



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO 166 OF 2012

AHMEDNASSIR MAALIM ABDULLAHI.....PLAINTIFF

VERSUS

STAR PUBLICATIONS LIMITED.....DEFENDANT

JUDGMENT

INTRODUCTION

1. In his Complaint dated 27th March 2012 and filed on 12th April, 2012, the Plaintiff sued the Defendant for having printed and published or caused words to be printed or published that he considered to have been defamatory against him. He sought the following reliefs against the Defendant;-

1. General damages.

2. Aggravated Damages.

3. Costs of the suit and any other reliefs as this Honourable court may deem fit to grant.

2. The Defendant filed its Statement of Defence dated 23rd May 2012 on even date.

3. The Plaintiff opted not to call his two (2) other witnesses to testify in support of his case as the Defendant informed the court that it would not be calling any witnesses.

4. The Plaintiff's Written Submissions were dated and filed on 19th November 2018 while those of the Defendant were dated 5th December 2018 and filed on 6th December, 2018.

LEGAL ANALYSIS

5. The parties were not able to agree on one (1) set of Statement of Agreed Issues. The Plaintiff filed its List of Issues dated the 18th June 2012 on 12th July 2012 while the Defendant filed its List of Issues dated 18th July 2012 on the same date.

6. The Plaintiff listed his issues as follows:-

1. Whether the words published by the Defendant were meant and understood to have the meanings pleaded in Paragraph 7 of the Complaint?

2. If not, whether the words published by the Defendant on 19th October 2011 referred to or were understood to refer to the Plaintiff?

3. Whether by reason of publication of the said words the Plaintiff had been defamed in his standing as Senior Counsel, as a member of the Judicial Service Commission and as an Advocate of this Honourable Court?

4. Whether the words in question published by the Defendant were innocent and unintentional in relation to the Plaintiff?

5. Whether the Defendant in publishing the articles or words complained of was reckless and was actuated by malice?

6. Whether the Plaintiff was entitled to the reliefs sought in the Plaintiff?

7. Who should bear the costs of this suit?

7. The Defendant listed his issues as having been:-

1. Whether the Defendant was entitled to the defence of unintentional defamation as provided for under Section 13 of the Defamation Act Cap 36 Laws of Kenya.

8. Having looked at the Issues that had been listed by both the Plaintiff and the Defendant, this court determined that the broad Issues that were placed before it for determination:-

1. Whether the Defendant was entitled to the defence of unintentional defamation as provided for under Section 13 of the Defamation Act Cap 36 Laws of Kenya.

2. If not, whether by reason of publication of the said words the Plaintiff had been defamed in his standing as Senior Counsel, as a member of the Judicial Service Commission and as an Advocate of this Honourable Court?

3. Whether the Defendant in publishing the articles or words complained of was reckless and was actuated by malice?

4. Who is to bear the costs of this suit.

9. The court dealt with the issues under the separate and distinct heads shown herein below.

I. DEFAMATION

10. The court dealt with Issues No (1) to (6) of the Plaintiff's Statement of Agreed Issues and the Defendant's sole issue together, as they were all related.

11. The Plaintiff adopted his Witness Statement dated 26th June 2018 and filed on 27th June 2018 as his evidence-in-chief. His testimony was that he was an advocate of the High Court of Kenya and that he had served as a former Chairman of the Law Society of Kenya (LSK), a former chairman of the then Kenya Anti-Corruption Commission (KACC) and as a representative of the LSK to the Judicial Service Commission (JSC). He also told this court that he was a Senior Counsel and the Publisher of The Nairobi Law Monthly.

12. He averred that on 19th November, 2011, under the column titled "Corridors of Power-Political Gossip", the Defendant caused it to be published in its newspaper, The Star, the following words:-

"A lawyer recently involved in the recruitment of new judges is said to be using his newfound influence to shift and transfer cases to "friendly judges". Our mole within the Judiciary tells us that the lawyer last week managed to have a case transferred from the Lands Division of the High Court to the Commercial Courts where he hopes to get a ruling favourable to his client"

13. He was emphatic that the said published words in their natural and ordinary meaning were understood to mean:-

i. That he colluded with Judges to shift and transfer cases to subvert the due administration of justice.

ii. That he had been shopping for Judges to decide cases in favour of his clients.

iii. That he had abused his privileged position as a member of the JSC to seek favours from Judges of the High Court.

iv. That he was corrupt and not fit to represent the Law Society of Kenya in the Judicial Service Commission.

