



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 1881 OF 2001

AHMED SHEIKH ADAN.....PLAINTIFF/RESPONDENT

- V E R S U S -

WANGETHI MWANGI.....1ST DEFENDANT/APPLICANT

NATION NEWSPAPER LIMITED.....2ND DEFENDANT/APPLICANT

JUDGEMENT

1) Ahmed Sheikh Adan, the plaintiff herein, filed an action against Wangethi Mwangi and Nation Newspaper Ltd, the 1st and 2nd defendants vide the plaint dated 1st November 2001 in which he sought for judgment in the following terms:

a) An Order that the defendants do make a full and unqualified apology, make amends and withdraw the said complained of publications/statements and such apology, amends and withdrawal to be given the widest circulation and prominence, similar to the complained of publications/ statements, and the same to be repeated three(3) times in the same media.

b) General, aggravated and exemplary damages for defamation, the quantum thereof to be determined by this honourable court.

c) Costs of this suit.

d) Interest on (b) above at the Commercial rate of 18% p.a from the date of judgment until full payment.

e) Such other and/or further relief as this honourable court might deem fit and just to grant in the unique circumstances of this matter.

2) The defendants filed a joint statement of defence to deny the plaintiff's claim.

3) When the suit came up for hearing, the plaintiff testified and summoned one witness to testify in support of his case. The defendants did not deem it fit to summon any witness in support of their defence.

4) Ahmed Sheikh Adan (PW1) was the first to take the witness box. PW1 told this court that on 31.1.2001 the defendants in their newspaper falsely, malicious, contemptuously and disparagingly published and or caused to be printed and published of and concerning him the following statement"

"As the trial of the 1998 US embassy bombing suspects open in New York City today, some of their associates are still in Kenya, according to a Nation Television investigations.

Fresh evidence shows that terrorist cells still exist in Kenya despite the arrest of several terrorists after the blasts in Nairobi and Dar-es-Salaam.

Twenty-two suspects have so far been indicted in the United States on charges related to the bombings. Thirteen of them, including mastermind Osama Bin Laden have so far not been arrested.

Kenyan intelligence sources said the Government had been aware of the presence of Osama bin Laden's agents in Kenya since 1993.

Investigations indicate that Kenyan intelligence operatives thrice disrupted terrorist plans that averted attacks in the country

before the August 7 raid.

The plots in Kenya were linked to a Lebanese-born US national Wadhi el Hage, now facing charges in the New York court, who lived in Nairobi from 1994 to 1997.

The terrorists operated in Kenya through private trading companies – Tanzanite Kings, Cyim Import and Exports and Banck Giant.

They also set up a number of non-governmental organisations – Mercy International Relief Agency, Help Africa People and Al Haramain Islamic Foundation – through which they channelled funds and the material they used to assemble the bombs.

Part of the evidence gathered by Kenyan intelligence in conjunction with the American Central Intelligence Agency (CIA) through electronic surveillance and a raid at El Wadhi's residence at Fedha Estate, Nairobi, in August 1998 is expected to be adduced in the New York courts.

A Kenyan of Somali origin, who was a director of Mercy International Relief Agency, is still living in Nairobi and is a student at the university of Nairobi taking a parallel law degree course, sources said.

Security officials have evidence that the Kenyan's mobile phone was used 12 times by Wadhi to talk to Osama bin Laden or his associates.

Some of the intercepted telephone conversations give incriminating evidence of the existence of the Al Qaida operations in Kenya, mainly in Nairobi, Mombasa and Malindi.

Electronic surveillance reportedly showed that the terrorists used wireless telecommunications to speak to Bin Laden in Afghanistan and his associates in Baku, Azerbaijan.

In one message intercepted in February 1997, Wadhi was instructed to pass a message to his agents to open their wireless system "every Monday and Thursday from 4 pm to 4.30".

Another call intercepted on August 13, 14 1997 indicates that Wadhi had gone to Afghanistan "to see the big boss (Osama bin Laden)".

Intelligence sources say that the infiltration of Mujahedeen fighters from Afghanistan into Africa, especially into Kenya was because of security lapses and corruption.

