



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 469 OF 2010

HON. GEORGE BENEDICT MAINA KARIUKI.....PLAINTIFF

VERSUS

THE PEOPLE MEDIA GROUP LTD.....1ST DEFENDANT

RACHEL MBURU.....2ND DEFENDANT

JUDGMENT

1. Vide a plaint dated 13th October, 2010, the Plaintiff filed suit claiming damages arising out of an alleged defamatory article published by the Defendants.
2. The 1st Defendant is sued as the proprietor and publisher of a local daily newspaper known as **The People Daily** while the 2nd Defendant was it's employee at all material times.
3. It is pleaded that on 16th October, 2009 the Defendant falsely and maliciously published the following words concerning the Plaintiff:

“... Chief Magistrate Gilbert Mutembei freed Kariuki, who appeared shocked that he had escaped a life sentence, on the grounds that the prosecution failed in its burden of proof. The judge openly wept with joy as he hugged a few relatives present in the courtroom.

...Kariuki was Kericho resident judge when the incident occurred and was temporarily relieved of his duties pending the determination of the criminal charges....”

4. It was further pleaded that the said publication was meant to injure the Plaintiff's reputation and is highly defamatory. That the imputation was that:

“(a) That the Plaintiff is unfit to hold the office of a judge.

(b) The Plaintiff had committed the crime of attempted murder.

(c) That the Plaintiff had resigned himself to the laws (sic) of his freedom and was shocked when he was acquitted.

(d) That the Plaintiff had been suspended and/or temporarily removed from the High Court bench on account of crime.

(e) That the Plaintiff was a person of bad character.

(f) That the Plaintiff was suspended/interdicted from his office as a judge of the high Court of Kenya

(g) That the Plaintiff is incapable of holding the office of a judge albeit temporarily.

(h) That the Plaintiff's is a person of high moral and ethical decadence and does not befit any just treatment before the law.”

5. The Defendants filed a joint Statement of Defence and denied the claim. It was denied that the words complained of were defamatory. It

was pleaded that the words were true in substance and were fair comment on matters of public interest. Further, and in the alternative, it was pleaded that the words complained about were published on an occasion of qualified privilege.

6. The Plaintiff filed a reply to the Defence, joined issues with the defence and reiterated the contents of the Plaintiff.

7. During the trial, the Plaintiff, PW1 George Benedict Maina Kariuki testified. He also adopted his witness statement as his evidence. The Plaintiff described himself as a judge of the High Court in Kericho at the material time, having been appointed as such in the year 2003. The Plaintiff stated that prior to the said appointment, he had practiced as an Advocate of the High Court of Kenya in the firm of GBM Kariuki & Co Advocates. That he was admitted to the bar in the year 1972 and was conferred the rank of Senior Counsel by His Excellency the President, Mwai Kibaki in the year 2003. The Plaintiff further stated that he was the Law Society of Kenya Chairman from the year 1985 to 1986.

8. Regarding the words complained of, the Plaintiff stated that although he was charged with the criminal case of attempted murder, the charges were trumped up. That there was no evidence in support of the charge and he ended up being acquitted. He pointed out that the words **“Judge on murder bid charge weeps with joy as court orders his release”** were not true. He stated that he was not shocked as the acquittal was not a surprise and neither did he weep with joy nor hug any relatives in court.

9. The Plaintiff further testified that the article read as a whole is libelous as the imputation was that he was guilty and had been let off the hook on a technicality. The Plaintiff further testified that he had not been relieved of his duties as a judge but had sought permission from the Hon. the Chief Justice not to sit when the case was ongoing and nor did he lose any of his benefits during the pendency of the case.

10. According to the Plaintiff, the article in question portrayed him, though freed, as culpable of the offence of murder; a person of bad character, bad tempered; morally decadent and unfit and not proper person to hold a public office or the office of a Judge and had been suspended and/or temporarily removed from the office of the Judge.

11. The Plaintiff's further evidence was that he wrote to the Defendants requesting for an apology but none was forthcoming. He subsequently filed suit.

12. During cross-examination, the Plaintiff reiterated that his complaint was about the falsehoods and stated that the Defendants had an obligation to publish the truth. That after the publication, there was no point of writing to the Defendants and explaining the truth as the horse had already bolted from the stable. The Plaintiff's view was that the impugned publication had left an indelible blot on his career.

