



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 503 OF 2011

JOHN ORIRI ONYANGO.....PLAINTIFF

VERSUS

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

STANDARD LIMITED.....2ND DEFENDANT

KTN-BARAZA LIMITED.....3RD DEFENDANT

DENNIS ONSARIGO.....4TH DEFENDANT

MOHAMMED ALI.....5TH DEFENDANT

JUDGEMENT

1. John Oriri Onyango, the Plaintiff herein, sued the Standard Group Limited, Standard Limited, KTN – Baraza Limited, Dennis Onsarigo and Mohammed Ali the 1st – 5th defendants respectively, vide the plaint dated 23rd November, 2011 seeking *inter alia* for.

a. General damages for libel and stander

b. Aggravated and exemplary damages for defamation

c. Injunctions

d. Costs of the suit with interest thereon.

2. The defendants filed a joint statement of defence dated 10th December 2011, where the publications and telecast were admitted, but libel and stander were denied.

3. The brief upshot of the plaintiff's case is that the defendants made a publication on 5th November, 2011 in the Saturday Standard Newspaper the following words of the plaintiff.

“The story of the large narcotic Seizure in Kenya's history as well as the most brazen criminal acts by rogue state officers.....

A massive cover up ensued in which the small players in the intricate drug trafficking ring ended up in prison as the real masters went scot free. Those who stood in their way or investigated them was executed...

The KTN investigation team has taken nine months to unravel the facts and players of the drug underworld.”

4. The publication covered a whole page. The plaintiff's name is not mentioned. However, the telecast that followed this publication, stated that the plaintiff was one of the rogue officers that had covered up the largest narcotic seizure in Kenya's history. This publication notified its readers of a telecast on KTN Television which was to be aired on 5th November 2011 at 7.50 pm and 9.00 pm. The plaintiff stated that the 1st publication constituted the 1st libel. The telecast was read by Dennis Onsarigo, the 4th Defendant in English and it was titled **“The untouchables and in Kiswahili it was read by Mohammed Ali, the 1st defendant and it was titled “Paruwanja la Mihadarati!”**

