



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO.1009 OF 2005

GRACE WANGUI NGENYE.....PLAINTIFF

VERSUS

CHRIS KIRUBI.....1ST DEFENDANT

CAPITAL GROUP LIMITED.....2ND DEFENDANT

JUDGMENT

The plaintiff herein brought her suit against the defendants by way of a plaint dated the 10th day of August, 2005 seeking the following prayers;-

- a) A permanent injunction restraining the defendants, their servants, employees and/or agents from airing, broadcasting, publishing and/or causing to be aired, broadcast and/or published, materials or matters defamatory or injurious concerning and relating to the plaintiff in any manner whatsoever.**
- b) General damages**
- c) Aggravated and/or exemplary damages.**
- d) Cost of the suit**
- e) Interests on (b) (c) and (d) above.**

The suit is premised on a defamatory broadcast by the 2nd Defendant aired on the 2nd Defendant's FM Radio Station known as Capital FM as the headline news at 6.00p.m. in the evening of the 27th June 2005 read by their Newscaster, ERIC LATIFF.

The Defendants entered appearance on the 31st day of August, 2005 and subsequently filed a statement of Defence dated the 13th September 2005.

The plaintiff filed a reply to defence on the 21st September, 2005

By way of chamber summons dated the 16th February, 2006, the plaintiff applied to strike out the defence and for judgment to be entered against the Defendants. The Defendants in turn filed chamber summons dated 20th December, 2005 seeking to strike out the suit against the 1st Defendant for improper joinder.

The two applications were heard together and the plaintiff's application dated the 16th February 2006 was dismissed with costs while that of the Defendants was allowed. The plaintiff appealed against both the decisions and on the 11th day of December 2015, the Court of Appeal dismissed the appeal against the decision of the superior court and struck out the defence of the 2nd defendant but also upheld the decision to strike out the suit against the 1st Defendant. This paved the way to setting down the matter for formal proof, the issue of liability having been settled by the decision of the Court of Appeal.

The matter came up for formal proof on the 28th day of June 2018, when the plaintiff testified and called one witness in support her case. It was her evidence that she is a Judge of the High Court and has been in the bench for the last 18 years. She stated that in the year 2005, she

was serving as an Acting Senior Resident Magistrate at Machakos Law Courts and on the 23rd June, 2005, there was an administrative action by the judiciary transferring over 40 magistrates country wide and she happened to be one of them.

That, the transfer had been effected vide a letter dated the 23rd June, 2005, in which, she had been given three months to complete her matters before leaving the station to Homa Bay Law Courts which was her new station. It was her evidence that on the 25th June, 2005 at Chumvi in Machakos, some people died after consuming illicit brew and for reasons not known to herself, the Media houses took up the story and connected her transfer and that of her colleague called Peter Muriuki to the illicit brew case. She named the 2nd Defendant as one of those media houses.

She testified that the broadcast was aired on 27th June 2005 in the late afternoon when she was driving from Machakos to her house in Buruburu. That, while on Mombasa road, her husband Mr. Macharia called her and asked her whether she had tuned in to Capital FM Radio Station and whether she had heard the news that were cast. She immediately tuned in and though the news had passed, there were news brief that kept switching to the effect that people had died out of illicit brew and that some magistrates had been transferred.

Before she got home, she bought a disc and used it to tape the news and she confirmed that what she had been told about the news was factual; that she had been transferred to Homa Bay because of her involvement in the killer illicit brew. She stated that, it was not true because the news came long after she had received her transfer letter and she was only clearing her backlog as she awaited to proceed on transfer. She denied being that prime woman who is alluded to, in the tape, and that she went into hiding.

It was her evidence that before the broadcast, the Defendant did not interview her or ask for clarification. She stated that after the broadcast, the Registrar of judiciary summoned her and sought to know the circumstances under which her name was mentioned and she explained that the matter had not even come to court. A press release by the Relations Officer of the judiciary was sent to all the media houses confirming that the news that were going round the Machakos magistrates courts on illicit brew, was false and an attack on the judiciary. That the press release also clarified that her transfer and that of her colleague were effected before the tragedy and had nothing to do with it.

