



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NUMBER 488 OF 2011

MICHAEL MANG'ELI.....PLAINTIFF

VERSUS

MESHACK MUSYOKI.....1ST DEFENDANT

HEADLINK PUBLISHERS LIMITED.....2ND DEFENDANT

JUDGMENT

The Plaintiff herein filed the suit vide a plaint dated the 8TH November, 2011 against the Defendants claiming general, aggravated and /or exemplary damages, a permanent prohibitive injunction to restrain the Defendants by themselves, agents and /or employees from re-publishing the article complained of, in any other form as against the Plaintiff, an apology and retraction in terms to be agreed upon by the Plaintiff, and costs of the suit plus interest.

The Plaintiff's cause of action as pleaded in the Plaint is that on/ or about the 26th July, 2011, the 1st Defendant published and / or caused to be published a letter dated the 26th July, 2011 addressed to the Managing Director, Mavoko Water and Sewerage Company, the following of, and concerning the Plaintiffs;

“Some works were carried out at Jambo Call Centre situate within Semco Industrial Park along Mombasa Road in a rather clandestine kind of engagement. Our preliminary investigations so far have been able to unearth the following;

- 1) The Company (Brooklyne Assay Agencies) that was contracted to do the work is associated with your Technical Manager raising concerns about a possible conflict of interest
- 2) The said brief case entity (M/S Brooklyne Assay Agencies) does not meet basic qualifications to bid for such works, does not even exist both by Statutory formal registration and physically and has no professional profile
- 3) The contract awarding procedure was very questionable with regard to the integrity and seems to us to have been deliberately stage managed.
- 4) In your full knowledge, the said officer diverted company materials and staff to do most of the work despite the fact that the same staff were supposed to be doing Company work at the same time as they were working on his side project during working hours and were as well using Company facilities including but not limited to vehicles, motor cycles and tools.
- 5) You deliberately misled the Board about the whole thing and covered inconsistencies regarding the said contract.

In view of the above, we are kindly requesting your able office to categorically respond urgently, else, we will institute legal proceedings against yourselves.

The Plaintiff further pleads that the said letter was copied to five listed entities namely; The Board through the chair, Chamber of Commerce-Athi River branch, The Permanent Secretary – ministry of Water, Safaricom limited and Kenya Anti-Corruption Commission. He avers that the magnitude of publication was extensive given that the letters were not specifically addressed but generally addressed thus subject to opening and reading by all and sundry.

He further averred that subsequent to the afore-stated publication of the 26th July, 2011, during the Week of 5th September 2011, the 2nd Defendant published and /or caused to be published an article titled

“Dirty Water Company deals smell at “Mavoko”

In its Citizen Weekly edition of September 5th -11th ,2011. The contents of the said article are set out in paragraph 9 of the Plaintiff.

The Plaintiff contends that some or all of the said words in both publications were understood to refer to him and the same were in their natural and ordinary meaning meant and were understood to mean, by right thinking members of the public, inter alia that;

- a) The Plaintiff is an unscrupulous leader who engages in clandestine activities.
- b) The Plaintiff is a con and corrupt.
- c) The Plaintiff abuses his office by performing functions there-under outside his mandate.
- d) The Plaintiff engages in unscrupulous deals in performance of the functions of his office.
- e) The Plaintiff involves in irregularities and abuses procedure for award of tenders within his office.

The Plaintiff has set out the meaning of the words by insinuation and innuendo, in paragraph 11 of the Plaintiff.

The Plaintiff averred that the Defendants published the said words maliciously, with intent to discredit him before the right thinking members of the general public and by reason of the said publication, he has been injured in his credit and reputation and he has been brought into public scandal, ridicule, odium and contempt.

He has set out the particulars of malice in paragraph 12 of the Plaintiff.

He has prayed for judgement against the Defendants as set out in paragraph 1 of this judgment.

The first Defendant filed his defence, on 1st November,2012 in which he denied the Plaintiff's claim. Though he admitted having written the letter dated 26th July,2011, he averred that he wrote the same on behalf of Mavoko Youth Congress as its chairman.

With regard to the article alleged to have been published by the 2nd Defendant, he averred that, the same was not connected in any manner whatsoever to the first Defendant letter dated the 26th July, 2011 addressed to the Managing Director of Mavoko Water and Sewerage Company.

He contended that his letter to the Managing Director of “WAVWASCO” dated the 26th July, 2011 was done without malice, spite and ill motive as the same was done for and on behalf of MYC in the course of its social audit of MAVWASCO in respect to sewer and other drain works, at Safaricom Jambo Call Centre situated within SEMCO Industrial Park along Mombasa Road. That the said social audit was carried out in good faith and with reasonable diligence as was required of MYC and the same was consistent with the Constitution of MYC and in particular clause C which objective include inter alia, to act as goodwill ambassadors in the fight against social ills such as substance abuse and Corruption.

He further contended that, the action that was taken by MYC had been informed by the findings of its social audit of MAVWASCO following which, MYC sought some interventions from the relevant authorities which included the office of the Prime Minister of the Republic of Kenya. He urged the court to dismiss the suit with costs.

The Second Defendant did not file a statement of Defence.

In support of his case, the Plaintiff testified and called two witnesses. In his evidence, the Plaintiff adopted his witness statement filed in court on the 1st June, 2012. He stated that the 1st Defendant published a letter dated the 26th July,2011 addressed to the Managing Director, Mavoko Water and Sewerage Company which letter was produced as an exhibit and that the same was copied to the Board and four other entities as noted earlier in the judgement. That further to the aforesaid letter, the 1st Defendant wrote another letter dated the 29th September 2011 addressed to the Right Honourable Prime Minister of the Republic of Kenya.

It was his further evidence that during the Week of 5th September 2011 to 11th September,2011, the 2nd Defendant published and /or caused to be published an article titled

“Dirty Water Company deals smell at Mavoko “

The full contents of the said article are set out in the Plaintiff.

He averred that the said words referred to in both publications were understood to refer to him and the same were in their natural and ordinary meaning meant and were understood to mean the references adumbrated in paragraphs 10 and 11 of the Plaintiff. It was his evidence that the Defendants published the said words maliciously and with intent to discredit him in the eyes of the right thinking members of the public and that as a result of the publications, he was injured in his credit and reputation and he has been brought into public scandal, ridicule, odium and contempt. That the publications exposed him to investigations by the Prime Minister's office, and the Ministry of Water and irrigation thus raising doubts as to his professional capability and integrity.

Benson Njagi Gate who gave evidence as PW2 testified that he had known the Plaintiff for almost 10 years having worked with him as his immediate boss in a multinational organization. It was his further evidence that he dealt with him on numerous occasions in his capacity as the Managing Director of Mavoko Water and Sewerage Company when handling corporate administrative affairs of the Panari Hotel and that he also transacted other businesses with him at a personal level.

He stated that he read the impugned article and was shocked at the contents and he immediately developed some reservations respecting his employer's dealings with Mavoko Water and Sewerage Company and in particular, the Plaintiff, who was mentioned in the article.

He averred that from the article, he concluded that the Plaintiff is unscrupulous, corrupt and he engages in clandestine activities; that the Plaintiff involves himself in irregularities and abuses procedures for award of tenders; that the Plaintiff engages in unprofessional conduct and stage-manages tender awards and that the Plaintiff encourages and misuses Company staff and facilities. He testified that as a result of the publications, his regard for the Plaintiff diminished after he read the article and he was reluctant to undertake business deals with him and his Company for fear of being caught up in a scandal.

On his part, Moses Aseka who testified as PW3 testified that he had known the Plaintiff for five years and had handled several business matters with him both in his personal capacity as well as the Managing Director of Mavoko Water and Sewerage Company.

He stated that he read the article and it had made negative comments about the Plaintiff and the Company the Plaintiff was working for. According to him, the contents of the article meant that, he was unprofessional, unscrupulous, corrupt, he is clandestine and he misuses company staff and facilities. He told the court that, after reading the article, his respect for the Plaintiff diminished and from then, he no longer transacts deals with him as before and he does not want to be associated with him anymore.

The Defendants did not attend court on the day of the hearing and therefore, the matter proceeded *ex parte*.

At the conclusion of the hearing, the Plaintiff filed submissions.

I have considered the evidence adduced by the Plaintiff together with the written submissions on record as well as the authorities cited by the Plaintiff.

