



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 159 OF 2010

NEWTON OMONDI OSIEMO.....PLAINTIFF

VERSUS

THE STANDARD LIMITED.....1ST DEFENDANT

MUTINDA MWANZIA.....2ND DEFENDANT

ATHMAN AMRAN.....3RD DEFENDANT

JUDGMENT

1. Vide a plaint dated 18th March, 2010, the Plaintiff sued the Defendants seeking the following orders:

- “i. The Defendants be ordered to print an unreserved apology to the Plaintiff and give it similar prominence as the article complained of.**
- ii. The court do order that the Defendants be restrained from publishing articles injurious to the Plaintiff’s reputation regarding the transaction regarding the purchase of the Cemetery plot by the City Council of Nairobi**
- iii. Exemplary and punitive damages**
- iv. Costs of this suit.**
- v. Any other or further relief the court may deem just and fit to award in the circumstances.”**

2. The Plaintiff, a businessman, alleges that the 1st Defendant who is the proprietor and the printer of the daily newspaper known as **the Standard** and the 2nd and 3rd Defendant who are it’s reporters on 10th March, 2010 published an article concerning him that was defamatory. The article was entitled **“KACC retraces how Ksh.283,000,000 set aside for a new public burial ground for Nairobi looted by lawyers, brokers and officials”** wherein they reportedly quoted from a report by the **KENYA ANTI-CORRUPTION COMMISSION (KACC) AND MENTIONED THE Plaintiff as a beneficiary to the tune of Ksh.59,000,000/=.**”

3. It is further stated that the said article kept referring to the Plaintiff as a lawyer who was being investigated by KACC and stated **“Lawyer at the center of the inflation of the purchase price, having collected Ksh.59,000,000/= with the explanation that it would be shared out among top Ministry officials among them Mudavadi.”**

4. The Plaintiff denied having collected the sum of Ksh.59,000,000/= or any other amount on behalf of Hon. Musalia Mudavadi or any other person. It is averred that there was no basis for the said publication or the further publications made on 11th and 12th October, 2010 about his being grilled by KACC on the said claim.

5. It is stated that the said publications in their ordinary meaning reflected the Plaintiff as a person who portrays himself as a Lawyer, associates with people of dubious character and colluded with Hon. Musalia Mudavadi to defraud the public. That the articles were defamatory, malicious, careless and negligent and have reduced his esteem in the eyes of the right thinking members of the society.

6. The Defendants filed a statement of defence and denied the claim. It is stated that the article related to the reporting of the facts and claims made surrounding the controversial acquisition of public land for purposes of a public cemetery by a public body to wit the City Council of

Nairobi which matter was investigated by KACC, a public body. It is further stated that the reporting was made in good faith and without malice in a matter of considerable public

7. In a reply to the defence, the Plaintiff reiterated the contents of the plaint. It is averred that it was the Defendants' duty to verify the story and not to make deliberately malicious publications which have no foundation.

8. During the hearing of the case, the Plaintiff testified (PW1) and adopted his witness statement as his evidence. The Defendants' side did not adduce any evidence. Both parties filed written submissions which I have considered.

9. It is the Plaintiff's evidence that he is a businessman who runs an aviation company and he is not a lawyer as alleged in the publications in question. That he never acted as a lawyer for Mr. Mudavadi neither acted as his agent in any financial transaction or received the sum of Ksh.59,000,000/= on his behalf, has never been a business associate of Mr. Mudavadi nor had anything to do with the acquisition of the cemetery land. That his family, friends and business were affected by the publication. It is contended that all the publications in question are false and that he was not contacted or interviewed by the newspaper, yet criminal motives were imputed and there has not been any correction or apology.

10. During cross-examination the Plaintiff admitted having appeared before KACC over the cemetery matter and stated that he has a brother who is a Lawyer and is known as Davis Osiemo who is also mentioned in the impugned articles.

11. PW2 Graham Shaw, the Plaintiff's business partner testified about the international nature of their business. He expressed his concern and that of their business associates over the articles in question and stated that interactions between him and the Plaintiff have reduced until the Plaintiff's name is cleared. He further testified that their business has also suffered.

12. The evidence by the Plaintiff's side was not controverted by any other evidence. The articles in question were published. The excerpts of the said articles have been produced as exhibits. The Plaintiff is reflected in **the Standard** of 10th March, 2010 as Newton Osiemo and claimed to be the Deputy Prime Ministers agent, and a beneficiary of Ksh.59,000,000/=. In the said article, the Plaintiff is described as a lawyer alleged to have been at the centre of the inflammation of the purchase price for the cemetery land and collected Ksh.59,000,000/= with the explanation that it would be shared out among top Ministry officials among them Mr. Mudavadi. The same article mentions the Plaintiff's brother, David Osiemo as the one who would take care of the interest of his brother, Newton Osiemo.

13. The story appears again in the Standard of 11th March, 2010 while reporting the appearance of Hon. Mudavadi at KACC where he denied the story and termed the scandal as politics. It is also reported that Mr. Osiemo distanced himself from the allegations and denied having received any money from the City Council or having transacted any business on behalf of the Government or Mr. Mudavadi or Sammy Kirui, the Permanent Secretary Local Government.

14. The article in **the Standard** of the 12th March, 2010 under the heading "**KACC grills Lawyer it claims acted for Mudavadi**" delves further into the cemetery land issue and published a photograph of the Plaintiff and his lawyer after they had appeared at KACC for interrogation.

