



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 102 OF 2016

HON. KIMANI NGUNJIRI.....PLAINTIFF

VERSUS

THE STANDARD GROUP LIMITED.....1ST DEFENDANT

WATHIMBA CRISPUS.....2ND DEFENDANT

JOHN WAINAINA.....3RD DEFENDANT

FREDRICK MUHORO.....4TH DEFENDANT

JUDGEMENT

Background

1. The Plaintiff is the duly elected Member of Parliament for Bahati Constituency within Nakuru County. The 1st Defendant is a media house which publishes a daily newspaper known as The Standard newspaper. The 2nd to 4th Defendants are residents of Bahati Constituency within Nakuru County.

2. On Sunday, the 4th December, 2016, the 1st Defendant in its publication The Standard caused to be published on its front cover a story titled:-

“MEGA CORRUPTION

HOW 273 MPS LOOTED SH4 BILLION IN ONE YEAR

LITANY OF GREED: Shortly after taking office these lawmakers embarked on a frenzy to defraud the public through fictitious claims and ghost projects.”

Under the headline on the front page, were the pictures of various lawmakers and among them was the picture of the Plaintiff indicating his name, the constituency he represented and the amount of Sh32.9million. The 1st Defendant went on to expound on the story on pages 10 and 11 of the newspaper and on page 11 it drew up a list of shame where it named the Plaintiff, the constituency he represented and the amount of Sh32.9 million that was being queried.

3. The 2nd to 4th Defendants were said to have made adverse remarks on the popular social media site, Facebook in a platform known Bahati ni Kwetu.

Pleadings

4. Due to the allegations by the Defendants against the Plaintiff, the Plaintiff filed this suit by way of Plaint dated 9th December, 2016 where he sought orders for:-

i. A permanent injunction restraining the 1st Defendant from publishing articles, stories or any other information in any of its publication which is defamatory to the plaintiff.

ii. A permanent injunction restraining the 2nd – 4th defendants, their agents, servants, proxies or anyone using the internet

platform at their behest defendant from writing publishing or making adverse and unsubstantiated comments in respect of use of CDF funds within Bahati constituency.

iii. General damages for libel.

iv. An apology to the plaintiff with the same prominence as the offending publication.

v. Costs of the suit

5. The Plaintiff stated that the article as published was false and malicious and the same was calculated to tarnish his character, expose him to public contempt and to shame and lower his standing in the estimation of the public. He contended that the 1st Defendant defamed him by innuendo that:

i. He was guilty of corruption and/or economic crimes.

ii. He was guilty of looting public funds.

iii. He was unfit to hold public office.

iv. He was guilty of gross abuse of the Constitution.

v. He was responsible for economic regression of Bahati Constituency.

6. On the 8th February, 2017, the 1st Defendant filed its defence dated 7th February, 2017 where it denied that the publication made on the 4th December, 2016 indicated that the Plaintiff had personally looted or was responsible for the loss of funds allocated to the CDF, that the publication was made in fair comment in good faith without malice as it was a matter of public interest and therefore under a legal, social and moral duty to publish the words. The 1st Defendant further stated that story was justifiable as it was based on facts that the Auditor-General had published an audit report on the Bahati Constituency CDF and made a finding that the amount of money was not accounted for. The 1st Defendant prayed that the suit be dismissed.

7. The 2nd to 4th Defendant never entered appearance and the Plaintiff on the 21st June filed a notice to withdraw the suit against them.

Evidence

8. The matter came up for hearing on the 5th April, 2018 where the Plaintiff gave his testimony as PW1. He told the court that on the 4th December, 2016, he was called by his personal assistant (PA) Kuria Njunjiri (PW2) and informed of the publication in the 1st Defendant's newspaper, The Standard on Sunday, which accused him of looting CDF money allocated to his constituency. He went and bought the newspaper (Plf Exh. No. 1) where he saw his picture and the story that he had looted Bahati constituency and that further on page 11 of the newspaper he was mentioned in a list of shame for stealing Sh32.9 million which he claimed is not true as he does not own the CDF and that CDF is run by a Fund manager.

9. The Plaintiff testified that due to the publication he was called by his political party (TNA) chairman John Sakaja and the President who inquired whether the story was true. He also told the court that his daughter, Harriet, who was in the U.S called him to inquire if the story was true.

10. He told the court that the publication was malicious as the 1st Defendant never contacted him to verify the story before publishing. He stated that he has never been labeled as being corrupt and he has never looted the CDF. He told the court that his role in the CDF committee was to bring public participation and that he does not sit on the board or sign cheques.

