



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1372 OF 2005

MARTIN NG'ANG'A.....PLAINTIFF

VERSUS

JEFF OTIENO

WANGETHI MWANGI

NATION MEDIA GROUP.....DEFENDANTS

JUDGMENT

1. The Plaintiff **Martin Ng'ang'a** sued the Defendants **Jeff Otieno, Wangethi Mwangi and Nation Media Group** the 1st – 3rd Defendants respectively vide the plaint dated 7th November 2005 in which he sought for judgment in the following terms:
 - a. *An order of permanent injunction do issue to restrain the Defendants by themselves, their servants and/or agents or otherwise howsoever from publishing or causing to be published any defamatory material contained in the said Article or any such material as would be scandalous or defamatory to the Plaintiff in any form or manner whatsoever.*
 - b. *General damages and exemplary and/or aggravated damages on the basis of the matters pleaded in paragraph 13 of the plaint.*
 - c. *Costs of this suit.*
 - d. *Interest thereon and any other relief as this court may deem appropriate to grant.*
2. The Defendants filed a common statement of defence to deny the Plaintiff's claim.
3. The brief summary of the Plaintiff's case is that on 17th November 2004 the Defendant's newspaper published an article which was based on a report. The article read that:

"Report says KWS hit by fraud, it also blames Mr. Martin Ng'ang'a the current financial controller for authorising payments for questionable deals that have left KWS in financial constraints. After an internal inquiry into kshs 2,553, 105 loss in the finance department, Mr. Ng'ang'a and other employees were recently sent on compulsory leave by the director, Mr. Evans Mukolwe, who was himself suspended last week..."

The Plaintiff claimed the said published article was defamatory and the Defendants had referred to him as corrupt, fraudulent and un-ethical. He averred that the Defendants had malice in publishing the said article.

4. The defence case is that they were not actuated by malice. They claimed that the publication was done in good faith and in public interest. They said that the article was not defamatory as the content therein was true in substance and form. They averred that it was an accurate report that necessitated fair comment on matters of public interest since the public has a right to know of any transactions involving the Kenya Wildlife Service (KWS).
5. When the suit came up for hearing, the Plaintiff was the only witness who testified in support of his case.

The gist of his evidence is summarized as follows: That he worked at the KWS as a finance controller. He stated that the background of the dispute was due to a new Board of Directors that was appointed by the Narc Government that replaced the older board. The new board accused him of leaking information to the Government. He asserted that at some point, he reported to the internal auditor that there was theft which caused him to be investigated, interdicted and finally dismissed. He averred that he was implicated in the report as having committed an irregularity yet the late Minister, Mr. Newton Kulundu had approved the expenses according to page 13 of the report. He referred to the report which on pages 22-28 outlined the names of those that were implicated but he claimed that, only his name was mentioned maliciously by the Defendants. He testified further that, after losing his job because of the report, he could not find another job and he left for the United States of America to look for greener pastures and as an asylum seeker. He concluded that the Defendants had not produced the report that they relied on and denied the claim that the Criminal Investigation Department found him culpable.

6. On their part, the Defendants did not tender any evidence.
7. At the close of evidence, learned counsels appearing in this case were invited to file written submissions which they did. I have considered both the evidence and the rival submissions. Though the Plaintiff listed seven statements of issues, the same maybe summarized to two main issues namely:
 - a. ***whether the article published constituted defamatory remarks about the Plaintiff?***
 - b. ***Whether the Plaintiff suffered any damages as a result of the defamatory article?***
 - c. ***Whether the defence of privilege is available to the Defendants?***
 - d. ***Damages.***
8. On the 1st issue as to whether there is proof of defamation, according to the Defendants the publication complained of was a matter of public interest as it involved the dealings in Kenya Wildlife Service which is a state corporation. It is the submission of the Defendants that the publication was made in utmost good faith and without any malice towards the Plaintiff. The Defendants claim that the article published was based on a report which blamed the Plaintiff for authorizing questionable deals, which report, they claimed, the Plaintiff did not contest. The Defendants argued that the wordings used in the article that are in contention are lifted almost word for word from the letter dated 4th November 2005 which letter sent the Plaintiff on compulsory leave. They further stated that the report was prepared by the inspectorate of State Corporations which is a statutory office established under section 18 of the State Corporations Act and pleaded that they are protected by qualified privilege under section 7 of the Defamation Act. The Defendants further cited the defence under defamation Act which provides for justification and fair comment. It is not disputed by the Defendants that they indeed published the article which the Plaintiff felt offensive and defamatory. The Plaintiff supplied to this court the extracts of the reports the Defendants relied on in publishing the offending story. The following documents are relevant to this dispute. First, is the extracts of the reports by the inspectorate of State corporations and secondly, is the letter dated 4th November 2004 sending the Plaintiff to proceed on compulsory leave with the reasons specified therein.
9. I have critically examined the aforesaid documents and it is apparent to me that the report is raising questions touching on the Plaintiff's exercise of authority to approve payments of certain deals. In the same correspondences the notes gross irregularities in respect of payments made to