She testified that even after the press release, the 2nd Defendant did not write to her to apologize and even after the demand letter was dispatched to the Defendants, they denied having broadcast any falsehoods or defamatory news of herself. They denied liability in toto but stood by the story as true. It was her evidence that the story was not true and just to demonstrate that the story was false, she was shortly thereafter, confirmed as a Senior Resident Magistrate which could not have happened if the story was true. She produced the confirmation letter dated the 23rd January, 2006 which was done six months after the broadcast. She stated that before the broadcast, she had not handled any case to do with illicit brew because any pleas were taken by Court 1 and in its absence, by Court 2.

It was her evidence that the broadcast had a nose dive on her career and as a family person. That most of the family members heard the News and she was called from far and wide by her friends seeking to know how she was involved. The family members who called her included her brothers, sisters and other close family members. She was also called by church members. That following the broadcast, some people disassociated themselves with her and todate people keep asking her what happened to the case. That the issue has also arisen in her career and it's not once or twice that she has been asked how she was involved in the chumvi illicit brew case because it was a tragic case. That the incident has not been eroded in people's minds including her employer and people keep wondering whether it is true that she was involved.

In cross-examination, she stated that the letter dated 23rd June 2005 effected her transfer but she received it on the 27th June 2005. She stated that the substance of the defamation and the text thereof are set out in the letter dated 26th July, 2005 and the content of the transfer was broadcast together with that of the deaths. It was her evidence that she has preferred suits against the Nation and Standard Newspapers as well. She averred that the defendants have not denied that she was the person referred to, in the broadcast.

Paul Mugo Chege gave evidence as PW2. He is an Advocate of the High Court of Kenya and has practiced for 25 years. He testified that on the 27th June, 2005, he was driving home and was listening to Capital FM Radio when at 6p.m, news that came in were that 50 people had died out of consuming illicit brew and several others had been hospitalized. The name of the plaintiff and another magistrate called Mr. Muriuki were mentioned as having been transferred following that tragedy. The same news were repeated at 7p.m. and he called the plaintiff's husband who said he was not listening to the Radio then but at about 9p.m, the plaintiff's husband called him and told him that his wife (the plaintiff) had gone home distraught and had informed him about the broadcast. The witness stated that he has known the plaintiff for many years since they were at Parklands University and when she was in practice. He told the court that he was taken aback by the news because the broadcast made the plaintiff look like a heartless person who does not care whether or not Kenyans die due to illicit brew, the major complaint being that, courts were not dealing with the brewers the way they were supposed to, and to a right thinking member of the society, there was corruption on the part of the plaintiff.

The witness testified that, the broadcast grouped the plaintiff together with police officers, assistant chiefs, two chiefs who were said to be facilitating this illegal trade. That in the course of his court attendances after the broadcast, he met with several of his colleagues who discussed the plaintiff in bad light saying that she is a corrupt and an incompetent judicial officer and that people did not understand how she went through vetting. According to him, he knows the plaintiff as an honest person who has worked so hard to rise through the ranks in the judiciary. He stated that he was very disheartened and that the damage caused by the broadcast is still being felt to date and the plaintiff is not as outgoing as she used to be before, not only to him but to the other friends. It was his evidence that the character depicted in the broadcast is not the character that he has known of the plaintiff over the years and no amount of money can bring the plaintiff's reputation to where it was before the broadcast.

In cross-examination, he stated that Capital FM radio is a favourite station with most people and he denied the assertion by Counsel for the 2nd Defendant that broadcast on radio is a passive way of passing news. He stated that the colleagues he spoke to, said that they had heard the broadcast and they specified the Capital FM Radio.