11. The Plaintiff further testified that due to the publication he had suffered a lot of embarrassment before his wife and family and that the publication was used by his political opponents in campaigns. He testified that the 1st Defendant had never explained how he looted the money and has never made an apology and denied the publication was true. The plaintiff asked the court to order that the 1st Defendant to publish an apology on the headline and indicate that the story was not true; that the 1st Defendant be stopped from any further publication of the offending story. He prayed that the court grants him damages for his damaged reputation.

12. In cross examination by Mr. Oduor for the 1st Defendant, the Plaintiff told the court that he was the MP for Bahati constituency and an ex-officio member of the CDF committee. He accepted that there was a report by the Auditor General for the year ending 30/6/2014 which mentioned 273 Mps. He further told the court that he had been called by certain people who are not witnesses in the case and he did not have their call logs. PW1 testified that as a consequence of the publication, he was almost not cleared to vie for his seat by the Jubilee party and that further the general public was agitated that he was cleared to vie yet he had been labeled a thief. He added that he got elected as the people knew the truth that the article by the 1st Respondent was propaganda. In re-examination by Ms Alwala, the plaintiff stated that he has never been shown a report that specifically stated that he had looted any money and that there was no explanation in the publication.

13. Kuria Ngunjiri who is the P.A of the Plaintiff testified as PW2. He told the court that when he saw the headline, the first thought that came to his mind was that the Plaintiff was corrupt. He told the court that the publication affected the plaintiff politically as it was published during the electioneering period.

14. In cross examination, PW2 told the court that the CDF has a committee and a fund manager and that the plaintiff did not sit in the committee all the time. He further said that the publication affected the plaintiff as he was portrayed negatively in social media and in political rallies and as a result they had to do a lot of damage control on the negativity explaining how the money was used. He further stated that the offending words were to the MPs as there were specific faces, names and constituencies in the article and that the article on page 10 and 11 did not attempt to explain as it was not complete. He told the court that he was not sure whether there was an audit query about Bahati Constituency.

15. In re-examination, PW2 told the court that before the publication there were no complaints against the Plaintiff but after the publication the public started complaining and even abusing him. PW2 said that the story was not true and they had to create a lot of public forums and roadshows to counter the story. He stated that the offensive words were; mega corruption and looting at a frenzy to defraud.

16. The 1st Defendant did not call any witnesses and parties agreed to file written submissions.

Submissions

17. The Plaintiff filed his submissions dated 17th April, 2018 on the 19th April, 2018 where he identified 4 issues for determination.

18. On whether the matter was defamatory, the Plaintiff submitted that the effect of the publication by the 1st Defendant should be weighed by the context it was made and referred to the case of **Joseph Njogu Kamunge vs Charles Muriuki Gachari**. The Plaintiff stated that the publication was run of the first page of the Sunday Standard and the headline was in bold and red colour. He submitted that in plain language the publication was meant to be understood that MPs whose names appeared on the front page of the newspaper had misappropriated the funds which had been set aside for development projects.

19. The Plaintiff further submitted that the publication meant that the plaintiff was corrupt, guilty of looting public funds, acted contrary to principles of the Constitution and unfit to hold public office as embezzlement of public funds was contrary to the conduct of an MP as set out in the Constitution, Anti-Corruption and Economic Crimes Act No. 3 of 2003; and Leadership and Integrity Act Number 19 of 2012. He further submitted that the publication was meant to lower his reputation in the eyes of his constituents and the society at large.

20. On whether the publication was justified, the Plaintiff relied on the case of **Joseph Njogu kamunge (supra)** and submitted that the information and imputation published are factual and true and that the burden to produce evidence of the truth and the justification was on the 1st Defendant. The Plaintiff stated that the 1st Defendant in publishing the story had relied on the report published by the Auditor-General on the Bahati constituency CDF that there were deficiencies. He submitted that the 1st Defendant had failed to produce the report which would have been easily availed as it was a public document and further they failed to call the Auditor-General who, if summoned, is bound to appear and give evidence in court as he is a state officer. The Plaintiff submitted that the 1st Defendant closed his case without evidence and that the defence of justification had not been proved.

21. On whether the publication was made on fair comment, the Plaintiff submitted that for fair comment to succeed it must be shown the statements constituted a comment and that there must be a factual basis for making the comment. He relied in the case of **Nation Media Group Limited & anon v Alfred N. Mutua [2017] eKLR**. He submitted that the publication was not made in fair comment but rather was a malicious statement of fact as the 1st defendant had failed to produce the Auditor-General's report to demonstrate that the Plaintiff had been accused of diverting funds from the CDF. He further submitted that the publication was made in malice on the grounds that; the 1st respondent never attempted to get a clarification from the Plaintiff, the Auditor-General was never summoned to court to clarify on the matter, and; the Auditor-General's report was never adduced as evidence.