former and current chief executives of Kenya Wildlife service. A recommendation is made to surcharge the Plaintiff'. The reports further raised audit queries relating to procurement of furnishings and purchase of a BMW Limousine for the director. A recommendation for the taking of a disciplinary action against the Plaintiff for professional negligence in abetting an irregular payment for accommodation and incidental expenses for Mr. Mukolwe at the Norfolk Hotel. It would also appear from the documents exhibited by the Plaintiff that the Plaintiff was eventually summoned to appear before the Kenya Wildlife Service Board. Upon hearing the Plaintiff, the Board of Trustees terminated the Plaintiff's services.

10. The defence put forward the argument that the article complained of is the truth in substance, privilege and public interest. The Defendant aver that the article consist of opinions made in public interest. It is apparent that the Defendants did not produce the records or reports or grounds they relied upon as the basis of their publication, namely the report of NACCOPI consultants. No nexus was established between NACCOPI and the Inspectorate of state corporations. No other report has been presented to this court. In the absence of such crucial evidence in support of the Defendants' averments, the pleadings remain unsupported and hence cannot stand. The Plaintiff presented a letter from the C.I.D offices dated 20.3.2005 clearly mentioning individuals responsible for the loss of kshs.2,553,105/= at KWS. The Plaintiff also tendered in evidence the letter dated 1st July 2005 from the inspectorate of state corporations ascertaining that their report naming the Plaintiff to have authorised payment of kshs.505,527/20 on 18.11.2003 and kshs.321,775/= on 18.11.2003 was erroneous. The offending article was published on 17.1.2004 and a demand was issued to the Defendants on 17.5.2005. The Defendants have made no attempt to correct the erroneous publication but have stood by their defence even with the full knowledge of the error in the information relied upon at the time of publication. It is clear to me that the article was reckless and in the circumstances of this case was actuated by malice. The Defendants selectively published the Plaintiff as the person involved in the fraud even when the report of the Inspectorate of State Corporations had named other individuals along with the Plaintiff under several heads on its investigation report. In the end I find no merit in the Defendants defence. The published article contained offensive remarks that were defamatory and aimed at tarnishing the Plaintiff's character and reputation. The article was made carelessly and maliciously against the Plaintiff as they were neither factual nor verified on their authenticity before being published.
11. The second issue to determine is whether the defence of privilege is available to the Defendants. There is no doubt that the Plaintiff admitted that there was a report by the inspectorate of state corporations. I have already pointed out hereinabove that the aforesaid report contained material errors which the inspectorate of state corporations acknowledged. In light of the aforesaid admission, the defence of justification fails.
12. One issue which has kept popping up is the fact that the Plaintiff was eventually dismissed from employment on the findings contained in the inspectorate of state corporation. It should be made clear here that no report or publication has been availed from KWS or the Inspectorate of state corporation confirming the alleged issues of fraud. The fact that the Plaintiff was targeted in the article and the other individuals left out aggravates the injury suffered.
13. Having found the Defendants liable for defamation, I now turn my attention to the question of damages. There is no doubt that the Plaintiff in his professional calling, his integrity, his repute ethical standards and moral standing in the eyes of right thinking members of the society was lowered. An award of damages would therefore go a long way to mitigate the damage that has been occasioned to the Plaintiff. The Plaintiff testified that the publication caused him trauma and as such he could not engage in any gainful employment in Kenya on account of the article. As a result he sought an asylum in the United States of America. There is no doubt that the Plaintiff was a high ranking civil servant. The Plaintiff asked to be paid ksh.9,000,000/= as general damages. The Defendant did not deem it fit to suggest any figures. I have looked at the authorities supplied by the Plaintiff on damages. In **George Oraro vs= Barack Mboja H.C.C.C no. 85 of 1992**, this court awarded ksh.1.5 million as damages for defamation.

In **Abraham Kiptanui =vs= Francis Mwanini & 4 others H.C.C.C no. 42 of 1997** this court awarded kssh.3.5 million as general damages for libelous statement published in a newsletter.

14. In the case of **Daniel Musinga T/A Musinga & Co. Advocates,**

Mombasa H.C.C.C no. 102 of 2000- the Plaintiff was awarded kshs.10,000,000/= as general damages for libel.

12) I have already stated that the Plaintiff in this suit was a high ranking civil servant who commanded high respect from his colleagues. I am convinced that in the circumstances this case an award of kshs.2.5 million is reasonable. I consequently make the award with costs.

Dated, Signed and delivered in open court this 12th day of February, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

.....for the Defendant