The court has considered the evidence on record and the submissions by the learned Counsel for the respective parties. As I had stated earlier, the issue of liability was settled by the Court of Appeal and the only issue for determination is the quantum of damages. In the case

of **Jones Vs. Pollard (1997) EALR 23, 243**, the court drew a checklist of compensable factors in libel actions as follows;

- (1) *The objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it was published, and any repetition.*
- (2) *The subjective effects on the plaintiff's feelings not only from the prominence itself, but from the Defendant's conduct thereafter both up to and including the trial itself.*
- (3) *Matters tending to mitigate damages, such as publication of an apology.*
- (4) *Matters tending to reduce damages; and*
- (5) *Vindication of the plaintiff's reputation past and future.*

Before I delve into quantum of damages to be awarded to the plaintiff, it is trite that the latitude in awarding damages in an action for libel is very wide as was enunciated in the Court of Appeal case of **Johnson Evan Gicheru Vs. Andrew Morton & Another CA No. 314 of 2000** where the court of Appeal stated;

“No case is like the other. In exercise of discretion to award damages for defamation, the court has wide latitude.”

In the case of **Standard Media Vs. Kagia & Co. Advocates**, the court took the view that in situations where the author or publisher of a libel could have, with due diligence, verified the libelous story or in other words, where the author or publisher was reckless or negligent, the factors in Jones's case should be taken into account in assessing the level of damages. The court also stated that the level of damages awarded should be such as to act as deterrence and to instill a sense of responsibility on the part of the authors and the publishers of libel and that the personal rights, freedoms and values should never be sacrificed at the altar of profiteering by authors and publishers.

Being guided by the checklist in the case of **Jones Vs. Pollard (supra)** and the submissions by the parties, it is not denied that at the material time, the plaintiff was an acting Senior Resident Magistrate based at Machakos Chief Magistrate's Court. The bulletin was repeated every so often at intervals of a few minutes. The plaintiff testified that she was summoned by the Registrar of the High Court and asked to explain under what circumstances her name was mentioned.

The evidence of PW2 is that Capital FM is a radio of choice to most professionals particularly Advocates because it is friendly and has a wide coverage and that ordinarily, the professionals who know the plaintiff would have listened to the 2nd defendant's radio. To attest to this fact, PW2 further stated that he heard his professional colleagues discuss the plaintiff in the court corridors saying that she is corrupt and incompetent.

Further, the plaintiff stated that she was called by her friends, family and church members trying to find out whether the news were true. This, no doubt means that the broadcast was heard far and wide. It was the plaintiff's further evidence that the offending broadcast pops up whenever any person across the globe undertakes a search in the name of the plaintiff, Grace Wangui Ngenye, especially on www.capital.fm.co.ke. The court notes that though this fact was denied by the defendant, it was done by way of submissions and since no evidence was offered by the defendant, the weight to be attached to that assertion can only be minimal because the same was not tested by way of cross-examination.

As a demonstration that the story was not true, the plaintiff proceeded to Homa Bay Law Courts and almost immediately thereafter, she was confirmed as a Senior Resident Magistrate. Had the story been true, she would not have been promoted, which therefore means that she is a judicial officer of integrity but following the broadcast, some people disassociated themselves with her and to date, some people keep asking her about that incident. The question also arises in her career and especially when she attends promotion interviews.

The character of the plaintiff as testified by PW2 is that she is an honest person who has worked diligently to achieve her current status in the judiciary. The broadcast has affected her social interaction with her friends and she is no longer outgoing as she used to be, because her image is shattered.

In an action of libel, the trial court in assessing damages is entitled to look at the whole conduct of the defendant from the time the libel was published down to the time the verdict is given. It may consider what the conduct of the defendant has been, before action, after action, and in court during the trial. See **Praud Vs. Graham 24 Q.B.D. 53, 55**.

In Broom Vs. Cassel & Co. (1972) A.C, 1027, the house of Lords stated that in actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of restitution in integrum has necessarily an even more highly subjective element. Such actions involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, but, in case the libel, driven underground emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a by-stander of the baselessness of the charges.

As **Windeyer J**, well said in **Uren Vs. John Fairfax & Sons Pty Limited 117 C.L.R.115,150**;

“It seems to me that, properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways – as a vindication of the plaintiff to the public and as a consolation to him for

a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money”.

The plaintiff has also claimed aggravated and exemplary damages. In the English Case of **John Vs. MGN limited (1996) 2 All E.R. 35**, the court held;

“The successful plaintiff in a defamation action is entitled to recover the general compensatory damages such sum as will compensate him for the wrong he has suffered. That must compensate him for damages to his reputation, vindicate his name, and take into account the distress, hurt and humiliation which the defamatory publication caused.....”

