



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL CASE NO. 76 OF 2009

WARIO SALA GUYO.....PLAINTIFF

VS

THE STANDARD L.T.D.....DEFENDANT

JUDGMENT

[1] The plaintiff **WARIO SALA GUYO** filed this suit against the defendant **THE STANDARD L.T.D** in a plaint dated 18th June, 2009 seeking for general and special damages for defamation of character, arising from the defendant's publication published on 24th January 2009 together with costs and interests. The impugned article was titled '**Hospital Staff Arrested Over Missing Car Parts**' and it stated as follows:

The criminal investigations Department (CID) is holding some General Hospital senior officials over missing parts of the state vehicles that were scheduled for sale to the public. They were arrested after prospective buyers complained the vehicles had missing parts. The officials under investigations, since Wednesday, include Isiolo General Hospital's Transport Officer Christopher Kimathi and the Public Health Officer Sala Wario. Two mechanics were also arrested between Wednesday and yesterday morning. Businessman Mr. Anthony Muthua had paid Shs. 320,000 for a stalled Nissan patrol on January 5 but when he turned up to collect it on Wednesday, he found the gearbox, front and rear propeller shafts had been removed. The vehicle belonged to the public health department. "I was shocked. The hospital management could not explain how or when the vehicle had been vandalized. I went to the CID and lodged complaint," Muthua said. A senior police source said the suspects had helped police to recover some of the parts, and more arrests are expected.

[2] It is the plaintiff's case that the words in the said whole article were false, malicious and seriously injured his character, integrity, reputation and professionally brought into public hatred, ridicule, odium and contempt.

[3] On the part of the defendant vide his defence dated 20th July 2009 it admitted to publishing the words stated by the plaintiff but denies that the words complained of were defamatory and put the plaintiff to strict proof. That the words were expressions of opinion; they were fair comment on true facts on a matter of great public interest. It denied that the plaintiff was injured in his character, integrity, reputation, in his profession or exposed to any public hatred. In the alternative and without prejudice the defendant pleaded defence of justification. Furthermore that the plaintiff failed to exercise his right and or mitigate his alleged loss under **Section 7 'A' of the Defamation Act CAP 36 (1992)**.

[4] In a reply to defence dated 23rd July 2009 the plaintiff reaffirmed his averments as stated in the plaint and denied the defence made by the defendant and put it to strict proof.

[5] At the hearing of this suit the plaintiff testified on oath as **PW1** adopting his statement dated 16th December 2015 and his documents filed on 16th December 2018 as his evidence. He told the court that he was the district public health officer situated at the DC's office and not at the hospital but the one defamed by the article. He does not have any documentation to show that he was the district public health officer for Isiolo at the time of the publication.

[6] **PW2 Christopher Kimathi Kirimi** adopted his statement signed on 16th December 2015 as evidence in chief. He averred that he knows the plaintiff who was District Public Health officer Isiolo working under the officer in charge of Isiolo Hospital. Sala Wario the name appearing in the article refers to the plaintiff and not any other person.

[7] At the close of the plaintiff's case, the defendant did not call any witnesses. The matter was then directed to be canvassed by way of written submissions.

[8] The plaintiff submitted that the words by the defendant were libelous as they portrayed him as an unprofessional and a criminal thus unfit to work in public offices. Failure on the part of the defendant to inquire into the true facts and position shows malice on its part. Moreover, its statement of defence is not substantiated in any way. That before the defence of fair comment can succeed the following ingredients must be fulfilled by the defendant which it has totally failed to prove: that the facts must be correct, the comments must be on a matter of public interest, and the opinion must be honestly held by the writer. Since the defendant refused to apologize bearing in mind that the plaintiff's sole source of livelihood is from his employment which was threatened by the libel not forgetting the damages inflicted professionally and psychologically it is only fair that the plaintiff be awarded a sum which befits the magnitude; as well as costs of the suit plus interest. On the other hand, the defendant has failed to file their submissions.

ANALYSIS AND DETERMINATION

[9] The issues of determination before this court are: *whether or not the plaintiff's character, integrity and reputation was injured as a result of the defendant's actions of publishing false information about the plaintiff and who should meet the costs of the suit.*

[10] According to the Black's Law Dictionary, 9th Edition at page 479 it defines defamation as

"the act of harming the reputation of another by making a false statement to a third person."

Hence, the words complained of must be shown to have injured the reputation, character or dignity of the plaintiff. The burden of proving this is on the plaintiff to demonstrate that a reasonable person would not have understood the words otherwise than being defamatory. Evidence that shows that the defendant knew that the said words were false or did not care to verify their authenticity; this is evidence of malice. The ingredients relied upon by the court in order to determine whether libel or slander has been committed were stipulated in the case of John Ward v Standard Limited [2006] eKLR where J. L. A. Osiemo J stated that:

"A statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule, or contempt or which causes him to be shunned or avoided or which has a tendency to injure him in his office, profession or calling.

