; the press conference and the subsequent publication of the contents of the conference in the 2nd Defendant's newspaper affected and still affects the Plaintiff directly unless corrected.
17. The Plaintiff submits that she is academically and professionally competent as she is a PHD student at the University of Aberystwyth in the United Kingdom, holder of masters of science degree in Biosafety (GMOs) from the University of Aberystwyth, a master of Philosophy degree in seed science and technology from Moi University, a bachelor of science degree in horticulture from Egerton University, and diploma in horticulture from Egerton University.
18. In addition, the Plaintiff has participated in vast professional trainings both locally and internationally and has been awarded various certificated to that effect.
19. It was submitted that the Plaintiff has over her 27years of work experience in agriculture and related fields, she has been an exemplary performer therefore; the 1st Defendant should show what criteria was used to evaluate her performance.
20. Reliance was placed on the cases of **J M K V. M W M & Another (2015)eKLR** see also **Rosenblatt V. Baer (1966) 382 (US) 75 at 92** where the value and importance of reputation was illustrated. It was submitted that the terminologically 'justification' as used in the law of defamation means 'truth'. It calls for the Defendants to demonstrate the defamatory imputation is true; therefore, they cannot be heard to say that they believe that the matter complained of was true.
21. **Hon. Uhuru Muigai Kenyatta V. Baraza Limited** was quoted where Rawal J held that; "in 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.
22. On quantum it was submitted that the Plaintiff's reputation is already tattered and what is left for the court to consider is the amount to be awarded as damages. In the case of **Samuel Ndung'u Mukunya V. Nation Media Group Limited & Another (2015) eKLR** reliance was placed in the Court of Appeal decision in **C A M V. Royal Media Services Limited Civil Appeal No. 283 of 2005 (2013) eKLR** where it was held that "the court has wide latitude in terms of discretion in defamation cases. The court looks at the libel itself, gravity, province, circulation of the medium in which it is published and any reputation; subjective effect on the Plaintiff's feelings not only from the prominence itself but from the Defendant's conduct thereafter both up to and including the trial itself; matter tending to mitigate damages; matters tending to reduce damages; vindication of the Plaintiff's reputation past and future. See also **Standard Media V. Kagia & Co. Advocates; Johnson Evan Gicheru V. Andrew Morton & Another (2005) eKLR**.

23. It is also submitted that a successful plaintiff in defamatory suit is entitled to general compensatory damages of such sum as will compensate the Plaintiff for wrong suffered.

24. It is therefore the Plaintiff's submission that the Honorable Court finds the Defendants conduct before, during and after the trial of the case is one which aggravated the damages to be awarded. It is further submitted that the publication was malicious having been done on a Thursday, a working day where most people purchase newspapers and read.

25. In addition, it was submitted that the Plaintiff's character and profession were cast into doubt by the reckless maligning of her reputation by the non-factual and malicious story.

26. Quoting the cases of **Benedict Maurice Omollo Olwenyo V. Migori County Government & 3 Others (2017) eKLR**; **Musikari Kombo V. Royal Media Services Limited (2018) eKLR** and **Kalya and Another V. Standard Limited (2002) eKLR**, the Plaintiff seeks for awards of damages to a sum of Kshs.20,000,000/-.

1ST DEFENDANT'S SUBMISSION

27. It is the 1st Defendant's submission that the core issue for determination is whether the words uttered during the press conference were defamatory.

28. Reliance was placed in a Court of Appeal case **Wyckliff A. Swanya V. Toyota East Africa Limited and Francis Massai Nairobi CA No. 70 of 2008** where elements of defamatory were established as follows;

- i. The matter complained of is defamatory in character
- ii. Defamatory statement or utterances was published in such a manner as the statement was commuted to someone other than the person defamed.
- iii. Publication was malicious
- iv. The plaintiff has suffered special damages.

29. Following the above, the 1st Defendant submitted that it's the responsibility of the Plaintiff to prove that she was defamed and must prove all the ingredients as presented.