Exemplary damages on the other hand goes beyond compensation and are meant to “punish” the defendant. Aggravated damages will be ordered against a defendant who acts not of proper motive e.g. where it is attracted by malice, Insistence on a flimsy defence of justification or failure to apologize.

The evidence on record is that before the defendant broadcast the news, they did not bother to contact the plaintiff and get her part of the story or/and verify the correctness of the contents of the broadcast. Had the defendants bothered to contact the plaintiff before the broadcast, they would have been informed that the plaintiff did not handle pleas and that the case of the illicit brew had not even reached the courts and therefore they would not have broadcast the news as they did. But they did not do so. On the 28th June 2005, the Registrar of the judiciary issued a press statement seeking to explain the reasons of the plaintiff’s transfer and clarified that it was a normal transfer and had nothing to do with the illicit brew but, that notwithstanding, the defendant still refused to retract the story or apologize to the plaintiff. Further, upon receiving the demand letter from the plaintiff’s advocate, the defendant tried to justify the broadcast and insisted on a defence of justification notwithstanding that the truth of the matter had been laid bare by the press release by the Registrar of the judiciary.

When the matter finally landed in court, the defendants filed a defence which was struck out by the Court of Appeal as it did not raise any triable issues. In view of the foregoing, the court finds that this is a perfect case in which, the plaintiff deserves aggravated damages and damages in lieu of apology.

On damages, the plaintiff has asked the court to award a sum of Kshs.20,000,000 and has relied on the cases of **Johnson Evans Gicheru Vs. Andrew Morton & Michael O’mare Broks Limited Civil Appeal No. 314 of 2000 (Nairobi)** where a sum of Kshs.6,000,000 was awarded to the plaintiff who was a judicial officer who, according to the plaintiff, had reached the sleeping time and had crossed all the rivers and climbed all the mountains as at the time of the defamation unlike the plaintiff herein who still has rivers to cross and mountains to climb before she could sleep. The plaintiff also relied on the case of **George Nthenge Vs. Nation Media Group (2001) eKLR HCCC. No.1354/2004** Nairobi in which a sum of Kshs.5,000,000 was awarded as general damages and Kshs.2,000,000 as aggravated damages. The plaintiff submitted that the damage to the plaintiff in the case herein is mind boggling in terms of the arrogance of the 2nd Defendant and its refusal to apologize. The case of **Daniel Musinga T/A Musinga & Co. Advocates Vs. Philip Ochieng & Co. & Another HCCC No. 4856 of 1990** where a sum of Kshs.18,000,000 was awarded as general damages and Kshs.2,000,000 as aggravated damages, was referred to.

On the part of the 2nd Defendant, the court was asked to award Kshs.1,750,000 as general and aggravated damages. The 2nd defendant relied on the case of **Standard Limited Vs. Kagia T/A Kagia & Co. Advocates (2010) eKLR** where an award of Kshs.6,000,000 made by the High Court was reduced to Kshs.3,000,000 by the Court of Appeal. The case of **Francis Xavier Ole Kaparo Vs. Standard Limited & Another (2010)eKLR** was also relied on, in which the plaintiff was awarded Kshs.7,000,000/-.

The court has considered the authorities cited and find that the awards made in the authorities cited by the plaintiff are on the higher side while those cited by the Defendant are on the lower side. All considered, that is, the station of life of the plaintiff, the circulation of the broadcast and the effect it had on her reputation, it is the considered view of the court that a sum of Kshs.5,000,000 is reasonable to compensate the plaintiff as general damages, Kshs.3,000,000 as aggravated damages and Kshs.1,000,000 in lieu of apology.

Accordingly the court enters judgment in favour of the plaintiff as follows;

- (A) General damages Kshs.5,000,000.
- (B) Aggravated damages – Kshs.3,000,000
- (C) Damages in lieu of apology Kshs.1,000,000

The plaintiff is awarded the costs of the suit.

General damages shall earn interest from the date of this judgment.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 15th day of **November, 2018**

.....

L. NJUGUNA

JUDGE

In the presence of:-

..... **For the Plaintiff**

..... **For the Defendant**