The ingredients of defamation are:

- (i) the statement must be defamatory**
- (ii) the statement must refer to the plaintiff**
- (iii) the statement must be published by the defendant**
- (iv) the statement must be false."**

[11] The defendant does not dispute that it published the impugned article. However, it alleged that the words complained of were expressions of opinion on a matter of great public interest. Also that it is a fact that the state vehicles at Isiolo General Hospital were scheduled for sale to the public; that prospective buyers from the public complained that the vehicles had missing parts and indeed one motor vehicle Nissan Patrol belonging to the Public Health Department was found without the gear box, front and rear propeller shafts missing; that the plaintiff is a senior official at Isiolo General Hospital Public Health Department; the plaintiff was arrested by two CID officers outside Isiolo police station; and that the Isiolo General Hospital's transport officer and two mechanics were arrested in connection with the missing parts.

[12] The defendant relied on **Section 15 of the Defamation Act** of which the plaintiff stated that it is not available to them. **Section 15** states as follows:

"In any action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved."

The Supreme Court of Canada in the case of WIC Radio Ltd. v. Simpson, [2008] 2 S.C. R. 420, 2008 SCC 40 making reference to the case of Cherneskey v. Armadale Publishers Ltd., [1979] 1 S.C. R. 1067 pointed out the requirements and or elements of the defence of fair comment as follows:

- "(a) The comment must be on a matter of public interest.***
- (b) The comment must be based on fact.***
- (c) The comment though it can include inference of fact must be recognizable as a comment.***
- (d) The comment must satisfy the following objective test could any person honestly express that the opinion on the proved facts.***
- (e) Even though the comment satisfies the objective test, the defence can be deflated if the plaintiff proves that the defendant was***

actuated by express malice.”

[13] If the defendant admits that the words published and in question are true in substance and fact then the onus shifts to the defendant. This expressed by J. L. A Osiemo J in John Ward case (supra) that:

“The defendant concedes to have published the words complained of, but submits that they were true in substance and fact. Since the law presumes that every person is of good repute until the contrary is proved, it is the defendant to prove affirmatively that the defamatory words are true or substantially true. The defence of justification asserts that the sting of the defamatory statement in its proper context is true in substance and in fact.

The law presumes that the defamatory words are false and it is upon the defendant to satisfy the court that the statement which is justified is true in substance and in fact.”

[14] From his evidence, the plaintiff stated that on the 24th January 2009 while he was still sleeping he received calls from people asking him whether he had been arrested since that was what had been reported in the Standard Newspaper. He affirmed that he has never been arrested. The law presumes that every person is of good repute and the onus was on the defendant to show that the said persons they had mentioned in the article were indeed arrested as alleged. However, they failed to do so since it was the one that alleged that the said persons had been arrested.

[15] In the alternative, the defendant relies on the defence that the plaintiff failed to exercise his right and failed to mitigate his alleged loss under **Section 7 ‘A’ of the Defamation Act CAP 36**. This section provides for a right to reply where under a person is aggrieved by the newspaper publication may provide for a rebuttal or clarification which the newspaper is bound to carry with the same prominence the impugned publication and at the earliest opportunity. The plaintiff claimed in his plaint and submission that he reached out to the defendant but it never offered any amends and refused to apologize. The defendant being the party that contends that the plaintiff failed to exercise his right and to mitigate his loss and wishes this court to believe so it is consequently placed with that onus to prove that particular fact as captured by **Section 107 and 109 of the Evidence Act**; of which it has failed to do so.

[16] For the article to be regarded defamatory, it must be referring to the plaintiff. According to the defendant it acknowledged that the plaintiff is a senior official at Isiolo General Hospital Public Health Department. During cross-examination the plaintiff stated that he has no document to show that he was the District Public Health Officer for Isiolo at the time of the publication. The article refers to Mr. Sala Wario of which he agreed is a common name among the Borana community but the only staff by that name. **PW2** reiterated that article referred to the plaintiff and not any other person.

[17] The name written in the impugned article is ‘... **Public Health Officer Sala Wario**’. The plaintiff fell short of not producing a payslip or a register of staff to show that it was indeed him that the publication was referring to taking into consideration that the name is common in the Borana community. Such evidence would have clarified and shown that he was the only staff by that name as declared by him. However, he produced one witness to corroborate his testimony. Nevertheless, I am of the view that this is not substantial proof. The identity of the person in the article has not been demonstrated to be referring to the plaintiff himself. The fact is that the plaintiff had the obligation to prove to this court that the person in the article was him taking into account that the name is a common name. He ought to have gone the extra mile and proved that it was him the article referred to. He produced only certificates of qualification as such officer but did not produce any proof that he was the public health officer for Isiolo at the time of the publication. Such is not an example of a properly argued case for such information is readily available in the records of the government. Or at least some confirmation thereof from the relevant employer would have been necessary. I am not arguing his case but I am simply showing that he failed to prove that the article referred to him.

[18] From the foregoing, I take the view that important requirements of defamation have not been met especially that the public health officer mentioned in the article was the plaintiff and no one else. Therefore, the suit must fail, and is dismissed. But given the analysis I have carried out above, this is a fit case to order and I do order that each party shall bear own costs.

Dated, signed and delivered in open court at Meru this 14th day of December 2018.

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F. GIKONYO

JUDGE

In presence of

Kariuki for Githae for defendant

Kimathi for Kaimenyi for plaintiff

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F. GIKONYO

JUDGE