



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NUMBER 141 OF 2010

WANJUKI MUCHEMI.....PLAINTIFF

VERSUS

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

KIPKOECH TANUI.....2ND DEFENDANT

CYRUS OMBATI.....3RD DEFENDANT

J U D G M E N T

The Plaintiff brought this suit against the defendants jointly and severally claiming damages based on an article published in the defendant's newspaper, **'The Standard'** on 17th February, 2010 which the plaintiff considered defamatory. 1st

The defendants in their joint statement of defence denied the plaintiff's claim, while admitting the said publication, by raising the defences of truth, justification, privilege and fair information/comment. The suit was subsequently listed for hearing where the plaintiff gave evidence and called one witness.

The genesis of this suit was a tender floated by the Ministry of Health and won by a company known as Megascop Healthcare (K) Limited at the sum of Ksh.66,780,000/-. This amount was not paid in time or at all, compelling the Ministry to seek legal opinion from the office of the Attorney General. At that time the plaintiff was the Solicitor General. It was that opinion penned by the plaintiff that attracted the attention of the defendants who then published the article complained of. That article had a heading reading **"Mucheми to be grilled over SH. 66m tender"**.

The defamatory statements that followed read in part as follows: -

"Solicitor General is wanted for questioning over claims he inflated costs of hospital equipment. Solicitor- General Wanjuki Muchemi is lined up for grilling over a illegal opinion he gave to the Ministry of Medical Services.

The Anti-Corruption Commission (KACC) plans to question Mr. Muchemi for advising the Ministry to pay Kenya SH.66 Million for equipment, which were initially supposed to cost Khs.1.8 million.

He is among a number of civil servants including Northern Kenya Development PS Mary Ngare, who will be questioned over the scam.

KACC began investigations after discrepancies were noted in the procurement of the equipment.

'In his letter dated December, 11 last year, Muchemi advised the Ministry to urgently settle the case of Ksh.66 million claims to avoid law suit.'

"It is clear from the foregoing analysis the supplier has valid claim against the ministry" reads part of his recommendations."

It is plaintiff's case going by his pleadings, that the publication of the offending words was done by the defendants knowing they were untrue and/or reckless disregarding whether or not they were true. It was also his case that, the defendants did not take any or any sufficient steps and/or precautions to establish they were true.

In their natural and ordinary meaning, it was the plaintiff's case that, the words were meant and calculated or understood to mean that the

plaintiff was corrupt, dishonest and fraudulent individual, who lacked integrity in the execution of his official and professional duties.

Several other attendant meanings were set out in the plaint which included, but not limited to, collusion with other persons in the Ministry of Medical Services and Kemsu, fraud and obstructing and/or interfering with the investigations.

In the said article the defendants included what an unnamed KACC official had said in the following words:

“We are in dilemma because the files in this matter will land at the Attorney General’s office who are among those under investigations.”

In his evidence the plaintiff adopted his witness statement filed on 9th September, 2016 alongside a list of documents filed on 17th September 2010 which he produced in evidence. It was his evidence that his office did to procure any office equipment and produced evidence that it was in fact the Ministry of Health which advertised for the supply of the equipment among others in an advert made on 28th September, 2007.

At that time, the plaintiff was the Solicitor General of the Government of Kenya, the Accounting and Authorizing Officer of the office of the Attorney General in which he served in that capacity from 18th May, 2003 to 19th May, 2013. Among his duties was to give advice to Ministries and parastatals as and when required. This is what he did in the present case.

In giving the contentious advice or opinion, he relied purely on the documents provided by the Ministry. His office did not participate in the tendering process. The publication was therefore, distressing to him and in his own words said as follows: -

“It was very shocking to me, distressing to my family and caused a lot of concern to my friends and associates.

That time I had been Solicitor General for 7 years and I had served the government without complaint. None of my opinions had ever been subjected to any controversy or appeal. Prior to my appointment as SG I had been a lawyer in private practice since my admission as lawyer in September, 1976. I have always been diligent, exercising the highest level of competence to my clients in private practice and 10 years as SG. I was and still am a member of Presbyterian Church of East Africa where I have served in various capacities. I have also served in various Boards of Governors in high schools including Kagumo High School, Kagumo Teachers College, Tumutumu Girls and about 8 others.....

The alleged grilling never took place. This was a figment of imagination by the newspaper. Before the article was published the defendants never contacted me for clarification or otherwise either through telephone, email or any other correspondence.”

The plaintiff’s witness PW2 Samuel Murigu Njoroge, is member of clergy and friend. He adopted his witness statement filed in court on 9th September, 2016. According to his statement, the plaintiff was entrusted with several responsibilities by his church which included legal advisor, a consultant in developing Law Faculty in PCEA University of East Africa, and also sat in the parish church board and church business committee. He read the article which formed the basis of the plaintiff’s claim which was to him very shocking.