22. The Plaintiff further submitted that the publication was grave as it alluded that the Plaintiff was guilty of corruption. That the 1st Defendant had waited until the electioneering period to publish the story in a bid to bring down the Plaintiff's political career. The story was published on a Sunday and printed in red to attract a wide readership; and that the 1st Defendant tried to drive up sales by suggesting that there would be a follow up story on the next day.

23. On damages payable, the Plaintiff submitted that the court should look at the conduct of the 1st Defendant before, during and after the action for libel and that the considerations should be both objective and subjective. The Plaintiff relied on the cases of **Joseph Njogu Kamunge (supra)**, **Martha Karua v Nation Media Group Ltd & anon**, and **Samuel Ndungu Mukunya v Nation Media Group Limited & another**.

24. The Plaintiff submitted that due to the publication there were strong negative feelings against the Plaintiff and was mocked on social media affecting his status as a father, husband and MP. The Plaintiff proposed the sum of Kshs. 27,000,000 and relied on the case of **Samuel Ndungu Mukunya (supra)** and **Hon Martha Karua (supra)** where the courts awarded Kshs.20, 000,000 and Kshs. 8,000,000 respectively.

25. The 1st Defendant filed its submissions dated 16th July, 2018 on the 17th July, 2018 where it identified three issues for determination.

26. On whether innuendo has properly been pleaded and proven, the defendant submitted that the Plaintiff failed to give facts of innuendo and instead gave the implications of the innuendo contrary to **Order 2 rule 7(1)** of the **Civil Procedure Rules** which are mandatory. The 1st Defendant further submitted that the failure to give facts was incurably defective as it goes to the substance of defamation hence cannot be cured by **Article 159(1)(d)** of the **Constitution of Kenya 2010** and therefore the suit or in the alternative paragraph 12 of the plaint be struck out. It relied on **Emmanuel Omenda v Safaricom Ltd [2012] eKLR**; **RAila Odinga v IEBC & 2 others (2010)eKLR** and **Nicholas Kiptoo Korir Salat v Independent Electoral and Boundaries Commission and 6 others [2013] eKLR**.

27. On whether the publication constitutes a fair comment on a matter of public interest, the 1st Defendant submitted that the court should

take judicial notice of the Auditor General report as it is a matter of general and local notoriety as it is within the knowledge of the public and went further to attach the said report. It relied on **Republic v Simon Wambugu Kimani & 20 others [2015] eKLR** and **Nicholas Kiptoo Arap Korir Salat (supra)**.

28. The 1st Defendant further submitted that the publication was on a matter of public interest as it touched on the utilization of public funds. On whether the publication was one of opinion and not fact it is the 1st Defendant's submission that the publication relied on the report by the Auditor-General and therefore is to be considered as an opinion. The 1st Defendant further submitted that the publication was not malicious as the comment made was genuine. The 1st Defendant relied on the **Kenya Anti-corruption Commission v Deepak Chamanlal Kamani and 4 others [2014] eKLR** and **Turner (otherwise Robertson) v Metro-Goldwyn-Mayer Pictures Ltd [1950] All E.R 449 at 461**.

29. Lastly the 1st Defendant submitted that the publication was a matter in public interest and under Article 34 of the Constitution the 1st Defendant had a legal duty to inform the general public of how public funds were used. It relied on **Joseph Njogu Kamunge case (supra)** and **Reynolds v Times Newspaper Ltd & others [1936] 4 All ER**.

Analysis and determination

30. Parties agreed to frame issues from the pleadings and each party in its submissions framed what each believed were the issues. I have condensed the same into three main issues for determination as follows:-

- i. Whether the publication was defamatory.*
- ii. Whether the publication was justified, in fair comment and qualified privilege.*
- iii. Whether the plaintiff is entitled to damages.*

31. **Black's Law Dictionary 9th Edition page 479** defines defamation as *the act of harming the reputation of another by making a false statement to a third person*. Further the Court of Appeal in **SMW v ZWM [2015] eKLR** defined a defamatory statement in the following term:-

"A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided."

