



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1361 OF 2003

J.P. M T/A M & CO. ADVOCATESPLAINTIFF

VERSUS

WANGETHI MWANGI1ST DEFENDANT

NATION NEWSPAPERS LIMITED 2ND DEFENDANT

JUDGMENT

The plaintiff is an advocate of the High Court of Kenya practising law in Nairobi in the name and style of M & Company Advocates. On 28th November, 2003 there was published in the “Daily Nation” newspaper a picture of the plaintiff with a lady with a title **“CHILDREN SUE LAYWER FOR THEIR UPKEEP BILL”**. There followed an article thereunder which I shall cite shortly hereunder.

The plaintiff considered the said publication defamatory and brought this suit against the 1st defendant, as Editor In Chief of the “Daily Nation” newspaper and the 2nd defendant a Limited Liability Company as proprietor and publisher of the “Daily Nation” newspaper. The particulars of the article were as follows,

“Two children have sued their alleged father – a Nairobi Lawyer, J P M for maintenance.

The children, one aged three and the other one sued their alleged father through their mother, Mrs. C G M M.

They now want their alleged father to be compelled to provide for their upkeep. In a plaint that was filed yesterday at the Children’s Court, Mrs. M claimed that she cohabited with Mr. M for the last five years since May 1999. She claimed that out of the cohabitation, they got two girls and that Mr. M had neglected them. She said the children required approximately Kshs. 103,000/= per month, which included a house rent of Kshs. 35,000/=, electricity and water bill Kshs. 10,000/=, two house helps Kshs. 7,000/=, health care Kshs. 5,000/=, foodstuff and groceries Kshs. 30,000/=, car fuel kshs. 8,000/= and Kshs. 8,000/= for entertainment.

Prior to cohabitation

And prior to the alleged cohabitation, Mrs. M claims that she was leaving alone and running her business under the name of [particulars withheld] Properties Limited.

She alleged that she stopped her business and decided to live with Mr. M as a result of his seduction and promise to marry her. During the time of their alleged cohabitation, Mrs. M had one daughter whom she claims Mr. M accepted and treated like his own daughter. Mrs.

M claims that on or about September 17, 2003, Mr. M assaulted her occasioning grievous harm at their Loresho matrimonial home. She claims that he left her for dead and was taken to hospital by neighbours.

Mrs. M further claims that for the past five years she lived with Mr. M she had been subjected to various acts of cruelty and inhuman treatment including being held in servitude. She claims that she was not allowed to maintain independent means of livelihood including opening of a bank account or keeping any savings. She was not allowed to interact with people unless they were previously cleared by Mr. M. Mrs. M alleges that she was under strict orders not to divulge any information to outsiders on beatings and harassment she allegedly underwent. And even when she suffered depression and required medical attention she claimed that she had to use an assumed name. Following the alleged assault, which was reported in media, Mrs. M claims that their relationship ended and she now lives alone with the two children, and that she now bears the burden of their upkeep alone.

She also listed Mr. M's wealth which included a residential house in Lavington at [particulars withheld] Estate, Loresho B, a flat at Valley Arcade, residential houses at South C, Mugoya and Akiba Estates, two houses at South B, one acre undeveloped land at Loresho Kaumoni lane, one acre of undeveloped plot at Safari Park among other things. Mr. M did not reply to the suit."

The plaintiff contends that the statement set out above and published by the defendants in the daily Nation Newspaper was not only false, malicious and defamatory to him, but also contemptuous, disparaging and ill motivated. The defendants in publishing the plaintiff's picture with a lady was actuated malice, contempt, spite and revenge and was calculated to defame and discredit him, both in his personal and professional image as a prominent advocate of the High Court of Kenya of longstanding.

The defendants never bothered to find out the truth or contact the plaintiff to hear his side of the story before the said publication. They knew and /or ought to have known and /or to have found the truth but did not bother to do so.

The natural and ordinary meaning of the publication was meant to and understood by anyone reading the same to mean that the plaintiff is an advocate and parent who is morally corrupt, a parent who is merciless, senseless and selfish to his own children and therefore irresponsible and unfit as a parent. Further, it conveyed a meaning of irresponsible lawyer who engages in dishonourable conduct and should not be entrusted with matters concerning duty and care of children.

Additionally, he was morally unfit without regard to professional ethics and unfit to hold a public office. As someone in legal practice the plaintiff was likely to be adversely affected both financially and otherwise and likely to lose both present and potential clients as a result of the said publication.

It was his case that the defendants were not remorseful at all and the said publication was motivated by financial profit to the detriment of the plaintiff.

He sought an order that the defendants make a full and unqualified apology by withdrawing the said publication, general aggravated and exemplary damages for defamation and libel, costs of the suit and interest.

The defendants denied the plaintiff's claim and prayers in their statement of defence claiming among other things that, the publication related to court proceedings and in public interest. At the instance of the plaintiff there was filed an application to strike out the defence and enter judgments in favour of the plaintiff.

In a ruling delivered by Osiemo J, the defendants' defence was struck out for being scandalous, frivolous and vexatious and abuse of the process of court. An interlocutory judgment was entered in favour of the plaintiff as prayed and an order made that the suit proceeds by way of formal proof.

In arriving at the said conclusion, the judge observed that since the defendants admitted publishing the statement they committed a criminal offence under the children's Act. That publication violated the children right which are protected by statute and not a matter of public interest.

The judge also observed that the defendants could not seek protection under Section 6 of the Defamation Act because for that privilege to apply, the report must be strictly confined to actual proceedings in court and must contain no defamatory observation or comments from any quarter whatsoever.

The judge rightly observed that to strike out a pleading is a drastic remedy but concluded that, the defendants having admitted that what they published was not fair and accurate reporting of proceedings in open court, and that the publication was prohibited by statute, he saw no defence to the plaintiff's claim available to the defendants.

With respect, I agree and add that the reporting of pleadings filed in court, and in most cases published before even the other parties have been served, cannot be termed court proceedings. I also agree that the publication in the instant case cannot be said to be of public interest as it related to the welfare of children with particular reference to the plaintiff. I note that the defendants did not appeal the ruling by Osiero J

This matter was subsequently heard by Ombija J who took the evidence of the plaintiff. The defendants' defence having been struck out, no evidence in defence was offered but submissions were filed by both parties.

The evidence by the plaintiff established that the publication was defamatory and malicious. Despite demand no apology was offered by the defendants. Being a formal proof and having believed the evidence of the plaintiff which remained uncontroverted and unshaken under cross-examination, my only duty is to assess damages payable to the plaintiff.

I observe at this stage that this is not the first time the plaintiff is litigating against the defendants. Indeed he has submitted that the defendants ought to have learnt a lesson from previous litigation against them by the plaintiff.

In assessing damages, I have considered the nature of the publication complained of, the plaintiff's standing in society, his profession and the likely adverse consequences on him in person and as an advocate of the High Court of Kenya. I have also considered that these allegations were published without due reference to him, and without any benefit of any notice of the case that had been filed in the Children's Court.

I have also considered the prominence of the publication, which included the photograph of the plaintiff and the lady who is said to have been the complainant. There is also the consideration of the degree of circulation of the "Daily Nation" newspaper which is one of the most widely read in the country and beyond. Its coverage cannot be underestimated.

In assessing damages payable to the plaintiff, I have looked at several authorities cited including the following,

Civil Appeal No. 314 of 2000 Johnson Evans Gicheru Vs. Andrew Morton & Another, Musinga T/a Musinga & Company Advocates Vs Nation Newspapers Limited(2005) 1 KLR 587, Nation Media Group Vs Daniel Musinga T/a Musinga & Company Advocate Civil Appeal No. 120 of 2008, Civil Appeal No. 148 of 2003 Wangethi Mwangi & Another Vs J.B Machira T/a & Company Advocates

In my judgment, the plaintiff is entitled to recover general damages for the wrong he has suffered in the hands of the defendants to address his reputation and vindicate his name. In that regard, I award Kshs. 10 Million. He had requested the defendants to withdraw the publication and publish an apology. Instead the defendants filed a defence and tried to justify the publication. He is entitled to exemplary damages.

Additionally, the plaintiff is entitled to aggravated damages as I believe the publication was reckless, knowing too well that the plaintiff had no notice of the case in the Children's Court, and failing to find out the truth from him before publication. I award Kshs. 2.5 Million exemplary damages and 2.5 Million aggravated damages. The total award is Kshs. 15 Million. The plaintiff shall have judgment in the above awards plus cost of the suit and interest at court rates.

Dated and delivered this 18th day of January, 2017

A. MBOGHOLI MSAGHA

JUDGE