**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO 181 OF 2013**

**EVANS ARTHUR MUKOLWE.....PLAINTIFF**

**VERSUS**

**THE STAR.....DEFENDANT**

**JUDGEMENT**

The plaintiff's case as pleaded in the plaint dated 15th May, 2013 and filed in court on the 17th May, 2013 is that;

On or about the 9th July, 2012, the defendant published an article captioned **"Dr. Richard Leakey speaks on all matters wildlife and politics,** which appeared on page 27 of the star issue Newspaper of the said date.

The plaintiff avers that in the said article, the defendant purporting to quote the words of the Dr. Richard Leakey, stated inter alia, the following words of and concerning the plaintiff, namely;-

> ***"…..Smart Cards were introduced during your tenure to curb loss of funds at the gates. But some years later, investigations by the inspectorate of State Corporations pointed out some irregularities over them…… a research was carried out and showed that KWS was losing close to 70 per cent of our revenue. The issue was that we picked one company to reproduce the smart cards. This was something that needed security and we picked one firm. There was no way more than one firm could share a password. Smart Card worked, but when I left, Mukolwe who replaced me had it duplicated and KWS lost a lot of money….."***

The plaintiff further avers that by publishing/causing to be published, the said article without prior inquiry and/or clarification by the defendant from the plaintiff, it intended to and did infact potray the plaintiff as, inter alia corrupt, untrustworthy and lacking in integrity and ethics and that the said words are false and defamatory of the plaintiff.

In its statement of defence filed on the 27th June, 2013, the defendant has denied the plaintiff's claim. It particularly contended that the article and the words in respect thereof as published, contained a verbatim extract of the interview given by Dr. Richard Leakey and that the contents of the interview was an expression of Dr. Richard Leakey's views and opinions on an issue he was entitled to comment on.

The defendant further contended that the article was true in substance and in fact (the particulars whereof have been set out in paragraph 10 of the defence). The defendant avers that the issue in respect of which the interview was given was of public concern and the said publication was of public benefit and is therefore, privileged. The particulars of defamation are denied and the plaintiff is put to strict proof.

Further or in the alternative, the defendants have pleaded that the article and the words in respect thereof as published, are not defamatory on the face of it and the defendant did not know of the circumstances by virtue of which the publication might be understood to be defamatory of the plaintiff.

In the reply to defence filed on the 4th July, 2013, the plaintiff has joined issues with all the allegations made in the defence and has reiterated the contents of the plaint where necessary.

At the hearing, the plaintiff testified as (PW1) and sought to have his witness statement adopted as part of his evidence in chief to which the court obliged. He confirmed the publication of the article and the allegation by the defendant that the words were uttered by Dr. Richard Leakey who was the director of Kenya Wildlife Service many years before he worked there.

It was his further evidence that he did not succeed Dr. Leakey but replaced Michael Wamithi Karathi before whom there were other three directors. He averred that the article as published is not true in view of the hierarchy of succession at KWS. His bone of contention was that the statement stated that he replaced Dr. Richard Leaky and that he was said to have duplicated smart Card and caused KWS to loose a lot of money, which allegations he denied.

According to him, for one to access the software of a smart card he would need a source code which is used to protect the software used in the card and he did not even know where the source card was. That the article portrayed him as incompetent, untrustworthy, corrupt, a thief and a person incapable of holding a public office.

He told the court that duplication of a smart card is a criminal offence and that he was not charged in a court of law for alleged duplication and the he was not summoned in any police station to record a statement regarding the issue. That he has never been called by KWS and questioned over any such loss as alleged in the article.

In cross examination, he admitted that there were smartcards in operation during his tenor but there was no issue of any lost revenue as alleged by the defendant. That he found the smartcards in operation and there was a company that was providing the services. He further fold the court that he did not approach the defendant to publish an apology because he wanted to meet the editor first. It was his evidence that his reputation was negatively affected by the article.

The plaintiff called one witness namely, Josiah Asaki Achoki who testified as PW2. He told the court that he used to work for KWS between 1977 and 2009 when he retired. At the time he retired, he was a deputy director in-charge of security services at KWS. He stated that he recalled reading an article in the star Newspaper on the 9th July, 2012 which was about wildlife and politics. That with regard to the plaintiff, it had mentioned about smartcard duplication and that the plaintiff had taken over from Dr. Leaky. That the article also stated that there was loss of money as a result of the duplication of the smartcard. He confirmed that the plaintiff was the Director of KWS between October 2003 and November, 2004 and that he did not replace Dr. Leaky directly but in between.

It was his further evidence that smartcards were introduced to curb loss of resources and they were being operated by a private company. He told the court that as security, he did not receive any report regarding theft of money with regard to the smartcard and even after he left KWS, he has never been contacted in respect of any criminal investigations to do with any such loss as alleged in the article.