This being a cause of action based on defamation, the plaintiff must prove that the Defendants defamed him. The court of Appeal in the case of **Wycliffe A. Swanya Vs Toyota East Africa Ltd & Another (2009)** Eklr set out the following essential elements which should be proven in a defamation case;

- (1) The matter for which the Plaintiff complains is defamatory in character
- (2) That the defamatory statement or utterance was published by the Defendant.
- (3) That it was false and was published maliciously
- (4) In slander, subject to certain exceptions, that the Plaintiff has suffered special damage.

On whether the statements were defamatory, Halsbury's Law of England fourth Edition, Volume 28 defines a defamatory statement as follows;

"A defamatory statement is a statement which tends to lower a person in the estimation of right thinking members of society 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".

The well-known work of Winfield gives the following definition;

"It 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 shy or avoid that person".

The Law of defamation protects a person's reputation, that is, the estimation in which he is held by others. It does not protect a person's opinion of himself or his character. The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit and it affords redress against those who speak such defamatory falsehoods. See the case of **Musikari Kombo Vs. Royal Media Services Limited Civil Appeal Number 156 of 2017**.

The test for whether a statement is defamatory is an objective one. It is not dependant on the intention of the publisher but on what a reasonable person reading the statement would perceive. In the **Halsbury's Laws of England .4th Edition**, the author opines;

"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".

In the case herein, the cause of action is said to have arisen from two letters and a publication carried out in the 2nd Defendant's Citizen Weekly edition of 5th-11th September 2011. The Plaintiff submits that the Publications were defamatory of him in that they portrayed him as

being unprofessional, one who does not obey procurement laws and that he misled the Board in awarding tenders which are the subject of this suit.

The court has perused the impugned publications, the letter dated 26th July, 2011 was written by the first Defendant and its addressed to the Plaintiff as the Managing Director of MAVWASCO. The letter accuses the Company and the Plaintiff in person, for irregularly awarding a tender to a company namely Brooklyne Assays Agencies and among the reasons given are ; a possible conflict of interest, as the said Company is associated with the Technical manager of MAVWASCO; the company (Brooklyne Assays) does not meet the most basic qualifications to bid for the works; the contract awarding procedure was questionable with regard to integrity and that the Plaintiff deliberately misled the Board by covering material facts and glaring inconsistencies regarding the said contract.

As for the article published by the 2Nd Defendant, it relates to the activities of MAVWASCO and the writer claims that there is a network of corrupt insiders who, despite procurement procedures, front companies to bid contracts that they in turn influence during evaluation. The article largely accuses the Company (MAVWASCO) but also mentions the Plaintiff as being associated with some of the Companies. Though the said Companies have not been named, it is true that some parts of the article refer to the Plaintiff in person.

As rightly submitted by the Plaintiff, the publications were intended to injure his reputation by discrediting him in the eyes of the right thinking members of the society and therefore the same is defamatory of the Plaintiff. This is also considering that the Defendants did not offer any evidence to support the contention in the first defendant's defence, that, they had carried out their investigations and that what he alleged in his defence was based on their preliminary findings.

On whether the publications were actuated by malice, it is trite that malice can be express or can be inferred and for it to be inferred, the language of the publication ought to have altered the facts and their meaning and there ought to be animosity. In the persuasive case of **Phineas Nyaga Vs Gitobu Imanyara (2013)**, Ondunga J held;

“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 malicemalice 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”.

In the case of **Joseph Njogu Kamonge**, 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.

The Plaintiff submitted that the defendants knew that the publications were false and defamatory of him in that, contrary to what is alleged in the publications that the tenders were not advertised, there is evidence that they were advertised as per the law. The Plaintiff further averred that the defendants made reckless statements to the effect that the Company which was awarded the tender was associated with the Plaintiff and also to the technical manager of MAVWASCO which is not true.

In his evidence, the Plaintiff produced two identity Cards to show that the person who was awarded the tender was different from the Technical manager of MAVWASCO. He also produced a copy of the inspection report dated 24th February, 2012 that cleared MAVWASCO and the Plaintiff of any wrong doing with regard to the allegations contained in the two publications. In view of the foregoing, I find that there was malice on the part of the Defendants.

On whether the statements were published by the Defendants, the first defendant who filed a defence in this matter admitted having published the same. The 2nd Defendant did not file a defence and therefore, there is no denial of the allegations.

There is no doubt that the defamatory statements were communicated to third parties. In the case of **Dorcas Florence Kombo Vs Royal Media Services (2014) Eklr**, the court held that;

“Publication is the communication of the words to at least one other person than the person defamed”.