14. It was his evidence that the defamatory article was accentuated by malice and was reckless as the Defendant did not seek to establish the veracity of the words. He contended that he was severely injured in his professional standing as an advocate, Senior Counsel and as a member, at the time, of the JSC.

15. He stated that although his firm had filed a widely published case at the material time, it had not been filed in the Lands Division as was alluded to in the defamatory article, the same having been filed in the first instance in the Commercial Division of the High Court.

16. He sought to be awarded aggravated damages on the ground that the Defendant published the article without first establishing the facts and on the ground that despite writing to it seeking a retraction of the Article, it had refused to retract the same.

17. He was categorical both in his Examination-in-chief and Cross-examination that although the Article did not mention his name, it was clear that it was referring to him as he was the only male LSK representative to the JSC, the other members in the Commission having been judges and magistrates who were not in active private practice and a female LSK representative to the JSC.

18. He was categorical during his Cross-examination that in the week that the Article was published, he had not filed any application for the transfer of a file from the Lands Court to the Commercial Division.

19. He asserted that for the reason that the Defendant did not adduce any evidence, his evidence had remained contraverted. In this regard, he relied on the case of Trust Bank Ltd vs Universal Bank Ltd & 2 others [2009] eKLR where it was held that:-

“....It is trite law that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings...”

20. He further relied on the case of Chripine Otieno Caleb vs Attorney General [2014] eKLR where Odunga J cited with approval the holding of Rawal J (as she then was) in the case of HCCC No 2666 of 1996 Drappery Empire vs The Attorney General where she stated that:-

“...where the circumstances... are not challenged and stand uncontroverted due to the failure by the defendant to adduce evidence, the standard in civil cases (on the balance of probabilities) has been attained by the plaintiff”

21. He also submitted that the reference in the Article of the lawyer as “he” and use of the pronoun “his” left no doubt that the same referred to him. It was his contention that the said words lowered his reputation in the mind of right thinking members of the society, a principle that was addressed in the case of Machira vs Mwangi [2001] eKLR amongst other cases that he relied upon.

22. He urged this court to look at the case of Wycliffe A Swanya vs Toyota East Africa Ltd & Another [2009] eKLR where the Court of Appeal laid down the principles to be considered when hearing a defamation case. These were:-

i. That the matter of which the plaintiff complains should be defamatory in character.

ii. That the defamatory statement or utterances were 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.

23. He also relied on the case of Shah vs Argus [1971] EA 36 where it was held that it was not necessary for a plaintiff to be referred to by name in an article but that it was only sufficient for readers to understand that it referred to him.

24. On its part, the Defendant submitted that a plaintiff must not only prove that a defendant published words that were defamatory but that he must also identify himself as the person who was defamed.

25. It argued that because the Plaintiff had admitted in his Cross-examination that he did not make an application to transfer a file from the Lands Division to the Commercial Division, then the Article could not have been referring to him.

26. It also averred that it was not sufficient for the Plaintiff to have concluded that the Article referred to him because other members of the JSC and its Secretariat qualified to be called lawyers, that the JSC was never mentioned in the Article and that there was nothing on record to suggest that an ordinary reader of the gossip column would assume that the Article was referring to the Statutory mandate of the JSC and deduce that the same referred to the Plaintiff herein.

27. It relied on the cases of Newstead vs London Express Newspaper Limited [1940] 1 KB 377 [1939] 4 ALL ER 319 and Mwangi Kiunjuri vs Wangethi Mwangi & 2 others [2016] eKLR to support its argument that if a person had not been named, then he had to demonstrate that he could reasonably be understood to have been the person who had been referred in the article.