It was his evidence that when he read the article, it occurred to him that the plaintiff's integrity was in question.

On cross examination, it was his evidence that the plaintiff left KWS in the year 2004 when he was still the head of security but he could not remember if there was any issue with the card. He stated that the plaintiff's reputation was not affected as much but all the same it was affected.

The defence called one witness namely Kibiwott Koros who testified as DW1. He currently works for

African Laughter but in the year 2012, he was working with the star as a feature writer. It was his evidence that he contacted Dr. Leaky for an interview who acceded to his request and agreed to meet him for the same. He told the court that the contents of the article to do with smartcard was in the public domain as KWS had lost money through smartcard. That the information in the article was given by Dr. Leaky who told him that the plaintiff herein succeeded him at KWS.

It was his further evidence that he knew the plaintiff personally but he did not contact him. In cross-examination, he stated that after he did the story, it went for approval and it was printed. That the features editor is supposed to verify the contents of the article before it is published but he admitted that is was his role to verify the truthfulness of the contents. Though he stated that the issue of smartcard had been online and in the public domain he did not have any evidence before the court to that effect. On being asked about his statement wherein he stated the plaintiff replaced Dr. Leaky, his answer was that, what he knew was that, the plaintiff came after Dr. Leaky. He denied having any malice when he published the story but admitted that a journalist is expected to have high moral ethics and confirm the truthfulness of a story before publishing the same. He admitted that he did not confirm if the plaintiff was involved as alleged in the article.

Counsel for the plaintiff made oral submissions in addition to the written submissions filed herein. He submitted that the article is not true for the following two reasons.

(1) The plaintiff did not succeed Dr. Leaky as alleged but rather succeeded Michael Wamiti.

(2) That the smartcard was duplicated by the plaintiff following which KWS lost a lot of money during the plaintiff's tenor as the Director.

It was submitted that the defendant did not demonstrate that the article was true but kept on insisting on the defence of public interest and privilege which should fail as the defendant did not verify the truthfulness of the information before publishing the same. That a chance was not given to the plaintiff as the defendant was not interested in the truth.

It was further submitted that there has to be a balance in the need to supply correct and accurate information through the media to the general public and the need to protect individual reputation and privacy. He contended that the behavior of the defendant was laden with malice.

On quantum of damages, the court was urged to award Ksh. 7 million and he quoted the case of **Phineas Nyaga Vs. Gitobu Imanyara**.

On the part of the defendant, it was submitted that the plaintiff did not tender any evidence to prove malice and that the contents of the words and /or statements of the publication made on the 9th day of July, 2012 solely reflected the expressions, views and/or opinions of Dr. Richard Leaky. That the same was reported by the defendant without embellishing or subscribing to its truth. The defences of public interest, qualified privilege and innocent dissemination were put forward by the defendant in its submissions which I shall consider in my analysis later in the judgement.

On damages, a sum of between Kshs. 500,000/- to 800,000/- was suggested as reasonable. In this regard, the defendant relied on the cases of **Emannuel Omenda Vs. Safaricom Limited (2012) eKLR** and that of **Dr. Richard S. Kimani Vs. Nation Newspapers Limited (2011) eKLR** in which Kshs. 500,000/- and 800,000/- were awarded respectively.

The court has carefully considered the pleadings filed in this matter, the evidence on record and the submissions by the learned counsels. In my view, the following are the issues for determination;

(1) Whether the article was defamatory of the plaintiff.

(2) Whether the article was false and malicious.

(3) Whether the article was published by the defendant and whether the words refer to the plaintiff.

(4) Whether the plaintiff is entitled to damages and the quantum thereof.

(5) Who should meet the costs of the suit.

**"WHAT IS DEFAMATION?"**

***"The tort of defamation consists in the publication of a false and defamatory statement concerning another person without lawful justification".***

In the case of Ondonkara Vs. Astles (1970) EA 374 a defamatory statement was described as;

***"……A statement is defamatory of a person of whom it is published if it is calculated to lower him in the estimation of ordinary, just and reasonable men".***

The leading English monograph of Gatley on the subject of defamation defines it as thus;

***"An imputation which may tend to lower the plaintiff in the estimation of right thinking members of the society generally".*** While the well-known work of Winfield gives the following definition of defamation;

***"it is the publication of statement which tends to lower a person in the estimation of right thinking members of the society generally or which tends to make them shun or avoid that person".***

The protection of every person from harm to their reputation by false or derogatory remarks is not only provided for in the defamation Act but its also anchored in the constitution under Article 33 (1) (a) as read together with clause (3) which provides;

"33(1) (a) every person has a right to freedom of expression, which includes freedom to seek, receive or impact information or idea.