30. It is submitted that the 1st Defendant during the press conference communicated what was in the actual knowledge of the Plaintiff through her termination letter. Therefore, what were said were pure facts pointing to the evaluation of her work performance.

31. It was further submitted that the 1st Defendant by virtue of Section 31(a) of The County Government Act No.17 of 2012, is empowered to remove any County official from office on basis of their performance. Therefore, the comments made were without malice and basically made on basis of public interest.

32. In addition, it was submitted that the speech of the 1st Defendant is protected under qualified privilege which finds basis in public policy and common convenience, common good, or welfare of society. Quoting the case of **Henwood V. Harrison (1872) LR 7CP 606** and **Gerhold V. Baker (1918) WN 368**. It was submitted that the 1st Defendant should not be condemned for carrying out his duty as a public officer in the interest of the public and more so, his country.

33. It was further submitted that the 1st Defendant can only respond to the allegation spoken as to those published by the 2nd Defendant. Accusation against the 1st Defendant for words spoken in tort amounts to slander. It was therefore the 2nd Defendant's submission that this tort is actionable on proof of special damages which in this case has not been proved by the Plaintiff.

34. In conclusion, the 1st Defendant relied on the cases of **George Mukuru Muchai V. The Standard Limited HCCC No. 2539 of 1997**; **The Standard Limited V. Joseph Leo Ochieng and others Civil Appeal No. 189 of 2004** and **Nation Newspaper Limited V. Gibendi (2002) 2 KLR** where the Learned Judges were of the view that for claim for defamation to succeed and damages to be awarded, then the claimant must prove that his/her reputation and character had suffered at the instance of the alleged libel or slander. Therefore, it was said that the Plaintiff has not proved the same and she is undeserving of the prayers as sought.

2ND DEFENDANT'S SUBMISSION

35. It was submitted that the burden of proof in a defamation case lies upon the Plaintiff to show on a balance of probabilities that the words alleged to have been published convey either naturally/ordinarily meaning or implicitly/by innuendo. Reference was placed on Order 2 Rule 7(1) of the Civil Procedure Rules 2010. Further, an omission to plead the alleged words that bear the alleged libel is fatal.

36. It was brought to the attention of the court that there is no pleading of innuendo as far this claim is concerned. Therefore, what is left for the court to determine is whether the words, ***"in the letter, Ruto accused Langat of poor performance, failure to attend duties, misconduct in handling staff matters and misuse of a county government vehicle"*** are libelous of the Plaintiff.

37. It was submitted that the words are true as during the press conference those words were stated by the 1st Defendant. In addition, the Plaintiff also produced a letter dated 3.03.16 signed by the 1st Defendant which categorically confirmed the words as pleaded.

38. It was further submitted that the Plaintiff does not in any way claim the reporting done by them was flared in any manner.

39. On the basis of the cause of action, it was submitted that what was for determination was whether libel had been established. The 2nd Defendant submitted that no evidence has been tendered to illustrate that the words caused any negative imputation upon the Plaintiff. Further, the two witnesses called upon to testify by the Plaintiff did not state that the publication caused them to think less of the Plaintiff.

40. Putting reliance on the cases of **Kagwiria M. Kioga and Another V. Standard Limited and 3 others (2015) eKLR** and **Ndungu Njoroge & Kwach Advocates and another V. Standard Limited & 8 Others (2018) eKLR**. It was submitted that the 2nd Defendant has qualified privilege.

41. The 2nd Defendant submitted that the Plaintiff has not proved any case to be awarded damages and in that line quoted the decision of the Court of Appeal in **Civil Appeal No. 89 of 2017 Standard Limited V. Alnashir Visram (unreported)** where the Judge referred to Defamation in the book "Law, Procedure & Practice 2nd Ed" by Sweet & Maxwell as follows;

"in a defamation action, exemplary damages may be awarded in the following circumstances; (i) where the defendant has deliberately libeled or slandered the Claimant for profit; or (2) where the defendant is a government servant and has acted oppressively, arbitrarily or unconstitutionally."