On reflection on the contents of that article, he did not see the plaintiff involved in what was alleged because he had a completely different picture of him. It was his evidence that, following that article he received several calls from the members of the church, friends and relatives of the plaintiff.

The inquiries were full of innuendos and even suggested that this witness knew more than what he was sharing. He found himself at crossroads, because he was apprehensive his reputation was going to be tarnished. He decided to visit the plaintiff in his office and on arrival found him looking very low, harassed and truly disturbed. The Plaintiff assured him that he had only performed his duty and had nothing to do with the procurement process of another ministry. He knew the plaintiff as an innocent person and nothing had come at his attention to suggest otherwise.

At the close of the plaintiff’s case, the defence did not call any witnesses and decided to rely on the statement of defence and also the documents already filed by the plaintiff. Both parties have filed submissions and cited some authorities.

The plaintiff is duty bound to prove his case and establish the allegations against the defendants. This will be in conformity with Sections 107 and 109 of the Evidence Act Cap 80 Laws of Kenya. I also agree with the defendants’ submission that the plaintiff has a duty to prove that the matter complained of is defamatory of character and that, that statement was published by the defendants and communicated to someone other than the plaintiff.

There is another requirement, and that is that the publication was done maliciously. See - **SMW Vs ZWM (2015) eKLR, George Mukuru Muchai Vs The Standard (2001) Eklr.**

For the defendants to dislodge the plaintiff’s case, they must persuade the court that the publication was a fair comment on a matter of public interest based on facts that are true or substantially true. – **Grace Wangui Ngenye Vs Chris Kirubi & another (2015) eKLR.** See also, **Gatley on Libel and Slander, 9th edition.**

The defendants pleaded justification. The onus lies on them to prove that the words complained of were substantially true.

Black's Law Dictionary defines "**defamation**" as a "*malicious or a groundless harm to the reputation or good name of another by making a false statement to a third person.*" It is further stated that it is "**a statement that is defamatory in and of itself and is not capable of an innocent meaning.**"

In the case of **Musikari Kombo Versus Royal Media Services Limited (2018)eKLR**, the court citing Halsbury's Laws of England, 4th edition Vol. 28 pg. 23 stated: -

"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 the circumstance in which the words were published, a reasonable man to whom the publication was made would be likely to understand then in a defamatory sense."

The court also cited **Patrick O'Challaghan in the Common Law Series**: -

The Law of Tort at paragraph 25 as follows: -

"The law of defamation, or more accurately, the Law of Libel and slander is concerned with the protection of the reputation. As a general rule, English Law gives effect to the 9th commandment that a man shall not speak evil falsely of his neighbour. It supplies the temporal sanction.... Defamation protects a person's reputation that is the estimation in which he is held by others."

In **Gatley and Lindsell on Slander and Libel 10th edition**, page 8 the authors' state: -

"There is no wholly satisfactory definition of defamatory imputation. Three formulae have been particularly influential; (1) Would the imputation tend to lower the plaintiff in the estimation of the right thinking members of the society generally? (2) Would the imputation tend to cause others to sanction or avoid the claimant? (3) Would the words tend to expose the claimant to "hatred" contempt or ridicule?"

There is no doubt that the 1st defendant's publication enjoys wide circulation and readership in the country. Indeed, it is one of the most popular mainstream print media in the country. The evidence of PW 2 that he received several inquiries from several people relating to the publication is enough proof to that effect. The publication, therefore, was consumed so to say, by third parties in addition to the plaintiff himself.

As decided cases point out, it is the opinion of an ordinary person in the streets that should be a yard stick to determine the effect of such a publication. It is common knowledge that, the Kenya Anti-Corruption Commission is vested with the mandate to investigate cases relating to corruption.

The words used in any publication have a particular effect when viewed against the content thereof. One may pick some at random like "**grilled**", "**inflated**," "**investigations**" and "**scam**". All these words appear in the said article. To an ordinary man in the streets, these words would lead to an irresistible conclusion that, the subject was of a criminal nature likely to lead to arrest and prosecution of the named person.

The plaintiff has testified that his office was never involved in the tendering and procurement of the goods leading to the claim. The documents produced by the plaintiff contain a chronology of steps leading to the claim of Ksh.66,780,000/-, starting from the advertisement of the tender up to the time it was allocated to the winning party. There is nowhere in those documents that the plaintiff was involved in any specification of the said equipment, leave alone the costs attached thereto.