28. In the case of Newstead vs London Express Newspaper Ltd (Supra), it was held as follows:-

“Where the plaintiff is referred to by name or otherwise clearly identified, the words are actionable even if they were intended to refer to some other persons. It is not essential that the plaintiff must be named in the defamatory statement; where the words do not expressly refer to the plaintiff they may be held to refer to him if ordinary sensible readers with knowledge of the special facts could and did understand them to refer to him.”

29. In the case of Mwangi Kiunjuri vs Wangethi Mwangi & 2 Others (Supra), it was held as follows:-

“Where identification is in issue, it is the duty of the trial court to rule whether or not the words are reasonably capable of being understood to refer to the plaintiff. In determining this question, the trial court must consider whether or not ordinary reasonable persons having the knowledge proved could understand the words to refer to the plaintiff. If no reasonable person could have reasonably understood the words as referring to the plaintiff there is no question left for determination.”

30. It further placed reliance on the cases of SMW vs ZWM [2015] eKLR and Alfred Aluvaala vs Moses Muhi & Another [2017] eKLR where the common thread was that a statement was defamatory of the person of whom it is published, if it tended to lower him or her in the

estimation of right thinking member of the society.

31. In addition, it referred to Halsbury's Laws of England 54th Edition Vol 28 at page 23 where it was stated that:-

“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 publication was made was likely to understand them in a defamatory sense.”

32. Having set out the respective parties' arguments and case law, it was evident that they were in agreement of what constitutes a claim for defamation.

33. A summary of their consensus which this court wholly concurred with was **THAT**:

- 1. The words that are published or printed must be found to be defamatory in their meaning. For the words to qualify as being defamatory, the printed or published words must be (a) false and (b) malicious.**
- 2. The printed and published words must have been communicated to another person other than the person who has complained of being defamed.**
- 3. The printed and published words must have the effect of lowering the image of the person for whom the defamatory words have been made to right thinking members of the society.**
- 4. The person of whom the defamatory words have been printed or published need not be named in the article, it is sufficient if right thinking members of the society can be able to identify him as the person to whom the words have been ascribed to.**

34. As the parties were agreed on the law regarding defamation claims, this court did not therefore deem it necessary to differentiate the cases that the parties relied upon. It's concern was whether or not the Plaintiff's case fell square within the parameters that had been set out hereinabove with a view to establishing if he had discharged his burden of proof on a balance of probability.

35. A careful perusal of the published Article revealed **THAT**:-

- 1. The lawyer was recently involved in the recruitment of new judges.**
- 2. The lawyer was un-named.**
- 3. The lawyer was abusing his position.**
- 4. The lawyer was transferring cases irregularly to High Court Divisions to accrue unfair benefit to his client by getting favourable decisions.**
- 5. The judges were under his control.**

36. It was undisputed that in Kenya's recent history, new judges were being recruited by the JSC which comprised of representatives from LSK, Judiciary and Public. The LSK representatives to the JSC were one (1) male and one (1) female. Some other members of the Judicial Service Commission, though lawyers by profession, they did not have clients whom they would have obtained favourable rulings as they were not practicing advocates.

37. The use of the words **“his”** and **“he”** pointed to the male Law Society of Kenya representative to the JSC.

38. Though un-named, sensible readers of the column in the Star could only have understood the words to have referred to the Plaintiff herein. The cases of Newstead vs London Express Newspaper Ltd (Supra), Mwangi Kiunjuri vs Wangethi Mwangi & 2 others (Supra) and Shah vs Argus (Supra) were on all fours with the Plaintiff's case. The words were not only communicated to the Plaintiff alone. Though unnamed, the Plaintiff ably proved that the lawyer who was alluded in the Article referred to him. The words printed therein were sufficient for any reader or ordinary man with knowledge of the special facts of who were the representatives to the JSC, who were lawyers who were male and representing clients in court to have discerned that the words that were published referred to the Plaintiff herein as he was clearly, identifiable and understood to be him from the said Article.

39. The words were published in The Star. It was a newspaper of wide circulation. It is logical to expect that the published words were not only read by the Plaintiff but were also read by third parties. The Defendant did not seek comment from the Plaintiff before it published the Article.