**Clause 3:**

***'In Exercise of the right to freedom of expression every person shall respect the rights and reputation of others".***

The elements of the Tort of defamation are well set out in the case of J. Kudwoli Vs. Eureka Educational and Teaching Consultants & 2 others HCCC No. 126/1990 which are that;

(1) The matter of which the plaintiff complains was published by the defendant,

(2) The publication concerned or referred to the plaintiff,

(3) That it was defamatory in character,

(4) That is was published maliciously,

(5) That in slander, subject to certain exceptions, that the plaintiff has suffered special damage.

These same principles were enunciated in the case of **Wycliffe A. Swanya Vs. Toyota East Africa Limited and Francis Massai (Nairobi CA 70/2008.**

Applying the above principles to the case herein, was the article defamatory of the plaintiff? The exact wording of the article are as hereunder;

> **"……..Smart Cards were introduced during your tenure to curb loss of funds at the gates. But some years later investigations by the inspectorate of state corporations pointed out some irregularities over them……. A research was carried out and showed that KWS was losing close to 70% of our revenue. The issue was that we picked one company to reproduce the smart cards. This was something that needed security and we picked one firm. There was no way more than one firm could share a password. Smart Card worked, but when I left, Mukolwe,** who replaced me had it duplicated and KWS lost a lot of money" …….

**WAS THE ARTICLE FALSE AND MALICIOUS?**

In his evidence, the plaintiff stated that the article was false and denied that he duplicated the smartcard as he could not access the code of the software used in the card. And on whether there was malice on the part of the defendant, the plaintiff avers that there was, as the defendant did not bother to contact him to verify the truthfulness of the contents of the article as published.

Though the defendant has alleged that the plaintiff did not proof malice, it is a well established fact that malice can be implied from the circumstances of the case. In the case of Phineas Nyaga, Justice Odunga held;

> ***"……Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice……..malice may also be inferred from the relationship between the parties……. The failure to inquire in the facts is a fact from which inference of malice may properly be drawn".***

It has emerged from the evidence on record that the defendant did not inquire into the facts by his failure to contact the plaintiff to get his side of the story. On its part, the defendant has argued that the contents, words and/or statements of the publication solely reflected the expressions, news and/or opinions of Dr. Leaky. While this may have been so, the defendant ought to have contacted the plaintiff to verify the truthfulness of the contents of the article. It is on record that DW1 knew the plaintiff even before the article was published but he just chose not to contact him.

On the defences of qualified privilege and justification, the defendants have relied on the cases of **Flood Vs. Times Newspapers limited (2012) UKSC 11** and that of **Reynolds Vs. Times Newspapers Limited and others (1999) UKHL45.** It should be noted that the defence of qualified privilege only protects the publisher if he has taken proper steps to verify the making of the allegations and provided that he does not adopt it. **See the case of Times Newspapers Limited (Supra).** In the case herein, the defendant did not take any step to verify the truthfulness of the allegations and for that reason, the defence is not available to him.

On the defence of justification, the following extract from Carter Ruck on libel and slander may be useful;

> "The defence of justification cannot succeed unless the expression of opinion was based upon the facts…… if the facts upon which the comment purports to be based does not exist, the comment cannot be fair but there is an exception to that general rule in a case where the facts commented upon are contained in a privileged document such as a parliamentary paper or a report of judicial proceedings, the defendant's comments upon the fact set out in such reports is entitled to protection as fair comment even though the facts contained in the privileged document or referred to, in the judicial proceedings, turn out to be untrue.

There is no doubt that the source of the article was not from a privileged source so as to afford the defendant the defences of absolute privilege and/or justification. The defendant had a duty to verify the truthfulness of the contents.

The evidence on record is that the article had the effect of lowering the reputation of the plaintiff in the

eyes of the right thinking members of the society like PW2 who testified as his witness. There is no doubt that the article was defamatory of the plaintiff and there was malice in the publication on the part of the defendant.

I now turn to the quantum of damages.

I have considered the submissions and the authorities relied on.

In awarding damages, this court draws considerable support in the guidelines in the case of **Jones Vs. Polland (1997) EMLR 233-243** where a checklist of compensable facts in libel actions were enumerated as follows;

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

Considering the above factors and the circumstances of this case including the stature of the plaintiff in the society, and the positions that he has held in the past, it is my considered view that a sum of Kshs. 2 million is reasonable as compensating damages.

This court makes no award on aggravated damages as no evidence was lead in prove of the same. In view of the time lapse between the publication and the hearing of the matter, the court declines to grant prayer (c) of the plaint. On prayer (b), the same is worded in very general terms and its vague, the same is declined.

The plaintiff is awarded the costs of the suit.

Dated, Signed and Delivered at Nairobi this 14th Day of July, 2017.

**……....**

**L. NJUGUNA**

**JUDGE**

**In the Presence of**

……. For the Plaintiff

……. For the Defendant