32. The ingredients of what constitutes defamation were set out by the Court of Appeal in **Musikari Kombo v Royal Media Services Limited 156 of 2017 [2018] eKLR**:-

"It follows that a claimant in a defamation suit ought to principally establish in no particular order:-

- i. The existence of a defamatory statement;*
- ii. The defendant has published or caused the publication of the defamatory statement;*
- iii. The publication refers to the claimant."*

33. From the evidence adduced there is no doubt that the 1st Defendant published the article in its newspaper, the Standard newspaper on Sunday, 4th December, 2016. Secondly, the publication clearly referred to the Plaintiff as the 1st Defendant posted a picture of the Plaintiff together with his names and the constituency that he represents as an MP satisfying two of the three ingredients of defamation. The only issue then is whether the publication was defamatory to the Plaintiff.

34. The test to determine whether a statement is defamatory is now well settled in various cases where it has been held that it is an objective test which depends on what a reasonable person on reading the statement would perceive. **Halsbury's Laws of England 4th Edition Volume 28** states at **Page 23** thus:-

"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."

35. In the headline the publication states *"How 273 MPs looted S4 billion on one year"* it continues and to read *"Litany of greed: shortly after taking office these lawmakers embarked on a frenzy to defraud the public..."* Further the publication indicated an amount of Sh32.9 million against the photograph of the Plaintiff and on page 11 went further to put the Plaintiff in its *"list of shame."* The Concise Oxford English Dictionary, 12th edition defines loot as *"informal money, steal goods..."* It also defines defraud as *"illegally obtain money from (someone) by deception"* and shame has been defined as *"a feeling of humiliation or distress caused by the consciousness of wrong or foolish behavior or dishonour."*

36. From the foregoing definitions it is clear that an ordinary and reasonable person would understand that the publication meant the 273

MPs stole sh4 billion and obtained money by deceiving the public and further the 1st defendant included the plaintiff in a list of dishonour or humiliation due to wrong doing. In my view the plaintiff tendered uncontroverted evidence of how the publication affected him in the eyes of his family and the public. Taking into consideration the words used by the 1st Defendant in their ordinary plain meaning in the newspaper it is my finding that the words were defamatory in nature to the plaintiff.

37. The 1st Defendant raised all the allowable defences in defamation cases being justification, fair comment and qualified privilege. The above defences are dependent firstly and importantly on whether the statements published were true and where they were untrue the defence justification and qualified privilege shall fail. In **Hon. Uhuru Muigai Kenyatta v Baraza Limited [2011] eKLR** Judge Rawal DCJ (as she then was) held:-

“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. Once verified, the justification or qualified privilege does not insert the defendant and in any event, the onus that the same is true rests on the defendants to make it a fair publication.”

38. In the case of **Machira t/a Machira & Co. Advocates –vs- East African Standard (2001) KLR 638**, it was observed at page 644:-

“...A Defendant is permitted to plead justification only where it is clear that the allegations he made and are complained of are true in fact or substantially so. He cannot be allowed to set out a version . . . For him to rely on justification, he must accept the Plaintiff’s version of the statement or a statement which is in sum identical with the Plaintiff’s version.”

39. In **Peter Carter – Rucks Treatise on Libel and Slander** states as follows:-

“To state accurately and clearly what a man has done and then to express an opinion is comment which cannot do any harm or work injustice. 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. A writer is not entitled to overstep those limits and impute sordid motives not warranted by the facts.” (Emphasis mine)

40. The 1st Defendant stated that it relied on the report of the Auditor General on the financial statement of constituencies’ development fund – Bahati Constituency. It did not however produce even a copy of the Auditor General’s Report at the hearing but only introduced it through submissions. Nonetheless, I considered the report as it is a public document. A look at the report presented does not mention the Plaintiff by name or by the office he holds, further the report does not state that the money was looted or that the MP defrauded the public through fictitious claims. The report simply states that the auditor was not in a position to verify the amounts as there was no evidence by way of receipts or acknowledgements. There is a clear contradiction between what the Auditor General’s Report stated and what the 1st Defendant published with regards to the Plaintiff.

41. Further, the CDF is run by the Constituency Committee established under **Section 43 of the National Government Constituency Development Fund Act No. 30 of 2015**. It is important to note that while under the Act the Member of the National Assembly of the Constituency is not a member of the Committee, at the time relevant to this suit the Plaintiff being the MP was an ex officio under **Section 24(3)(f) of the Constituency Development Fund Act No. 30 of 2013**.

42. On the issue of projects, **Section 27 of the Act** provides that it is the duty of the Constituency Committee to identify and submit the list of proposed projects to the Board. Allocation of funds to the various projects is provided for under Section 32 and Section 35 (2) of the Act.

43. A reading of these Sections clearly indicate that the Committee of the constituency’s CDF, submits projects, allocates funds and ensures that the projects comply with the provisions of the Act and does not place the onus of so doing on the Plaintiff. The Defendant has not shown in these proceedings how the Plaintiff side stepped the provisions of the law.