5. The Plaintiff claimed that the publication and telecast alleged that the investigations and prosecution into the case deal worth tens of billions of shillings was bungled. The plaintiff averred that defendants alleged that he was put in-charge of case and therefore was responsible of it being bungled.
6. The defendant is said to have also alleged that the plaintiff colluded with the police and procured the destruction of the drugs seized before the commencement of the trial of the suspects/culprits. The plaintiff further stated that the defendant alleged that the Director of public prosecution, Mr. Philip Murgor was fired for speaking against the cover up and several people killed in the course of the cover- up.
7. The plaintiff states that the publications and telecasts were repeated on 6th November 2011 at 7.00 pm on KTN Television and that the telecasts were notified to the public through the Sunday Standard Newspaper of 6th November, 2011.
8. The plaintiff states that the telecast were aired on KTN Television on 7th, 8th and 9th November, 2011. The plaintiff further stated that the same are permanently retained on the defendants' website, [www.standard media.co.ke](http://www.standardmedia.co.ke), and www.ktn.co.ke and on facebook, twitter and you tube. These media websites and social media have a large international audience and are permanent.
9. The defence case is that they published and telecasted the story referred to by the plaintiff titled **"The untouchable"** and **"paruwanja la Mihadarati"** respectively. The story was based on the disputed fact of the impounding of a massive consignment of cocaine sometimes in 2004 that were shipped to Kenya from Venezuela for repackaging and re-export to Europe. The police reported several persons in connection with the drug haul and subsequently some people were arraigned and prosecuted, with some of them being acquitted on this case. There was a ruling by Hon. Ougo and a judgment by Hon. Muchelule, to which the court expressed disappointment as to the manner the investigation and prosecution of the cases in question to the cocaine were conducted. It is in light of the two court decisions that the 4th and 5th defendants began with their investigations which took them to several cities and towns both in Kenya and in Europe. It is in the course of the investigation on the cocaine drug haul that more information was uncovered into this story and it was of public good that the public had to be informed the case having caught the eyes of the public when the drugs were initially impounded.
10. The defendants state that it is on the premise of all the information gathered and purely for the purposes of informing the public in the documentaries. The said documentaries were not informed by any malice other than the sole intention of informing the public about the massive drug haul.
11. The documentaries were not meant to defame anyone but to inform the public of what transpired in relation to the cocaine drug haul which had generated a lot of public interest.
12. When the suit came up for hearing, the plaintiff tendered the evidence of 3 witnesses, while the defendants presented the evidence of one witness.
13. John Oriri PW1, told this court that he was admitted as an advocate on 17th November, 1986. He was employed as a state counsel and rose through the ranks and held position of Deputy Director of public prosecution. PW1 retired in 2010.
14. The publication and telecasts by the defendants portrayed him as a corrupt public servant who obtained and benefited from the proceeds of drug trafficking, and member of a drug syndicate, unfit to hold public office, incompetent to conduct criminal prosecutions, deliberately mishandled and suppressed evidence in the case concerning the largest narcotic seizure in Kenya for the benefit of certain government officers and drug barons and a person of dissolute to profligate character and unfit to associate with respectable persons.
15. PW1 stated that the publication and telecast severally injured his character and reputation. A demand was served upon the defendants on 11th November 2011 seeking the retraction of the libel and slander was not acted upon.
16. The plaintiff and PW1 called witnesses of his character. Jeremiah Okoth, PW2, stated that he is the plaintiff's elder brother. He raised and educated the plaintiff. He read and was told of the publication by the defendants. He said he was shocked and disturbed by the publication.
17. Esther Akoth Soti, PW3 stated that the plaintiff is her maternal uncle. She has known the plaintiff since childhood. She read the publications and watched the telecasts. She said she was shocked by the allegations leveled against the plaintiff. PW3 stated that the plaintiff is a virtuous civil servant who could not have been involved in a cover up to subvert the course of justice.
18. On the part of defendants, they tendered the evidence of Dennis Onsarigo, DW1 who stated he is an accomplished and seasoned journalist with the Standard Newspaper and KTN Television. He produced a documentary in respect of the publications and telecasts in conjunction with Mohammed Ali, the 5th defendant. DW1 stated that the expose was newsworthy and a matter of public interest. The source of his information was public documents and court proceedings. DW1 stated that the plaintiff had been accused by the Director of public prosecution of mishandling the cocaine case investigations and prosecution. Reliance by DW1 expose was also based upon internal communication between the DPP's office and that of the commissioner of police to support the claim that the investigations and the prosecution were a cover up involving the plaintiff and many others. DW1 stated that they published the story innocently and without intending to defame the plaintiff and that the matter was of public interest as it touched on the subject of drug trafficking.
19. At the close of evidence, learned counsels appearing in this case were invited to file written submissions which they did. I have considered both the evidence and the rival submissions. The issues which commend themselves for determination of this court are two fold:

i. Whether there is defamation

ii. What is the quantum of damages

20. The plaintiff submits that his claim is based on libel in so far as it relates to the publication in the standard Newspaper and pronouncements on KTN television.

21. What constitutes defamation by the plaintiff is set out in the treatise of **Gately on libel and slander P. 7** which states;

“Three formulae have been particularly influential. (i) would the imputation tend to lower the plaintiff in the estimation of right thinking members of the society generally?” (ii) would the imputation tend to cause others to shun or avoid the claimant? and (iii) would the words tend to expose the claimant to hatred contempt or ridicule?”

22. The plaintiff submits that the expose by the defendants have passed the test as laid down in **Gately on libel and slander** for defamation.

23. The words against the plaintiff were interpreted to mean that the plaintiff is a corrupt public servant who obtained and benefited from the proceeds of drug trafficking, and member of a drug syndicate, unfit to hold public office, incompetent to conduct criminal prosecutions, deliberately mishandled and suppressed evidence in the case concerning the largest narcotic seizure in Kenya for the benefit of certain government officers and drug barons and a person of dissolute to profligate character and unfit to associate with respectable persons.