42. In conclusion, it was submitted that the burden of proof has not been discharged against the 2nd Defendant therefore; the 2nd Defendant seeks for dismissal of the Claim with costs.

ISSUES FOR DETERMINATION

43. After perusing the pleading and reading the evidence adduced in court and considering the written submissions filed by all parties and the authorities cited therein, I find that a summary the issues for determination are as follows:

a) Whether the Plaintiff has proved the tort of defamation to the required standard.

b) Whether the Plaintiff is entitled to the damages she is seeking.

44. On issue as to whether the plaintiff has proved the tort of defamation against the defendants, the necessary ingredients of defamation were reiterated in the case of **John Edward V. Standard Limited** as follows;

"A statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule, or contempt or which causes him to be shunned or avoided or has a tendency to injure him in his office, profession or calling."

The ingredients include the following;

i. The statement must be defamatory.

ii. The statement must refer to the plaintiff.

iii. The statement must be published by the defendant.

iv. The statement must be false."

45. It is well established in law that for words to be defamatory, they must tend to lower the Plaintiff's reputation in the estimation of a right minded person in the society or, must tend to cause the Plaintiff to be shunned or avoided by other persons.

46. The test as to 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.

47. In this case, the Plaintiff called in two (2) witnesses and it was their evidence that they read about the Plaintiff's termination in the newspaper and they believe it to be untrue because they know the Plaintiff as competent and a performer in her duties. The publication amounted to libel and it is actionable perse (without prove of damages).

48. It was also the Plaintiff's evidence that she bears all qualifications for the position she held. Her evidence was not in any way challenged by the 1st and 2nd Defendants. The Plaintiff's profession or standing should have been questioned by the Defendants. Further, it was the Plaintiff's evidence that since the publication she has attended many job interviews in which she has been unsuccessful.

49. In **Naqvi Syed Omar v Paramount Bank Limited & another [2015] eKLR** James Rika held that, ***"In Employment Law defamation takes place when the Employer publicizes or causes to be publicized, statements which stigmatize the Employee. The manner of dismissal and the negative publicity attached to the Claimant had the potential to damage his employability..... in employment related,***

defamation is based on the old tort of defamation but with a new spin: the employee's injured or damaged employability and not merely the personal stigmatization must be compensated."

50. In addition; for a publication to be defamatory, there should be evidence of malice. Generally, malice can be founded if the language used is utterly beyond or disproportionate to the facts. In this case, the 1st and 2nd Defendant denies malice and insisted that the statement and publication was done as a matter of public interest and that the words were true.

51. It is well established that for one to rely on the defence of public interest, then the maker of the statement must demonstrate that the statement in question was one of opinion, not of fact, and that it was made on a matter of "public interest."

52. In this case, the 1st and 2nd Defendants in alluding public interest, they both rely on the letter dated 30.3.2016 which letter bears factual statement as to reasons why the Plaintiff was terminated from her employment and not in any way give the details as that of opinion. Therefore, in that regard the defence of public interest must fail.

53. The 1st and 2nd Defendants have taken the defence of qualified privilege. While taking this line, it is well settled that the onus lies on the Defendants to prove the truth of the words in their ordinary and natural meaning. Information causing the defamation will be assumed to be untrue unless proved otherwise.