Some of the terrorists are said to have either Kenyan passports or national identity cards."

5) The plaintiff further stated that on 2nd January 2001, a similar publication as the above quoted excerpt was also broadcast on the Nation Television and Nation Radio being media channels associated and or owned by the 2nd defendant.

6) PW1 stated that at the time of the publication he was a module II Law (parallel programme) student at the University of Nairobi. He also said that he was the only Somali student doing a parallel law degree programme and that as a result of the offensive publication he was treated and commonly referred to as a terrorist.

7) The plaintiff further stated that he is currently an advocate of the High Court of 15 years standing. PW1 also said that at the time of the publication he was a director of an NGO by the name **Mercy International Relief Agency**.

8) In cross-examination, PW1 admitted that his name was not mentioned in the publication. He also stated the publication did not have his photographs. PW1 said he was not sure of the year he graduated with a law degree from the University of Nairobi. He stated that the publication referred to a student undertaking a parallel law degree which he believed the article was referring to him.

9) The plaintiff further admitted in cross-examination that he did not produce any document to show that he was a student or a graduate of the University of Nairobi. He further failed to tender any documentary evidence to show that he was a director or that he was associated with **Mercy International Relief Agency**.

10) The plaintiff also summoned one Michael Mubea (PW2) to testify in support of his case. PW2 stated that he was admitted to the University of Nairobi to pursue a law degree in 1998 and that he graduated in 2001 together with the plaintiff and that they were both admitted to the bar in 2003. PW2 further stated that PW1 was the only Kenyan of Somali origin in his class. PW2 stated that he was shocked when he read the publication after which he heard people referring to the plaintiff in derogatory words like a terrorist, alshabab, Osama Bin Laden, Al Qaeda etc.

11) In cross-examination PW2 admitted that he did not tender any documentary evidence proving that the plaintiff was his classmate at the University of Nairobi. He also averred that he did not state in court his student registration number nor the award he received. PW2 also stated that the publication referred to the plaintiff by description and not by name. PW2 further stated that other than his oral assertion that the plaintiff was his classmate, he did not tender other relevant evidence to prove that the plaintiff was indeed a student of the University of Nairobi at the time of the publication of the offensive article.

12) The defendants closed their case without summoning witnesses to testify in support of their defence. At the close of the evidence, learned counsels were invited to file and exchange written submissions which they did. Having considered the rival written submissions plus the evidence presented, the following issues commend themselves for determination:

i. Whether the words complained of in the offensive publication referred to the plaintiff.

ii. Whether the words complained of in the impugned newspaper article in their ordinary and natural meaning are defamatory of the plaintiff's character reputation, professional and social standing.

iii. Whether the words complained of are fair comment on matters of public interest.

iv. Whether the plaintiff is entitled to an award of damages in the suit.

13) On the first issue as to whether the offensive words referred to the plaintiff, it is the submission of the plaintiff that the correspondences and or documents exchanged between the plaintiff's advocate and the defendant's advocate, show that the statements complained of were published in respect of the plaintiff.

14) The plaintiff stated that at the time he was a director of the NGO known as **Mercy International Relief Agency**. The plaintiff further stated that he was the only Kenyan student of Somali origin pursuing a law degree and averred that Michael Mubea had corroborated his evidence.

15) It is the submission of the defendant that the words published did not refer to the plaintiff at all. It was pointed out that the plaintiff was not referred by name and neither his photographs were published alongside the publication.

16) Having considered the competing submissions and the evidence tendered by the plaintiff, it is important to first set out the ingredients which must exist to prove the tort of defamation. In the case of **Brian Odhiambo Oluoch =vs= Standard Chartered Bank Ltd (2017) eKLR** this court restated those principles as follows:

i. The matter to which the plaintiff complains about was published by the defendant.

ii. The publication concerned or referred to the plaintiff.

iii. That it is defamatory in character.

iv. That it was published maliciously and

v. That in slander, subject to certain exceptions, that the plaintiff has thereby suffered special damage.