13. DW1 Rachel Mburu testified on behalf of the Defendants. She also adopted her witness statement as her evidence. She described herself as a journalist with experience spanning over 12 years at the material time, specializing in reporting court cases especially matters that touch on public interest.

14. DW1 conceded to the publication of the article in question but denied that the same was defamatory. Her further evidence was that the Plaintiff herein faced a murder charge and was acquitted of the same. That what was reported was the correct position. That the Plaintiff was at the material time the Resident Judge at the High Court of Kenya in Kericho and was not performing his duties during the pendency of the case. According to DW1, her aim was to inform the public about the case in a matter of public interest.

15. At the close of the case the parties opted to file written submissions. I have considered the evidence on record and the submissions filed. The parties also filed a statement of agreed issues which I have also considered.

16. Defamation is defined in **Winfield in J.A. Jolowicz and T. Ellis Lewis – Winfield on Tort 8th Edition**, thus:

“Defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of the society generally, or which tends to make them shun or avoid that person.”

A defamatory statement, according to Gatley on Libel and Slander 8th Edition by Phillips Lewis paragraph 4 page 5 discredits a man or tends to lower him in the estimation of others or to expose him to hatred, contempt or ridicule or to injure his reputation in his office trade or profession or to injure his financial credit.”

17. 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.”

18. On qualified privileged, the case of **Raynolds v Times Newspaper Ltd [2001] AC 127** and **Flood v Times Newspapers Ltd [2012] 2 AC, 273** sets out the parameters to be considered when considering the defence of qualified privilege. It was stated, *inter alia*;

“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 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 statement of fact.**
- 10. The circumstances of the publication, including the timing.”**

19. The court was referred to Article 33 & 34 of the Constitution which guarantees the freedom of expression of the media. However, there are limitations set out in Article 34 of the Constitution. The Constitution balances the rights of freedom of expression with the rights and reputation of others. I am persuaded by the case of **Cheserem v Immediate Media Services (2000) 1EA 371 (CCK)** where it was stated;

“Before I conclude I will try to correct three things. First, the right of a journalist to freedom of speech and expression as guaranteed by the Constitution of Kenya is not absolute and it is not correct for the Respondents to say that, that right cannot be taken from the press. I have already discussed the limitation of the freedom of expression elsewhere. Secondly, it is not sufficient and I think it is dangerous and not good for a journalist to disseminate information based solely on good faith. He should base the information on factual truth if he expects the law to protect him. Thirdly, it is not correct to say as the Respondents say that; “Where public interest conflicts with private interest, the public interest shall prevail.” This is public interest (versus) private interest in defamation actions and the end result is not always the same. The result can be in favour of the public interest or in favour of the private interest. If there is a substantial risk of grave injustice and the private interest in preventing the publication the Applicant seeks to prevent outweighs the public interest, then the court will declare that private interest prevails over public interest, and from my discussion in this chamber summons dated the 13th March 2000, that is exactly the way I am ending this ruling.”

20. It is not in dispute that the words complained of were published by the Defendants concerning the Plaintiff. The issue is therefore whether the said words were defamatory and capable of bearing the meaning attributed to the same by the Plaintiff.

21. The impugned article was produced in court as an exhibit. The said article was headed **“Judge on murder bid charge weeps with joy as court orders his release.”** The article essentially reflects the following facts which are not disputed:

- (a) The charge was that of attempted murder and causing grievous harm.
- (b) The offence carried a life sentence.
- (c) The Plaintiff had denied the offence.
- (d) The prosecution failed in its burden of proof.
- (e) The Plaintiff was acquitted.
- (f) The prosecution witnesses contradicted themselves and were found to be untrustworthy and unreliable.
- (g) The trial magistrate accused the police of carrying out shoddy investigations.

(h) The summary of the submissions made by the Plaintiff.

22. The words that aggrieved the Plaintiff, that is, that he appeared shocked and openly wept with joy and hugged relatives remain the word of one party against the other. The Plaintiff's position is that the words did not reflect the truth while according to the newspaper reporter (DW1), the words were true.