40. This court was not persuaded that the Defendant was entitled to the defence of unintentional defamation as provided for under Section 13 of the Defamation Act Cap 36 (Laws of Kenya). The same provides as follows:-

- 1. A person (in this section referred to as the defendant) who has published words alleged to be defamatory of another person (in this section referred to as the plaintiff) may, if he claims that the words were published by him innocently in relation to the plaintiff, make an offer of amends under this section, and in any such case-**

a. if the offer is accepted by the plaintiff and is duly performed, no proceedings for libel or slander shall be taken or continued by the plaintiff against the defendant in respect of the publication in question (but without prejudice to any cause of action against any other person jointly responsible for that publication);

b. if the offer is not accepted by the plaintiff, then, except as otherwise provided by this section, it shall be a defence, in any proceedings by him against the defendant in respect of such publication, to prove that the words complained of were published by the defendant innocently in relation to the plaintiff and that the offer was made as soon as practicable after the defendant received notice that they were or might be defamatory of the plaintiff, and has not been withdrawn.

2. An offer of amends under this section must be expressed to be made for the purposes of this section, and must be accompanied by an affidavit made by the defendant specifying the facts relied upon by him to show that the words in question were published by him innocently in relation to the plaintiff, and for the purposes of a defence under paragraph (b) of subsection (1) of this section no evidence other than evidence of facts specified in such affidavit shall be admissible on behalf of the defendant to prove that the words were so published.

3. An offer of amends under this section shall be understood to mean an offer-

a. in any case, to publish or join in the publication of a suitable correction of the words complained of, and a sufficient apology to the plaintiff in respect of those words;

b. where copies of a document or record containing such words have been distributed by or with the knowledge of the defendant, to take such steps as are reasonably practicable on his part for notifying persons to whom copies have been so distributed that the words are alleged to be defamatory of the plaintiff.

4. Where an offer of amends under this section is accepted by the plaintiff—

a. any question as to the steps to be taken in fulfillment of the offer as so accepted shall, in default of agreement between the parties, be referred to and determined by the High Court, whose decision thereon shall be final;

b. the power of the court to make orders as to the costs in proceedings by the plaintiff against the defendant, or in proceedings in respect of the offer under paragraph (a) of this subsection, shall include power to order the payment by the defendant to the plaintiff of costs on an indemnity basis and any expenses reasonably incurred or to be incurred by the plaintiff in consequence of the publication in question, and if no such proceedings are taken, the High Court may, upon application made by the plaintiff, make any such order for the payment of such costs and expenses as could be made in such proceedings.

5. For the purposes of this section, words shall be treated as published by the defendant innocently in relation to the plaintiff if and only if the following conditions are satisfied—

a. that the defendant did not intend to publish them of and concerning the plaintiff, and did not know of circumstances by virtue of which they might be understood to refer to the plaintiff; or

b. that the words were not defamatory on the face of them, and the defendant did not know of circumstances by virtue of which they might be understood to be defamatory of the plaintiff, and in either case that the defendant exercised all reasonable care in relation to the publication; and any reference in this subsection to the defendant shall be construed as including a reference to any servant or agent of his who was concerned with the contents of the publication.

6. Paragraph (b) of subsection (1) of this section shall not apply in relation to the publication by any person of words of which he is not the author unless he proves that the words were written by the author without malice.

41. It was clear from the circumstances of this case that the Defendant did not make any amendments under the Section 13 despite the Plaintiff having asked it to retract the publication. It did not prove justification or fair comment under Section 14 and Section 15 of the Defamation Act.

42. In view of the fact that the Defendant did not call any witnesses to rebut the evidence that the Plaintiff adduced, this court had no option but to accept his evidence that the words published in the The Star were false and malicious as his testimony remained uncontroverted.

43. The Plaintiff is a Senior Counsel, the LSK representative to the JSC at the time. As the words published in the Article could be deduced to mean that the Plaintiff was not a person of no integrity, his reputation and/or image must have been lowered in the eyes and minds of right thinking members of the society.

44. Accordingly, having considered the evidence that was tendered by the Plaintiff, this court came to the firm conclusion that the person referred to in the published Article was him and there was no other question that was left for determination in that regard.