15. The foregoing analysis of the evidence establishes that the Plaintiff was reflected in the articles in question as a lawyer by profession. The Plaintiff's uncontroverted evidence is that he is not a lawyer but a businessman. The articles went further to name the Plaintiff as the Lawyer at the centre of the Ksh. 59,000,000/= scandal. The said words can be construed to mean that the Plaintiff was an impersonator and defrauded the public of the said amount of money.

16. Although it was stated in the Defendants' defence that the matters in question were in public domain and the report made in good faith in matters of public interest, no evidence was adduced by the Plaintiff's in support of the said pleading.

17. The articles complained about concerned the Plaintiff and were published by the Defendants. The said articles have not been shown to be true. The said publications were therefore defamatory.

18. The Court of Appeal in the case of **Wycliffe A Swanya v Toyota East Africa Limited & another Nairobi CA No. 70 of 2008** set out the elements of defamation thus:

"It is common ground that in a suit founded on defamation the plaintiff must prove:-

(i) That the matter of which the plaintiff complains is defamatory in character.

(ii) That the defamatory statement or utterance was 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."

19. The Plaintiff has established that he is not a lawyer by profession nor portrayed out himself as such. The evidence of PW2 Graham Shaw has demonstrated that the publications in question have affected their business and personal relationships. There is however no evidence to show how the business was doing and to what extent the business was affected. However, such defamatory publications would undoubtedly as demonstrated by the evidence of PW1 and PW2 lower the Plaintiff's reputation amongst the right thinking members of the society. There

was no public interest to be served by way of false information. The lack of truth connotes malice (See for example **Hon. Uhuru Muigai Kenyatta v Baraza Ltd 2011 eKLR**; **Phineas Nyagah v Gitobu Imanyara 2013 eKLR**).

20. The Plaintiff has prayed for exemplary damages. Exemplary damages go beyond compensation. They are meant to punish the wrongdoer and act as a deterrent from similar conduct in future (See for example **Ken Odondi & 2 others v James Okoth Omburah T/a Omburah & Co. advocates [2013] eKLR**; **Standard Ltd v G. N. Kagia T/a Kagia & Co. Advocates [2010] eKLR**).

21. In the case at hand, a simple verification exercise would have shown the Plaintiff's profession. The Plaintiff was not contacted by the Defendants for any verification of the matters in question. There is no evidence to show that the Plaintiff was contacted by the Defendants before the publication of the article. There was no apology or retraction of the article despite the formal demand through the Plaintiff's advocates. The Plaintiff is therefore entitled to exemplary damages.

22. The Plaintiff's counsel submitted for an award of Ksh.5,000,000/= as exemplary damages.

23. I have also looked at the following authorities in computing exemplary damages.

(a) **Amirita Bhagwanji Shah (supra)** where an award of Ksh.1,000,000/= was made as exemplary damages to a retired Court of Appeal Judge.

(b) **Hon. AMB Chirau Ali Makwere v Royal Media Services Ltd HCCC No. 57 of 2004** where a politician was awarded of Ksh.1,000,000/= as exemplary damages.

(c) **C A M v Royal Media Services Limited [2013] eKLR** where a cabinet Minister was awarded Ksh.500,000/= as exemplary damage

(d) **Mwangi Kiunjuri v Wangethi Mwangi & 2 others [2016] eKLR** where a politician was awarded the sum of Ksh.1,000,000/= as exemplary damages.

24. In my view the award of Ksh.2,000,000/= as exemplary and punitive damages is reasonable compensation in the case herein.

25. It is noteworthy that the Plaintiff has not asked for an award of general damages in the plaint. The Plaintiff's counsel however submitted for a sum of Ksh. 20,000,000/= as general damages. The Defendant's side did not quantify the same. The Plaintiff is bound by his pleadings and he cannot be awarded that which he did not plead.

26. If general damages had been prayed for, I would have awarded a sum of Ksh.3,000,000/=. This would bring the total award to Ksh.5,000,000/=. (See for example

(a) **Hon. AMB Chirau Ali Makwere (supra)** where the Plaintiff who was a former ambassador and a politician was awarded Ksh.3,000,000/= as general, exemplary and aggravated damages.

(b) **Martha Karua v Standard Limited & another Nairobi HCCC No. 295 of 2004** where a cabinet minister was awarded Ksh.4,500,000/= as general and aggravated damages.

(c) **Andrew Mukite Musangi v Standard Group Limited, Nakuru HCCC No. 331 of 2009** where an advocate was awarded general damages of Ksh.3,000,000/= and Ksh.500,000/= for exemplary damages.

27. One of the orders sought by the Plaintiff is an order that the Defendant do retract and withdraw the offending words and tender a suitable apology to the Plaintiff. In assessing the exemplary damages, I have taken into account that there was no apology or retraction of the article. It's too late in the day for any meaningful apology.

28. The Plaintiff has sought orders to restrain the Defendants from publishing articles injurious to his reputation regarding the transactions relating to the purchase of the cemetery plot by the City Council of Nairobi. Only defamatory statements can be injurious. If the truth is told then there is no injury. Consequently this court declines to allow the said prayer.

29. With the foregoing, I enter judgment for the Plaintiff for the sum of Ksh.2,000,000/= plus costs.

Dated, signed and delivered at Nairobi this 17th day of May, 2018

B. THURANIRA JADEN

JUDGE