24. On liability the plaintiff states that he has demonstrated the falsehoods in the publication and telecasts. The plaintiff further states that the defence of fair comment is not available to the defendants in the circumstances. The plaintiff also argued the injury he suffered was aggravated by the defendants before and after the action therefore the defendants are liable to the plaintiff in general, aggravated and exemplary damages.

25. The plaintiff further averred that the defendants should be enjoined from further repeat publications and telecasts.

The plaintiff cited the case of **Kipyator Nicholas Kiprono Biwott –vs- Clas Limited and 5 others (2000) eKLR** when the plaintiff was awarded general damages of Ksh.10,000,000/= and exemplary damages of Ksh.15,000,000/=. The plaintiff cited this case among many other cases.

26. The defendants on their part submit that the documentary was a fair comment on a matter of public interest and as such does not amount to libel or slander. They averred that drug trafficking is an international problem and indeed falls within what it referred to as an international crime. The term defamation is used as a collective term for libel and slander. The defendants also cited **the treatise of Gately libel and slander, 12th edition page 7**, in which the ingredients of defamation were stated.

The defendants also cited the case of **CFC Stanbic Bank Limited –vs- Consumer Federation of Kenya (COFEK) & 2 others H.C.C.C No. 31 of 2014**. Where it was held inter alia *that in an action for defamation, the claimant must establish three things namely;*

“firstly that the words complained of are defamatory that is, they tend to lower the claimants reputation in the estimation of right thinking members of the society, secondly, that the words refer to the claimant and finally, that the words are malicious.”

27. It therefore follows that defamation is not about publication of falsehood against a person, it is necessary to show that the published falsehood disparaged the reputation of the plaintiff or tended to lower the plaintiff in the estimation of right thinking member of the society generally.

28. The defendants submit that the plaintiff did not lead any evidence to show which part of the documentary was defamatory. He expressed his unhappiness with the contents of the documentary. It is incumbent upon the plaintiff to show or establish how he was exposed to public hatred, contempt or ridicule or that the words had caused him to be shunned or avoided by certain people.

29. It is the defendants further submissions that the documentary it aired was fair comment on a matter of public interest. It is a defence to an action of libel and slander that the words complained of were fair comment on a matter of public interest.

30. The documentaries published and telecast by the defendants was in respect of the largest cocaine haul ever impounded in Kenya's history. The seizure created a lot of public interest. It is on the basis of this investigation that the defendants came up with the documentary which was produced and telecasted.

31. The documentaries were not informed by any malice other than that of informing the public of matters about the massive drug haul.

32. When submitting on fair comment and public interest, the defendant cited the case of **Raynolds –vs- Times Newspapers limited & others (1999) 4 AILER 609** where it was held inter alia that;

“whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at what is going on, or what may happen to them or others, then it is a matter of public interest on which everyone is entitled to make fair comment.”

33. The defendants submit that he plaintiff has not proved his case of defamation against the defendants. Furthermore it is argued that the documentary by the defendants amounts to a fair comment on a matter of public interest and does not amount to a defamatory statement

therefore the plaintiff's case against the defendants should be dismissed with costs.

34. I am persuaded by the defendants' argument. I have come to the conclusion that the plaintiff has not tendered plausible evidence to show that the publications were false, wrongful and defamatory. I am also not convinced that as a result of the publications, the plaintiff was exposed to public scandal, ridicule, contempt and embarrassment. In the end I find that on a balance of probabilities, the tort of defamation was not established against the defendants.

35. Liability not having been established as against the defendants, I hereby dismiss the suit. In the circumstances of this case, I think a fair order on costs is to order which I hereby do, that each party meets its own costs.

Dated, Signed and Delivered in open court this 6th day of April, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

.....for the Defendants