II. QUANTUM

45. Having concluded that the plaintiff was defamed by the published Article, the next question for determination was whether or not he was

entitled to the reliefs he had sought in his Complaint against the Defendant. In other words, what was the reasonable award that could be awarded to him to compensate him for the injury that he had sustained as a result of the defamation by the Defendant?

46. In his claim for general damages, the plaintiff referred this court to the **Treatise of Macgregor on Damages 19th Edition at page 176** where it was stated that:-

“It is well established that general damages in defamation cases serve three functions...to console the claimant for injury to his feelings occasioned by the publication of the defamatory statement to repair the harm to his reputation and as a vindication of his reputation.”

47. He placed reliance on the cases of **Daniel Musinga t/a Musinga & Company Advocates vs Nation Newspapers [2005] 1 KLR 587, Samuel Ndungu Mukunya vs Nation Media Group Ltd & Another [2015] eKLR** where Khaminwa J (as she then was) and Aburili J each awarded the plaintiffs therein Kshs 10,000,000/= general damages for defamation. In the case of **Justice Alnashir Visram vs The Standard Newspapers [2016] eKLR**, Aburili J awarded Kshs 18,000,000/- general damages for defamation.

48. He also referred this court to the cases of **Johnson Evan Gicheru vs Andrew Morton & Another [2005] eKLR** and **Biwott vs Mbuguss & Another [2002] 1 KLR** where the court awarded Kshs 10,000,000/- general damages for defamation respectively.

49. He therefore urged this court to award him Kshs 20, 000,000/- general damages and Kshs 10, 000,000/- for aggravated damages.

50. On its part, the Defendant argued that this was not a proper case for awarding the Plaintiff general damages as it was at the bottom of the gossip column of a newspaper that was not widely circulated. It pointed out that no evidence was adduced to show that any other person other than the Plaintiff read it.

51. It referred to the case of **Muriuki Karue Muriuki vs The Standard Ltd [2005] eKLR** where Kimaru J awarded the Plaintiff therein a nominal sum of Kshs 100/-.

52. As was rightly submitted by the Defendant, the Plaintiff did not tender any evidence to prove that any other person read the Article. However, this court took cognisance of the fact that the Plaintiff opted not to call the other two (2) witnesses after the Defendant indicated that it would not call any evidence. This court was not therefore find favour with the Defendant's arguments that other people did not read the Article for the reason that the Plaintiff's evidence had remained unrebutted in this regard.

53. This court therefore found and held that the Plaintiff was entitled to general damages to compensate him for the loss of reputation following the publication of the defamatory article against him. However, damages ought to be reasonable and sustainable in a country's economy. They are not to be granted to punish a defendant who has defamed a plaintiff but rather they are to offer consolation to the plaintiff who has been defamed. Indeed, it must be understood that no amount of money can compensate a person for loss of reputation following a false statement.

54. Consequently, bearing in mind all the cases that were relied upon by the parties herein, and taking into consideration the inflationary trends and the fact that the Article was not in a conspicuous place, which implied that it was given prominence in The Star during that particular week, it was the considered opinion of this court that Kshs 3,500,000/= would be reasonable to compensate the Plaintiff herein.

55. In arriving at the said conclusion, this court had due regard to the case of **Phineas Nyagah vs Gitobu Imanyara [2013] eKLR**, Odunga J held that he would have awarded the plaintiff therein Kshs 3,000,000/- general damages had he succeeded because he did not call any witness to testify that he had been injured by the spoken words.

56. This court did not find the Plaintiff to have been entitled to aggravated damages for the same reason that he did not call any witnesses to say how they shunned him, if at all or for him to prove what injury he suffered as a member of JSC or in his practise as a lawyer after the publication of the Article. He still retained his rank as a Senior Counsel. There was also no indication that he was ever removed to act as a Commissioner in the JSC.

DISPOSITION

57. For the foregoing reasons, the upshot of this court's decision was that the Plaintiff's claim was merited. It is hereby directed that judgment be and is hereby entered in favour of the Plaintiff against the Defendant for Kshs 3,500,000/- general damages plus costs and interest thereon from the date of judgment till payment in full.

58. It is so ordered.

DATED and DELIVERED at NAIROBI this 7th day of May 2019

J. KAMAU

JUDGE