



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 231 OF 2015

DR. KAMAL S. GIDDIE.....PLAINTIFF

-VERSUS-

MEHREEN BHATTI.....1ST DEFENDANT

MEHERISH BHATTI.....2ND DEFENDANT

SHAMA ASIF.....3RD DEFENDANT

JUDGMENT

1) Dr. Kamal S. Giddie, the Plaintiff herein, filed an action against Mahreen Bhatti, Meherish Bhatti and Shama Asif, the 1st, 2nd and 3rd Defendants respectively vide the Plaint dated 22nd June, 2015. In the aforesaid plaint the Plaintiff sought for the following reliefs:

a) A written and equivocal apology addressed to the Plaintiff and copied to all individuals to whom the said defamatory statements were originally uttered.

b) An injunction restraining the Defendants whether by itself or its servants, employees and/or agents from making and/or broadcasting any statement whose import or effect will be to defame the plaintiff.

c) General damages

d) Exemplary and punitive damages

e) Costs and incidental yto this suit.

f) Interest on (c),(d) and (e) above at Court rates until payment in full.

g) Any other or further orders that this Honourable Court may deem fir to grant.

2) On 14th May 2019, the suit as against the 3rd Defendant was withdrawn. The 1st and 2nd Defendants filed a defence to deny the Plaintiff's claim. They also filed a counter claim whereof they sought for damages for medical negligence on the part of the Plaintiff.

3) When this suit came up for hearing the Plaintiff testified together with three independent witnesses in support of his case. The Plaintiff (PWI) stated that what provoked him to file this suit is captured in paragraphs 5,6, and 7 of the Plaint whose contents are reproduced as follows:

“ 5) On or about 14th February 2015, the Defendants jointly and severally did utter defamatory words against the Plaintiff to the effect that the Plaintiff was reckless and /or negligent in treating a patient by the name of Mukadam Hussein at M.P Shah Hospital, Nairobi which alleged negligence resulted in an operation that was carried out by another doctor at the hospital.

6) In particular, the Defendants maliciously and repeatedly in the presence of many people including the Plaintiff's patient did utter the following defamatory words against the plaintiff:

“... Dr Kamal is a rotten surgeon and no person should be treated by him”

7) The Defendant's maliciously uttered words aforesaid while knowing very well that the said allegations are totally false, unfounded and untrue in all respects.”

- 4) It is the evidence of PW1 that the aforesaid words uttered by the 1st Defendant in the presence of Many people both visitors and workers within the premises of MP Shah Hospital, subjected him to humiliation, scandal, suspicion, odium and contempt in the eyes of the public and particularly patients who were at the clinic at the time. He said that Mehreen Bhatti, the 1st Defendant, was shouting and yelling.
- 5) PW1 said his character, credit, reputation and goodwill were injured by the said defamatory and malicious words. The Plaintiff testified stating that he qualified as a medical doctor in 1976 and has been practicing medicine since then. PW1 said he later obtained a masters degree in medicine as a surgeon in 1986 from the University of Nairobi.
- 6) The Plaintiff tendered in evidence a copy of a letter he wrote to Medical Practitioners and Dentist Board dated 9th October 2015 and a copy of a ruling delivered on 7/3/2016 in the matter of the medical practitioners and Dentist Board preliminary inquiring committee case no 38 of 2015.
- 7) The Plaintiff also summoned one Diana Nyaboke Samson (PW2) who narrated the events that took place on the, material day. She said that before the 1st Defendant made her way to the Plaintiff's clinic she claimed she told to her that your doctor is a crook.
- 8) Petronila Wataka (PW3) told this court that one of the ladies was hurling insults about the Plaintiff. She said she heard her referring to the Plaintiff as a butcher who butchered her son and that she further heard her say that she will ensure that she tells everyone what kind of a doctor he is.
- 9) PW3 also said that there was chaos and that the lady caused a lot of disturbance to the other patients who were waiting outside the offices and had to be forced out by the security guard.
- 10) The 4th witness is Phoebe Atieno Orek (PW4) said that she heard a lady screaming and directing insults towards the Plaintiff. She said she heard her shout and referring to the Plaintiff as a butcher who butchered her son and that she will ensure that she tells everyone what kind of a doctor he is.
- 11) The Plaintiff submitted that the 1st Defendant's utterances impute directly and or indirectly on the conduct and or intrinsic worth on the part of the Plaintiff and to lower his esteem before the eyes of right thinking members of the society and are therefore defamatory therefore he should be awarded damages.
- 12) The 1st and 2nd Defendants each testified in support of their defence and counter claim. Mehreen Bhatti (DW1) stated that on the fateful day she was in the hospital after a second surgery was performed on her son DW1 said she was distraught in that she had to pay for the second surgery as a result of a surgery that had gone away by the Plaintiff. She said she together with Shama Asif (3rd former Defendant) visited the clinic of the Plaintiff to plead with the Plaintiff to lower the charges.
- 13) DW1 averred that before they could leave the ward where her son was operated, she suffered an asthmatic attack and both Meherish Bhatti (DW2) and Shama Asif (former 3rd Defendant) helped to bring her around from the attack and then proceeded to the Plaintiff's clinic while supporting her.
- 14) DW1 said that at the doctor's clinic the Plaintiff did not utter a word as the former 3rd Defendant was the one pleading to the Plaintiff to lower the charges. It is said that Plaintiff engaged the three in a rude manner and they had no choice but to leave. She said she uttered nothing because she was still weak and that the 2nd Defendant told the Plaintiff that what goes around comes around.
- 15) Mehreen Bhatti (DW2) told this court that the hospital was indeed near empty and averred that no defamatory words were uttered.
- 16) In the counter claim, the 1st Defendant claimed that the Plaintiff being a qualified doctor preferred a surgery on her son but did it so boldly that it necessitated that the young boy undergoes a second corrective surgery.
- 17) It is said that the 1st Respondent's son was in much pain and had lost sensitivity to his hand and could hardly eat. DW1 further stated that he consulted one Dr. Mughal who upon conducting a surgery on the boy, he found that the ulna nerve had been sutured to the Flexor Cayo Unary (F.C.U) tendon stump and nerve ends had been lying cut since the time of injury . DW1 said the wrongs done during the first surgery and the 1st Defendant's son healed upon getting proper medical attention.
- 18) It is the submission of the 1st Defendant that the first surgery was done negligently and had it been done according to the proper medical standards the, second operation would not have been necessary.
- 19) DW1 said she incurred costs to facilitate the second surgery which was unnecessary were it not for the Plaintiff's negligence. The 1st Defendant sought for payment of ksh. 385,571 being the amount she spent on the 2nd surgery.
- 20) In response to the counter claim, the Plaintiff denied being negligent while operating the 1st Defendant's son.