44. As earlier stated the truth of a statement is a key factor to the defences available to the 1st defendant namely being, justification, fair comment and qualified privilege. Where there is no foundation of truth in these statements as set out then the defences available shall fail. It is this court’s finding that there was no truth in the 1st Defendant’s publication as it read the Auditor General’s report, and inferred its own meaning, and published a sensational report without justification.

45. On the issue of damages, **Section 16A of the Defamation Act Cap. 36** provides:-

“In any action for libel, the court shall assess the amount of damages payable in such amount as it may deem just.

Provided that where the libel is in respect of an offence punishable by death the amount assessed shall not be less than one million shillings, and where the libel is in respect of an offence punishable by imprisonment for a term of not less than three years the amount assessed shall not be less than four hundred thousand shillings.”

From the above it is clear that the decision to award or not to award damages is an exercise of judicial discretion. The courts have come up with guidelines on how to award damages to a successful litigants. The Court of Appeal in **Civil Appeal No. 314 of 2000 Johnson Evan Gicheru v Andrew Morton & Another [2005] e KLR 1** provided guidelines for assessing damages in defamation cases relied on the case of **JONES V POLLARD [1997] EMLR 233.243** and where a checklist of compensatable factors in libel actions were enumerated as:-

i. *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.*

ii. *The 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.*

iii. *Matters tending to mitigate damages, such as the publication of an apology.*

iv. *Matters tending to reduce damages.*

v. *Vindication of the plaintiff's reputation past and future.*

46. In the case of **John v MGM Ltd** (1997) Q.B 586 the English Court of Appeal said in part at page 607 paragraph F:-

“In assessing damages for injury to reputation, the most important factor is the gravity of the libel; the more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people.”

47. From the evidence and pleadings adduced in this case what comes to the fore is: The Plaintiff at the time of the publication was made was the Member of Parliament (MP) for Bahati Constituency in Nakuru County and therefore a public figure. Secondly, the article with the defamatory statements was published in the Sunday Standard which is a newspaper of nationwide circulation reaching millions readers in the country and has a large international online presence. Secondly, the Auditor General's Report, which the 1st defendant relied on, was published on the 15th September, 2015; while the article was published on the 4th December, 2016, over a year since the report was done.

48. The Plaintiff has sought damages in the total sum of Sh. 27,000,000/- being made of general damages of Sh20,000,000, exemplary damages of Sh5,000,000/-, damages in lieu of apologies of Sh20,000,000/- and has placed reliance on the cases of **Samuel Ndungu Mukunya v Nation Media Group Limited & another** which the court awarded Sh.20,000/- and **Hon Martha Karua V Nation Media Group Limited** which granted Sh.8,000,000/-.

49. In **John v MGM Ltd** (*supra*) the Court of Appeal stated thus:-

“The successful Plaintiff in a defamation action is entitled to recover, the general compensatory damages such sum as will compensate him for the wrong he has suffered. That must compensate him for damages to his reputation, vindicate his name, and take account of the distress, hurt and humiliation which the defamatory publication caused. . .

Exemplary damages on the other hand had gone beyond compensation and are meant to “punish” the defendant. Aggravated damages will be ordered against a defendant who acts out of improper motive e.g where it is attracted by malice; insistence on a flurry defence of justification or failure to apologize”.

50. Section 7A(7) of the Defamation Act provides:-

“In any civil proceedings for libel instituted by a person or body of persons entitled to a right of reply who or which has failed to exercise such right in accordance with this section the court shall, in the event of it having found in favour of the plaintiff, be at liberty to reduce the amount of damages which it would have otherwise awarded by such sum as the court considers appropriate having regard to all circumstances of the case.”

51. This court takes judicial notice that corruption is a vice which if left unchecked can consume the nation. While the court would not countenance the destruction of a person's reputation on the basis of unfounded and reckless reporting, excessive damages on the other hand would have the unintended consequences of suppressing reporting on the application or misappropriation of public funds thereby defeating the public interest.

52. Having taken all factors into consideration, I award all inclusive damages of Kenya shillings four million (Kshs.4,000,000/=). The Plaintiff shall also have costs of the suit.

Judgement signed

R.LAGAT KORIR

JUDGE

Judgment delivered, dated and signed at Nakuru this 3rd day of April , 2019

.....

JANET MULWA

JUDGE

In the presence of:

.....**Court Assistant**

.....**For the Plaintiff**

.....**For the 1st Defendant**

.....**For the 2nd Defendant**

.....**For the 3rd Defendant**

.....**For the 4th Defendant**