The statement in the article which read "**Solicitor General is wanted for questioning over claims he inflated costs of hospital equipment**", clearly showed that he interfered with the process but more so, the cost of the goods procured by inflating the same. There was only one Solicitor General in the office of the Attorney General. That statement is followed immediately by the title and name of the Plaintiff and again, the word "**grilling**" is used by the defendants. Again, the man in the street would reach the same verdict, that is ,the subject is the suspect.

That statement was published by the defendants without any reference to the plaintiff and this has not been denied. One is entitled to ask whether or not the defendant had the opportunity to consult the plaintiff before such a publication.

The office of the Solicitor General is a public office. Its physical location is known because it is domiciled in the Office of the Attorney General. If the defendants were unable to reach the plaintiff on phone or by way of correspondence, they could have made an attempt to see him physically. This was not done.

The plaintiff has given evidence as to the effect the publication had upon him, his family and friends. I have no doubt that the effect was devastating.

The defendants did not call any evidence to support the pleadings set out in the statement of defence. However, it is important to cite one other case relating to privileged publication.

In **Reynold's Vs Times Newspapers (1999) 4 ALL ER 609**, the House of Lords set out the criteria for determining whether a publication is subject to qualified privilege and stated as follows: -

“Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only.

- 1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.*
- 2. The nature of the information, and the extent to which the subject-matter is a matter of public concern.*
- 3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.*
- 4. The steps taken to verify the information.*
- 5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.*
- 6. The urgency of the matter. News is often a perishable commodity.*
- 7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.*
- 8. Whether the article contained the gist of the plaintiff's side of the story.*
- 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.*
- 10. The circumstances of the publication, including the timing.”*

The above case reinforces the duty on the part of the defendants, or indeed any publisher, to conduct due diligence before releasing any publication to the public. It is an indictment to any party who fails to achieve that criteria. It will be noted that the alleged grilling never took place. That notwithstanding, the defendants did not correct their publication and that may point to malice, which may be imputed.

On the evidence adduced by the plaintiff supported by his witness, and considering the totality of the circumstances of this case, I am persuaded that the plaintiff has achieved the threshold required of him to establish that the publication by the defendants was defamatory, and therefore proved liability against the defendants, jointly and severally. I so find.

It follows that the plaintiff is entitled to damages following the publication made by the defendants. I have looked at the authorities cited by both counsel. These include **C. A. M vs Royal Media Services Limited (2013)eKLR**, **Mwangi Kiunjuri Vs Wangethi Mwangi & 2 others (2016) eKLR**, **Johnson Evans Gicheru Vs Andrew Motton & another (2005)eKLR**, **Samuel Ndungu Mukunya Vs Nation Media Group Limited & another (2015)eKLR** and **Dr. Christopher Ndarathi Murungaru Vs John Githongo (2019)eKLR**.

The Court of appeal in **Nation Media Group Limited and 2 Others Vs John Joseph Kamotho & 3 others (2010)eKLR** cited the case of **John Vs NGM Limited (1966) 2 ALL ER 35** at page 47 and stated as follows: -

“In assessing the appropriate damages for injury to reputation the most important factor is 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 the publication is also very relevant: a libel published to millions has greater potential to cause damage than libel published to a handful of people. A successful litigant may properly look to an award of damages to vindicate his reputation: but the significance of this is much greater in a case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libelous publication took place.”

In the instant case, I bear in mind that the publication was made in the year 2010 just about 3 years before the plaintiff retired from his position as the Solicitor General. He continued to work as such, notwithstanding the publication, and also performed, and continues to perform, his other duties as set out in his evidence.

The dominant issue, however, is the damage done to his reputation and the perceived reflection on the wider public. I have balanced the principles set out in the cited cases, the positions of the respective persons in society, and the fact that damages should not appear to be punitive.

The demand letter dated, 19th February, 2010 addressed to the defendants was never acknowledged or replied to. The plaintiff had asked for an unconditional and an unequivocal apology, to be prominently published in ‘**The Standard**’, in the like manner as the defamatory article. A demand was made on the part of the defendants to make an offer of amends. This was not done.

Prayers **a)** and **d)** in the plaint relating to a permanent injunction and apology respectively, are no longer relevant in the view of the time it has taken to have this matter heard and determined. No Orders are made in that regard.

Doing the best I can with the material placed before me, I make an award of Ksh.15 million general damages plus Ksh.2 million exemplary damages. Judgment is hereby entered in favour of the plaintiff against the defendants jointly and severally in the said sums.

He plaintiff shall have the costs of the suit and interest at court rates.

Dated, signed and delivered at Nairobi this 7th day of November, 2019.

A. MBOGHOLI MSAGHA

JUDGE