54. The leading case of **Reynolds v Times Newspapers (2001) 2 AC 127 (HL)** put guidelines to be observed if the defendant wishes to rely on the defence of qualified privilege. Lord Nicholls, listed the following:

a) The seriousness of the allegation, i.e. if the allegation is not true what will be the level of misinformation to the public and what will be the corresponding harm to the individual.

b) The nature of the information and the extent to which the subject-matter is a matter of public concern.

c) The source of the information and whether it is reliable or motivated by malice and/or avarice.

d) Whether suitable steps have been taken to verify the information.

e) Whether the allegation in a story has already been the subject of an investigation which commands respect.

f) Whether it is important that the story be published quickly.

g) Whether comment was sought from the claimant, or whether that was not necessary in the context of the story.

h) If the article or story includes the gist of the claimant's version of events.

i) Whether the article or story is written in such a way as to amount to statements of fact, or whether it raises questions and is suggestive of the need for further investigation.

j) The timing of the publication.

55. Having carefully studied the record, I am unable to pin point any of the above guidelines in the 2nd Defendant's defence to bring their allegation within the ambit of qualified privilege. In addition, no attempt was made to show that the 2nd Defendant took steps to verify the truth of the allegations or seek any comment from the Plaintiff prior to publishing.

56. Following the above, I find that Plaintiff has proved that the defendants committed the tort of libel against her on a balance of probabilities as required by law. I also find that the 1st and 2nd Defendants have failed to establish their defences of qualified privilege and public interest.

57. On the second issue as to whether the Plaintiff is entitled to the damages she is seeking, the plaintiff has cited several cases in support of the claim for damages for defamation mostly on quantum. The 1st and 2nd Defendants denied the claim of defamation and relied on several cases as well.

58. It is noted that compensation for reputation by damages operates in two ways; one as a vindication of the Plaintiff to the public and secondly, as a consolation to him for a wrong done. In **Uren V John Fairfax & Sons Pty Ltd (1966) HCA 40** Windeyer J held that compensation is here a solarium rather than a monetary recompense for harm measurable in money.

59. In assessing damages, the court has to consider the particular circumstances of each case; the Plaintiff's position and standing in society, the mode and extent of publication, the apology, if offered and at what time of the proceedings, the conduct of the Defendants from the time when libel was published up to the time of judgment.

60. Following the arguments above, I find that Plaintiff's Claim has merit and therefore she is entitled for damages for defamation. However, it is my opinion that no aggravating circumstances have been proved to persuade an award for exemplary damages.

61. The plaintiff is seeking the following heads of damages;

- (i) An apology and retraction of similar prominence as the defamatory letter and publication;
- (ii) General damages for libel;
- (iii) General damages for malicious falsehood;
- (iv) Exemplary damages;
- (v) Damages for psychological and emotional distress;
- (vi) Costs of this suit together with interest thereon; and
- (vii) Any other remedy that this Honorable Court may deem fit to award.

62. I find that the 1st defendant is no longer the Governor of Bomet County and in the circumstances, it is not possible for him to retract the statement in a similar manner that it was made. I also find that the plaintiff has not proved that she is entitled to Exemplary damages and general damages for malicious falsehood and also damages for psychological and emotional distress.

63. However, I find that the plaintiff is entitled to general damages for libel and costs of the suit. Compensation must be reasonable and fair and must take into account all the circumstances of each case. The specific circumstances of this case are well set out above and in addition there is evidence that the plaintiff was not able to secure a job because of the defamation by the defendants. I find that the plaintiff admitted she was compensated Ksh.4.5million for wrongful dismissal.

64. The plaintiff is awarded damages as follows:

- (i) General damages for libel of ksh.5,000,000
- (ii) The plaintiff is also awarded costs of this suit and interest at court rates from the date of this judgment until payment in full.

65. Judgment be and is hereby entered in favor of the plaintiff against the defendants jointly and severally in the sum of ksh.5,000,000 plus costs and interest at court rates from the date of this judgment until payment in full.

Judgement read, signed and delivered in open court at Bomet this...1st.....day of.....July....., 2020.

A N ONGERI

JUDGE

In the presence of

.....Mr. Kipkoech.....**for the plaintiff**

.....Mr. Mugumya.....**for the 1st defendant**

Mr. Geoffrey Kipngetich holding brief for Kipkoech.....**for the 2nd defendant**