21) Having considered both the rival evidence and submissions, it is apparent that the following issues arose for determination.

- i) Whether the plaintiff was defamed by the defendants utterances.
- ii) What is the available remedies to the Plaintiff.
- iii) Whether or not he 1st Defendant established her counterclaim as against the Plaintiff.
- iv) Whether the 1st Defendant is entitled to damages for malicious negligence.

22) On the first issue as to whether the 1st and 2nd Defendants utterances were defamatory of the Plaintiff, it is the submission of the Plaintiff that those utterances were defamatory. The 1st Defendant admits that there was an argument between her and the Plaintiff but denies that the words she uttered were defamatory.

23) The evidence of PW1, PW2, PW3 and PW4 are in agreement that the words complained of were uttered by the 1st Defendant. Their evidence is not controverted.

24) In my humble estimation, the words injured the Plaintiff's reputation in the eyes of right thinking members of society. The words were uttered in public and within a hospital facility where the Plaintiff worked. In the end I find that the Plaintiff has established his case to the required standards in Civil Case.

25) The second issue is whether the Plaintiff is entitled to damages. The Defendants are of the submission that the Plaintiff is entitled to claim damages since he failed to discharge the burden of proof.

26) I have already come to the conclusion that the Plaintiff has established his case on a balance of probabilities. He is therefore entitled to claim damages. The Plaintiff has urged this court to make the following awards in his favour:

a) General damages	Ksh. 2,500,000/=
b) Exemplary damages	Ksh. 4,000,000/=
c) Punitive Damages	Ksh. 4,000,000
Total	Ksh. 10,500,000/=

27) The Defendants on their part, did not suggest any form of awards. The Plaintiff relied on the case of **Johnson Eva Gicheru Vs Andrew Morton & Another [2005] eKLR** where the court of Appeal awarded ksh. 6,000,000 as general damages. The Plaintiff also relied on the case of **Joseph Njogu Kamunge Vs Charles Muriuki Gachar [2016] eKLR** where this court affirmed on appeal the award of ksh. 1,500,000/= given to the Respondent at the trial court as general damages. The third relevant authority cited by the Plaintiff is the **case of Muskari Kombo Vs Royal Media Services Ltd [2015] eKLR** which the court of Appeal confirmed the award of ksh. 6,000,000/= given to the Appellant for both general and aggravated damages.

28) Having considered the evidence, the submissions and the available precedents, I am convinced that the appropriate and reasonable award to make in the circumstances of this case is a sum of ksh 3,000,000/= for general damages. The Plaintiff did not properly lay the basis of the claims on the punitive and exemplary damages, therefore I decline the same.

29) The third issue relates to the counter-claim which the Defendants are claiming both general and special damages for medical negligence. Both the Plaintiff and the Defendants produced as exhibit in evidence the decision of the medical practitioners and Dentist Board. It is the submission of the Plaintiff that the Defendants failed to prove their counter claim therefore their claim should be dismissed.

30) It is not in dispute that the Board's Committee Case no 38 of 2015 was produced as an exhibit in evidence. The document indicate that both the Plaintiff and **M.P Shah Hospital** faced a complaint filed by the 1st Defendant. The Board's Ruling was delivered on 7/3/2016 arising from the treatment of Mukhadam Hussein. In the aforesaid ruling the Board clearly stated that the patient was well received and that the decision to carry out a exploratory surgery which was appropriate under the circumstances of the case.

31) It is also noted that in the report that it was proper for the Plaintiff to consult and involve an orthopaedic surgeon in the surgery was proper as was the operation was not in his area of specialization.

32) The Board found no evidence of malpractice on the part of the Plaintiff. The Board however, found him to be in breach of the code of professional conduct and Discipline of the Board. It is clear that the Plaintiff was not found guilty of professional negligence.

33) In the end I find that the Defendant have failed to establish their counter claim on a balance of probabilities.

34) The final issue is what is the available remedy due to the Defendants? Having failed to establish their counter claim the Defendants cannot be awarded damages. However, had they proved their counter claim I would have awarded them Ksh. 385,571/= as special damages and a sum of ksh. 1,500,000 as general damages.

35) In the end, Judgment is entered in favour of the Plaintiff and against the Defendants jointly and severally in the sum of ksh. 3,000,000/=. The Plaintiff to also have costs of this suit.

36) The Defendants' counter - claim is ordered dismissed with costs to the Plaintiff.

Dated, signed and delivered at Nairobi this 13th of December, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the 1st Defendant

..... for the 2nd Defendant

..... for the 3rd Defendant