



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 759 OF 2007

MARY KEMUNTO MARIERA.....PLAINTIFF

VERSUS

THE STANDARD GROUP LIMITEDDEFENDANT

JUDGMENT

1. The Plaintiff sued the Defendant for damages for allegedly having published a defamatory article concerning her. The Plaintiff also sought an apology and a permanent prohibitory injunction restraining the Defendant from publishing any similar words concerning her.

2. The words complained of are alleged to have published in the “**Digger classified**” section of **The Standard Newspaper** dated 5th March, 2017 accompanied by a photograph of the Plaintiff and read as follows:

“The above pictured employee of Sun N Sand Beach Hotel. A member of SDA Cross Road choir is a con woman masquerades as a person who has orphans to care for. Approaches only financially able people, entices to bed and ends up stealing from you. Claims to be very saved.”

3. It is averred that the said words in their ordinary meaning depicted the Plaintiff as immoral, a fraudster, a conwoman and a dishonest person. That the Plaintiff’s character has been disparaged in the estimation of the right thinking members of the society and it has exposed her to distress and ridicule.

4. The claim is denied. In the alternative it is pleaded in the statement of defence that the publication complained of was privileged. It is further pleaded that the Plaintiff is in breach of her obligations under Section 7 of the Defamation Act.

5. The Plaintiff filed a reply to the defence in which she reiterated the contents of the Plaintiff and joined issues with the defence.

6. In her evidence the Plaintiff described herself as a Housekeeper at Sun N Sand Beach Hotel at the material time and at the same time was taking care of seven (7) orphaned children who she lived with in Mtwapa area of Mombasa. That some defamatory fliers were distributed around her home area, church and workplace and similar defamatory words also appeared in **The Standard Newspaper** on 5th March, 2007. That the words complained of were defamatory and caused her pain and distress. That as a result of the defamatory words she was ostracized at work, in the community and church and her family exposed to ridicule.

7. The Plaintiff gave the particulars of the negative effects of the words complained of as being removed from her church manual and having to leave her position in church as a youth leader and choir member. That she fell ill as a result of the article and was also unable to engage in personal relationships. That she was suspended from her work pending investigations but was reinstated and worked for the Sun N Sand Beach Hotel in the same capacity till year 2011 when the hotel was closed down and it became difficult getting a job in Kenya due to the defamatory advertisement.

8. During cross-examination, the Plaintiff described her job as a Group Executive Housekeeper in a Hotel in Zanzibar, a job which is at a higher level than her previous job in Kenya. The Plaintiff did not have any documents from her church to show that she had been de-registered or any documentary evidence of rejected job applications in Kenya.

9. The Defendant’s side closed their case without calling any witnesses.

10. Written submissions were filed. I have considered the said 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 Gately 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. The suit herein is 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. The Plaintiff’s evidence remains uncontroverted by any other evidence. There is no evidence in support of the statement of defence. The Plaintiff produced as exhibits, *inter alia*, her letters of appointment at Sun N Sand Beach Resort, a demand Notice to the Defendant and the advertisement in question. The Plaintiff’s evidence is that the contents of the said advertisement are untrue, malicious and defamatory. Without evidence by the Defendant of any truth in that said words, the Plaintiff’s case is proved on a balance of probabilities.

14. In the case of **Miguna Miguna v Standard Group Ltd & 4 others [2017] eKLR** the Court of Appeal espoused as follows on the proof of defamation:

“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 – See the English case of Mortgage & Investment society Limited v Odhams Press Limited [1941] KB 440.

In the 4th Edition Vol 28 of Halsbury’s Laws of England, the following statement appears at page 23:

“In deciding whether or not a statement is defamatory, the court must first 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.”

The “reasonable man” was explained in **Winfield & Jolowiez** on Tort 8th Edition at P. 255 as:

“The answer is the reasonable man. This rules out on the one hand persons who are so lax or so cynical that they would think none the worse of a man whatever was imputed to him, and on the other hand those who are so censorious as to regard even trivial accusations (if they were true) as lowering another’s reputation or who are so hasty as to infer the worst meaning from any ambiguous statement. It is not these, but the ordinary citizen, whose judgment must be taken as the standard.”

15. In the **Miguna Miguna** case (supra) the Court of Appeal proceeded to hold that the Appellant therein did not need to call witnesses to prove the publication complained of was viewed and that the Appellant did not need to call witnesses to prove that his character has been tainted.

16. The Plaintiff’s counsel submitted for an award of Ksh.5,000,000/= general damages, Ksh.1,000,000/= aggravated damages and Ksh.2,000,000/= exemplary damages.

17. The Defendant submitted for an all inclusive sum of Ksh.500,000/=.

18. The 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**).

19. 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 & 2 others (supra)**). In the instant case, the evidence on record has established that the publication was not true. There was recklessness in that there was failure to verify the facts. The Plaintiff was not contacted by the Defendant prior to the publication of the article. There was no apology or retraction of the article despite the formal demand through the Plaintiff’s Advocates.

This must have added to the Plaintiff's odium.

20. With regard to aggravated damages, as encapsulated in **Francis Xavier Ole Kaparo v the Standard & 3 others HCCC No. 1230 of 2004 (UR)**

“Malicious and/or insulting conduct on the part of the Defendant will aggravate the damages to be awarded. The aggravated damages (distinguished from exemplary damages) are meant to compensate the plaintiff for the additional injury going beyond that which would have flowed from the defamatory words or statements above, caused by the presence of the aggravating factors ...Damages will be aggravated by the Defendant's improper motive.”

21. In assessing the damages herein, I have looked at comparable authorities. For example in the case of:

(a) **Benedict Ombiro v The Board of Governors Kenya Utalii College & another [2018] eKLR** where the court of Appeal confirmed an assessment of Ksh.200,000/= where the publication was limited to a few persons.

(b) **Johnson Gicheru v Andrew Morton [2005] eKLR** where the Court of Appeal held that compensation is a solatium more than a monetary recompense for harm measurable in money and went ahead to list factors to be considered in assessing damages.

(c) **Anne Wairimu Njogu v Rader Africa Ltd [2017] eKLR** where the general damages award if the case had succeeded was assessed at Ksh.2,000,000/= for an alleged defamatory newspaper article.

22. In the case at hand, an apology and retraction by way of advertisement may not be appropriate, over ten (10) years down the line. There is also no evidence of any republication of the advertisement in question to warrant any permanent prohibitory orders of injunction. I award the sum of Ksh. 1,000,000/= general damages and a composite figure of Ksh.500,000/= exemplary and aggravated damages .

23. In the upshot, judgment is hereby entered in favour of the Plaintiff against the Defendant for Ksh.1,500,000/= plus costs.

Dated, signed and delivered at Nairobi this 5th day of March, 2019.

B. THURANIRA JADEN

JUDGE