On whether the statements referred to the Plaintiff, it can clearly be seen that some of the statements refer to the Plaintiff and even mention him by name.

On whether the statements were false, it is trite law that the burden of proving the truth of a defamatory statement lies on the Defendant. In the case of **Uhuru Kenyatta Vs Baraza Limited** cited in the case of **Joseph Njogu Kamunge V Charles Muriuki Gachari** the court held;

“the information that causes defamation will be assumed to be untrue until the Defendant proves otherwise.....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.....”.

Similarly, in the case of **Grace Wangui Ngenye Vs Wilfred Kiboro & another (2009) Eklr**, the court cited with approval the case of **John Ward Vs Standard Limited Nrb HCCC Number 1062 of 2005** in which the court held in part;

“The Defendant concedes to have published the words complained of, but submits that they were true in substance and facts..... since the law presumes that every person is of good repute until the contrary is proved, it is the defendant to prove affirmatively that the defamatory words are true or substantially true. The defence of justification asserts that the sting of the defamatory statement in its context is true in substance and in fact. The law presumes that the defamatory words are false and it is upon the Defendants to satisfy the court that the statement which is justified is true in substance and in fact”.

As noted earlier in this judgement, the defendants did not defend the suit and in the absence of their evidence, the evidence by the Plaintiff remains uncontroverted.

On whether the Plaintiff is entitled to damages, having found that the publications were defamatory, it follows that the Plaintiff is entitled to damages. In awarding damages, the court has an absolute and wide discretion. The court in the case of **Jones Vs Polland** set out some guidelines in what would guide the court in arriving at a fair and reasonable award as follows;

- a) The objective features of the libel itself, such as its gravity, its prominence, the circulation of the medium in which it is published and any repetition.
- b) The effect of 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.
- c) Matters tending to mitigate damages, such as the publication of an apology
- d) Matters tending to reduce damages
- e) Vindication of the Plaintiff's reputation past and future.

Being guided by the above principles, the court notes that the Plaintiff was at the material time the Managing Director of MAVWASCO. PW2 and PW3 testified of how the Publications changed their perception of the Plaintiff after they read the articles. The court has also noted the evidence of the Plaintiff and how the publications affected his reputation.

It should be remembered that a man defamed does not get compensation for his reputation, that simply because he was publically defamed. Compensation by damages operate in two ways; As vindication of the Plaintiff to the publication and as a consolation to him for the wrong done. Compensation here is a solation rather than a re-compense for the harm measurable in money. See the case of **Vein Vs John Rairax & Son's Property Limited 177 C.L. R 115, page 150**.The same position was held in the case of **Brigadier Arthur Ndong Owuor Vs the Standard Limited, Nairobi HCCC Number 511/ 2011**.

- 1) The court has considered the submissions of the Plaintiff with regard to the quantum of damages. On general damages, the court has been urged to award 20 million while a sum of 3 million has been submitted on, as an appropriate award for Exemplary damages. The cases of **Samuel Mukunya Vs Nation Media Group Limited & another (2015) eklr** and that of **Daniel Musinga ta Musinga & co Advocates Vs Nation Newspaper Limited (2005) eklr** were relied on.

The court is of the considered view that the authorities cited are not a reflection of the loss suffered by the Plaintiff herein going by the principle guidelines set in the case of Jones Vs Polland.

I do enter judgement for the Plaintiff against the defendants as follows;

- (1) General damages Kshs. 3 Million
- (2) Exemplary damages Kshs. 500,000
- (3) Prayers (a) and (b)

It is important to note that the defendants are sued in their respective capacities and their causes of action are separate and distinct. The cause of action against the 1st defendant is based on a letter while that of the 2nd Defendant is based on publication in a widely circulated media. This means that the circulation with regard to the publication by the 2nd Defendant was wider than that by the 1st defendant. For that reason, the 1st defendant is liable to pay to pay a sum of Kshs. 500,000 out of the awarded sum of Kshs. 3000,000.

The Plaintiff is also awarded the costs of the suit.

Dated, Signed and Delivered at Nairobi this 2nd day of July, 2020

.....

L. NJUGUNA

JUDGE

In the presence of; -

.....**for the Plaintiff**

.....**for the first Defendant**

.....for the 2nd Defendant