17) The defendant does not dispute that it published the words complained of. The question which has to be determined is whether those words published, referred to the plaintiff.

18) In the treatise of **Gatley on Libel and Slander 9th Edition P. 161** it is stated as follows:

“To succeed in an action for defamation, the plaintiff must not only prove that the defendant published the words and that they are defamatory, he must also identify himself as the person defamed..... It is an essential element that the cause of action for defamation that the words complained of should be published of the plaintiff.”

19) It would appear that the statement must identify the plaintiff or refer to the plaintiff. In other words, the words must be understood to refer to the plaintiff. It is admitted that the words complained of did not mention the plaintiff by name or by use of his photographs.

20) The plaintiff picked the relevant portions of the statement which he believed referred to him. He specifically identified the following descriptions:

a) A Kenyan of Somali origin.

b) Who ws a director of Mercy International Relief Agency.

c) Is still living in Nairobi.

d) Is a student at the University of Nairobi pursuing a parallel law degree.

21) It is clear in my mind that the above descriptions refer to a class of people being Kenyans. It also referred generally to students at the University of Nairobi who were pursuing a parallel law degree course. It was incumbent upon the plaintiff to tender credible evidence establishing his Somali origin. He has also failed to present evidence proving that he was the only student fitting the description given in the newspaper statement as at the date of the publication.

22) It is also apparent that the plaintiff failed to present evidence proving he was a director of the NGO known as Mercy International Relief Agency at the time of the publication. The plaintiff further failed to tender credible evidence in form of a admission letter, graduation booklet or even certificates showing he was a student of the University of Nairobi. The evidence the plaintiff and his witness tendered were unreliable.

23) It was important to bring out documents showing that at the material time the plaintiff was indeed a student at the University of Nairobi. In fact the plaintiff was unable to even remember the year and date he graduated from the University of Nairobi. The plaintiff could have been a student at the University of Nairobi but may be in a different date other than the date of the publication. If indeed, the plaintiff was a student at the University of Nairobi then why was it so difficult for him to produce documentary evidence proving that. I can only infer that the documents he had if any were detrimental to his case and that is why he together with his witness, PW2 did not deem it fit to produce those documents. It is not difficult to produce a letter of admission or even a letter from the relevant authorities of the university. I have come to the conclusion that the plaintiff failed to tender evidence that the words complained of, refer to and concerned him.

24) The second issue to be determined is whether the words complained of were defamatory of the plaintiff. I have already stated that the plaintiff has expressly averred that he was injured by the publication. He said that the publication referred to his as a terrorist and that the defendant's denial cannot stand. On the other hand the defendants are of the view that the words complained of were not defamatory of the plaintiff.

25) In my humble estimation, if the publication is proved to be false, then the only conclusion the court can make, is that the publication was meant to disparage the character of the person referred by the publication. In my view, the publication tends to lower the reputation of the person whose name is mentioned therein. However, since I have formed the opinion that the publication did not refer to the plaintiff, then it cannot be said that the plaintiff was defamed.

26) The third issue is whether the publication can be said to be a fair comment on a matter of public interest. It is the submission of the plaintiff that the defence of fair comment is not available to the defendants since the publication is protected as qualified privilege under Section 7 of the Defamation Act. The plaintiff further argued that the defendants failed to present a defence to establish the defence of fair comment. With respect, I am persuaded by the arguments of the plaintiff. the defendants are enjoined by law to establish the defence of fair comment by tendering credible evidence which they failed to do so in this matter.

27) The final issue is whether or not the plaintiff is entitled to damages for defamation. It is obvious that having failed to prove his case on a balance of probabilities that the plaintiff is not entitled to damages. Consequently, this suit is ordered dismissed with costs to the defendants.

28) However, had the plaintiff proved his case to the required Standard in civil cases, I would have awarded him a sum of ksh.10,000,000/= as general damages for defamation and ksh.2,000,000/= for aggravated and or exemplary damages plus costs and interest at court rates from date of judgement until full payment.

Dated, Signed and Delivered in open court this 9th day of November, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendants