



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 94 OF 2011

RTD JUSTICE AARON RINGERA..... PLAINTIFF

- V E R S U S -

NATION MEDIA GROUP LIMITED DEFENDANT

JUDGEMENT

1. The plaintiff herein, filed an action before this court vide the amended plaint dated 21st April 2011 in which he sought for judgment against the defendant as follows:

a. General damages.

b. Damages on the footing of aggravated or exemplary damages.

c. An injunction restraining the defendant its agents or servants or otherwise from further printing, circulating, distributing, publishing or otherwise causing or authorising to be published the same or any such libels of and concerning the plaintiff.

d. Costs.

e. Interest on (a), (b) and (d) above.

f. Any other or further relief or reliefs that this honourable court shall deem just to grant.

2. The defendant field a defence to deny the plaintiff's claim. When the suit came up for hearing, the plaintiff and the defendant each tendered the evidence of one witness.

3. What provoked the filing of this suit, is the publication on the Saturday Nation of 18th December 2010 titled "**Hide and go seek with Corruption**". The publication read as follows:

"The controversial U.S envoy captures Mr. Githongo's fears for his life in financial times journalist Michele Wrong's book "It's our turn to eat" because of his efforts to exposé the multimillion shillings Anglo-leasing scandal.

"Paragraph five provides details of statements made by Ringera to Githongo that Githongo took as direct threats to his life by the Kenyan political elite, to include Ringera. This TD corroborates Githongo's conclusion about Ringera who is identified in a room with leading Kikuyu politicians, including ministers of government, plotting to kill Githongo in 2009," Mr. Rannerberger wrote in the classified cables dated September 16th last year."...

“Latest classified American diplomatic cables released by whistleblower website wikileaks allege that the former Kenya Anti-corruption (KAC) Director has consistently shielded top government officials from investigations over corruption apart from engaging in the vice himself.”

“Post strongly believes Mr. Ringera has engaged in and benefited from public corruption in his capacity as Director of the Kenya Anti-corruption Commission (KC) for the last five years by interfering with judicial and other public processes....”

4. The plaintiff was of the view that the aforesaid words in their natural and ordinary meaning meant and were understood to mean

i. The plaintiff with others plotted to kill Githongo in 2009

ii. That while employed as the Director of Kenya Anti-corruption Commission, the plaintiff engaged in the vice of corruption and that he also shielded top government officials from investigation over corruption.

iii. That the plaintiff is a criminal and unfit to hold any public office.

5. The plaintiff stated that the aforesaid publication contained allegations which were and are entirely false. It is his averment that by reason of the publication, he has been seriously injured in his character and reputation and he has been brought into public scandal, odium and contempt and has been lowered in the estimation of right thinking people generally.

6. On the other hand the defendant admitted having published the article complained of but denied that the allegations that the words were defamatory to the plaintiff. The defendant further stated that the publication was fair comment on a matter of public interest namely corruption within the Kenyan Government. The defendant also denied that the allegation that as a result of the publication the plaintiff suffered public scandal, odium and contempt. It is the defendant’s belief that the publication was not actuated by malice on its part.

7. Justice (retired) Aaron Ringera (PW1) personally testified in support of his case. He told this court that on the material date, i.e on 18.12.2010, he was at his home in Nairobi. He purchased the daily newspapers including the Saturday Nation of the same date. PW1 said he read with disbelief what the defendant had published of and concerning him. PW1 further stated that the story portrayed him as a murderer and a thoroughly corrupt person who had gone to the length of plotting to kill or assassinate a previous permanent secretary in the Government of Kenya in order to hide corruption and benefit from it. The plaintiff gave a detailed narrative of the high profile positions he has held in this country. He stated that he served this country as a senior lecturer at the university of Nairobi, a High Court judge, a Court of Appeal judge, Solicitor General and the Executive Director of Anti-corruption Commission among other positions and that he had never imagined in his life that he would be accused of plotting to commit the offence of murder. He said that the publication caused him maximum pain which he endures todate. The plaintiff pointed out to this court that the defendant’s publication was the largest and most widely read newspaper in Kenya and in the East African region and that since it is published online the publication is read all over the world by parties in Kenya concerning the fight against corruption. PW1 also stated that any publication concerning Mr. John Githongo a key participant in matters anti-corruption was a subject of worldwide concern. PW1 said he took action to protect his reputation by instructing his lawyers to demand a retraction with an apology. He also demanded to be given an undertaking not to repeat similar allegation and for payment of a substantial sum in damages to compensate him for the injury to his reputation and considerable distress that has been caused. The defendant refused to comply with the demand prompting him to file this suit. The plaintiff stated that within the country as head of the Anti-corruption body, the plaintiff’s activities were given high visibility due to the interest of the public in fighting corruption which was the object and purpose of passing legislation to set up the Anti –Corruption Commission. These activities were reported by all the media houses in the country, including the electronic and print media on almost daily basis. Outside Kenya, the plaintiff stated he was widely

known.

8. At the trial, the defendant summoned Peter Leftie Mutiso (DW1), the author of the offending article to testify in support of the defence case. DW1 admitted having authored and making the publication. DW1 stated that the article was published on three separate pages. The highlight on the front page is titled: **“New assassination claim over graft.”** with a photograph of Mr. John Githongo. The main article was published on two continuous pages which were exclusively dedicated to the story complained of. It is the evidence of DW1 that the words in the publication constituted a fair comment on a matter of public interest. DW1 also stated that he merely quoted in the publication from the former U.S.A Ambassador Michael Ranneberger’s leaked diplomatic cable as captured on wikileaks. DW1 was of the view that the statement cited portray the expression of an opinion and not a statement of facts.

9. After a careful consideration of the evidence and the submissions of both sides, I am satisfied that the issues which came up for determination are two vizly:

i. whether the words published by the defendant were defamatory of the plaintiff?

ii. whether the plaintiff is entitled to damages as prayed for in the plaint and how much?

10. On the first issue, I have already outlined the arguments of both sides. I have, on my part, examined the newspaper article presented to this court. It is an eye catching publication which was meant to attract the reader’s attention. The photographs of the plaintiff and those of Ranneberger and Mr. Githongo prominently featured in the publication. The defendant has submitted that the article was fair comment on a matter of public interest. According to **Clerk and Lindsell on Torts, 20th edition pp 1519 – 1526**, in order to establish the defence of fair comment, the defendant must establish that:

a. the statement complained of were comments not facts

b. the comments had a sufficient factual basis

c. the comments were objectively fair.

d. the subject matter of the comments is a matter of public interest.

11. It is the defendant’s argument that the author of the offending article was merely commenting on Ranneberger’s observations as captured by wikileaks. It is said that the statement constituted comments and not a statement of facts. It is said that the author merely commented on the wikileaks report which was already in the public domain. The plaintiff is of the contrary view, that the whole publication was not fair comment but defamatory. There is no doubt in my mind that the defendant knew that the article conveyed a message to the public to the effect that the plaintiff had conspired with others to kill Mr. John Githongo who was then a famous former Permanent Secretary in the government of Kenya. The author also knew that the publication conveyed a message that the plaintiff planned to commit murder which is a capital offence in Kenya. The defendant also knew that the article conveyed the message that the plaintiff in his position as the Director of the Kenya Anti-corruption Commission was a beneficiary of corruption and that he abused his position to shield top government officials from investigations over corruption instead of fighting the vice. It is also apparent from the evidence tendered by both sides that the defendant knew that the said publications were rumours or mere allegations and not facts from a purported secret communication between officials of the US government including the then Ambassador of the US government in Kenya. It is further clear that the defendant knew that by publishing the said secret communications in its newspapers, both in print and electronic media, it was given wide publicity to the said rumours which, prior to the defendant’s publications were secrets. The plaintiff demanded to be given a retraction and an apology but the defendant became adamant. The defendant did not take diligent steps to verify the truth of the rumours and allegations from the sources and from the plaintiff before publishing. The evidence presented seem to suggest that the defendant knew that the publication irreparably ruined the plaintiff’s reputation and seriously hurt the plaintiff’s feelings. In my humble view the defendant’s assertion that the author of the author merely made fair comment cannot therefore stand

in the face of strong evidence suggesting otherwise. I find that the plaintiff has tendered credible evidence proving on a balance of probabilities that the publication published by the defendant was defamatory to the plaintiff.

12. Having come to the conclusion that the tort of defamation has been successfully proved, let me now turn my attention to the question as to whether or not the plaintiff is entitled to damages and if yes how much.

13. It is evident that the plaintiff is a successful litigant. The question as to whether or a successful litigant is entitled to damages was succinctly considered in the case of **John =vs= M.G.N Ltd (1996) 2 ALL E.R 35** *inter alia* as follows:

“The successful plaintiff in a defamation action is entitled to recover, as general compensatory damages such sum as will compensate him for the wrong he has suffered. That sum must compensate him for the damage to his reputation; vindicate his good name; and take account of the distress, hurt and humiliation which the defamatory publication has caused. In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel; the more closely it touches the plaintiff’s personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of publication is also very relevant; a libel published to millions has a greater potential to cause damage than a libel published to a handful of people. A successful plaintiff may properly look to an award of damages to vindicate his reputation: but the significance of this is much greater in a case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libelous publication took place. It is well established that compensatory damages may and should compensate for additional injury caused to the plaintiff’s feelings by the defendant’s conduct of the action, as when he persists in an unfounded assertion that the publication was true, or refuses to apologise, or cross-examines the plaintiff in a wounding or insulting way. Although the plaintiff has been referred to as ‘he’ all this of course applies to women just as much as men.”

14. I have already stated that the article complained of, accuses the plaintiff of committing two serious crimes of murder and that of benefiting from corruption and shielding the perpetrators of corruption. The defendant through its witness admitted the story was published for sale to the public and it also knew that by so doing it was spreading the rumour and the false allegations to the whole world. The plaintiff is therefore entitled to damages. The plaintiff has beseeched this court to award him a sum of ksh.35,000,000/= representing both general and exemplary damages.

15. The defendant on its part was of the view that the figure of ksh.35,000,000/= suggested by the plaintiff is manifestly high and excessive. The defendant argued that since the plaintiff had failed to exercise his right to reply in the same newspaper published by the defendant, any damages that may be awarded to the plaintiff ought to be substantially reduced.

16. The plaintiff heavily relied on the case of **Eric Gor Sungu =vs= George Odinga Oraro C.A no. 226 of 2011** where the respondent had been defamed as having played a role in the disappearance of the late Dr. Robert Ouko was awarded by the Court of Appeal a sum of ksh. 9 million comprising of ksh. 5 million as general damages and ksh. 4 million as aggravated damages.

17. This award was made in 2014. The value of the Kenyan shilling has obviously been affected by inflation. I am convinced an award of ksh.7,000,000/= is fair and a reasonable sum on general damages.

18. On exemplary damages, the plaintiff has alleged that he demanded for an apology and a correction of the story which request the defendant declined. It would also appear that the defendant published the article for purposes of making more money thus enriching itself from the sales of the publication. On this head I award the plaintiff a sum of k sh.4,500,000/=.