23. On whether the Plaintiff was temporarily relieved of his duties, the Plaintiff's evidence was that he was not seating during the pendency of the criminal case. The Plaintiff's evidence was that he had written to the Hon. The Chief Justice and sought permission to be away from duty while the case was ongoing. On the other hand the evidence of DW1 is that the Plaintiff was not seating during the pendency of the criminal case. There was no evidence placed before this court to confirm the procedure followed when a judge is facing criminal proceedings visa viz the carrying out of official duties.

24. By and large, this court's view after considering the impugned article in its entirety is that it substantially reflected the truth. There was therefore no malice or recklessness. (See for example **Hon. Uhuru Muigai Kenyatta v Baraza Limited [2011] eKLR; Phineas Nyagah v Gitobu Imanyara 2013 eKLR**).

25. As stated in **Carter-ruck on libel and slander 5th Edition** at page 54:

“In order to succeed upon a plea of justification, the onus lies upon the Defendant to prove ‘that the whole of the defamatory matter complained of, that is to say, the words themselves, and any reasonable inference to be drawn from them are substantially true. On the other hand, for the defence to be successful, it is not necessary that every “t” should be crossed and every “I” dotted; it is sufficient if the substance of the libelious statement is justified. As much must “be justified as meets the sting of the charge and if anything contained in the charge which does not add to its sting that need not be justified.”

26. With the foregoing, I find the that Plaintiff's case was not proved on a balance of probabilities. However, this court will proceed to assess the damages that it would have awarded if the Plaintiff's case had succeeded.

27. The Plaintiff has prayed for general damages and aggravated damages. In the circumstances of the instant case, if the Plaintiff's case had succeed, he would have been entitled to general damages to compensate him for the harm caused to his reputation and the distress and humiliation caused by the defamatory publication (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**):

28. The Plaintiff submitted for an award of general damages at Ksh.10,000,000/= and Ksh.1,000,000/= punitive damages. The following cases were relied on:

(a) **Hon Henry Obwocha v Headlink Publishing Ltd (2014) (eKLR)** where an award of Ksh.15,000,000/= was made as general damages to a politician.

(b) **Daniel Musinga T/a Musinga & Co. HCCC No. 102 of 2000 (Mombasa)** an award of Ksh.10,000,000/= was made to a Judge of the Court of Appeal.

(c) **Johnson Evans Gicheru v Andrew Morton & another Civil Appeal No. 314 of 2000** where a composite award of Ksh.6,000,000/= was made to a judge of Court of Appeal.

d) **Charles Kariuki T/a Charles Kariuki & Co. Advocates HCCC No. 5 of 2000 (Meru)** where an award of Ksh.20,000,000/= was made to a senior advocate .

e) **Amirita Bhagwanji shah v Standard Limited & another Civil Case 1073 of 2004** where an award of Ksh.1,000,000/= was made as exemplary damages to a retired Court of Appeal Judge.

29. The Defendants side submitted that the award of Ksh.10,000,000/= suggested by the Plaintiff is manifestly excessive. The Defendants referred the court to the case of **Jones v Polland (1997) EMLR 233-243** on the guidelines to be followed. That is:

“1. The objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published and any repetition.

2. The subjective effect to the Plaintiff's feelings not only from the prominence itself but from the Defendant's conduct thereafter both upto and including the trial itself.

3. Matters tending to mitigate damages such as the publication of apology

4. Matters tending to reduce damages.

5. Vindication of the Plaintiff's reputation past and future.

30. It was submitted that no award of aggravated damages is necessary in the case at hand. It was argued that there was no recklessness or

malice.

31. As stated by the Court of Appeal in the case of **Miguna Miguna v The standard Group Ltd & 4 others [2017] eKLR** while quoting the case of **John v GM Limited [1993] QB 586**

“Aggravated damages will be ordered against a defendant who acts out of improper motive e.g. where it is attracted by malice; insistence on a flurry defence of justification or failure to apologize.”

32. I would assess general damages at Ksh.5,000,000/=. Although the Plaintiff did not exercise his right of reply under Section 7A of the Defamation Act and there was no evidence of republication, there was no apology and readership of the newspaper could have increased. I would have awarded Ksh.1,000,000/= aggravated damages.

33. In the final analysis, having held that the Plaintiff failed to prove his case on a balance of probabilities, I dismiss the case. Taking into account the circumstances of this case, each party shall bear own costs.

Date, signed and delivered at Nairobi this 16th day of Oct., 2018

B. THURANIRA JADEN

JUDGE