



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

**CIVIL DIVISION**

**CIVIL SUIT NO. 42 OF 2008**

**REUBEN ODHIAMBO.....PLAINTIFF**

**VERSUS**

- 1. DUKE RADING**
- 2. WANGETHI MWANGI**
- 3. NATION MEDIA GROUP LIMITED**
- 4. THE ATTORNEY GENERAL.....DEFENDANTS**

**JUDGEMENT**

The Plaintiff in his amended plaint seeks an order for a full and unqualified apology to be given widest circulation; general and aggravated damages for defamation and loss of employment opportunities; false imprisonment; special damages of Kshs. 25,000/- and interest.

The Plaintiff claims that the 1<sup>st</sup> Defendant on 23<sup>rd</sup> May 2007 caused to be carried in the 3<sup>rd</sup> Defendant's 'DAILY NATION' newspaper a publication together with his photo with the following words below –

***“The person whose photo appears above is wanted by YALA POLICE STATION for questioning in relation to a serious offence. A reward of Kshs. 50,000/- shall be awarded to any person who will facilitate his arrest. For any information, please contact the CID Siaya on the numbers below: 07228017 or 057321056/321428”***

According to the Plaintiff the said words and photograph in their natural and ordinary meaning defamed him which particulars are listed in paragraph 7 of the amended plaint. That as a result his reputation and integrity has been seriously injured and he has suffered considerable distress, agony, mental torture, humiliation and embarrassment. He has also been brought into public scandal, odium, suspicion and contempt.

He further states that the publication was actuated by malice and calculated to give the 3<sup>rd</sup> Defendant unfair publicity. This is imputed from the fact that none of the Defendants bothered to confirm the truth from him before publication. Particulars of malice are outlined in paragraph 14 of the amended plaint.

That on 5<sup>th</sup> June 2007, the Plaintiff voluntarily presented himself to the C.I.D offices in Siaya town where he was placed in custody for 12 (twelve) days after which he was released without any charges being levelled against him.

The 4<sup>th</sup> Defendant filed defence dated 28<sup>th</sup> April 2008. It denied publishing the words complained of and

the attendant malice and put the Plaintiff to strict proof of basically all the contents of the Plaintiff. There was no other appearance made on behalf of the 4<sup>th</sup> Defendant in court.

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not enter appearance or file defences within the prescribed period even after being duly served. Interlocutory judgment was thus entered against them.

The Plaintiff testified on his own behalf; he called one other witness who is his birth brother. He adopted his witness statement as his testimony-in-chief dated 7<sup>th</sup> September 2012. He produced the following documents in evidence –

- newspaper cut-out containing the publication -**Exhibit 1**;
- Notice to the 4<sup>th</sup> Defendant - **Exhibit 2**
- Advocate's fees paid during the criminal investigation –**Exhibit 3**
- Letter from 4<sup>th</sup> Defendant dated 30<sup>th</sup> August 2007- **Exhibit 4**
- Witness statement – **Exhibit 5**
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The 2<sup>nd</sup> witness Sospeter Omondi Odera the Plaintiff's brother also adopted his witness statement dated 30<sup>th</sup> October 2013 which was marked as Exhibit 6.

I have considered the testimonies of those two witnesses. I have also considered the written submissions filed on behalf of the Plaintiff on 7<sup>th</sup> July 2015.

On whether the Plaintiff was defamed by the public notice published by the 3<sup>rd</sup> Defendant at the instigation of the 1<sup>st</sup> and 4<sup>th</sup> Defendants, it is not in dispute that the public notice was issued by the 1<sup>st</sup> and 4<sup>th</sup> Defendants who caused it to be published by the 3<sup>rd</sup> Defendant as the Plaintiff's evidence remains unchallenged.

Gatley on Libel and Slander, 8<sup>th</sup> Edition by Phillip Lewis, states that -

**'a defamatory imputation is one to a man's discredit or which tends to lower him in the estimation of others or to expose him to hatred, contempt or ridicule or to injure his reputation in his office, trade or profession or to injure his financial credit.'**

A defamatory statement has been defined in Halsbury's Laws of England 4<sup>th</sup> Edition Vol. 28 page 7 –

**'A defamatory statement is a statement which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business'**

The published words in this case were false and tended to injure the Plaintiff's reputation in the eyes of the public. The Plaintiff testified that the notice was put up in the newspaper without seeking confirmation on who had committed the alleged crime and without any investigation having been carried out.

Allegations of committing the crime of murder are grave, and to put up a notice that a person is wanted by the police without any investigations as to the true identity of that person, is to act negligently and maliciously with no care whether it would tarnish and destroy the Plaintiff's reputation.

It is also not disputed that the notice was false, malicious and defamatory of the Plaintiff. The Defendants did not bother to call or lead any evidence despite service.

As for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, though they had been paid to publish notices just like any other

advertisement, they took part in publication of defamatory matter and are thus prima facie liable in respect of that publication.

In **Daily Nation vs Mukundi & Another [1975] EA 311** at 316 the Court of Appeal for Eastern Africa stated –

**‘When the defendant publisher accepted an item for publication, it had the right and indeed the duty to see whether such item contains seditious or libelous matters, and if it fails in that duty, it always publishes at its own risk and that that suggested recklessness on the defendant’s part.’**

In **Godwin Wanjuki Wachira v Okoth [1977] KLR 24**, the court had this to say –

**‘I may go further and hold that failure to check records to ascertain the true position may very well be negligence on their part... the defendants must be deemed to have acted recklessly in publishing the distorted story... I hold that the author published the defamatory statement complained of... with reckless indifference as to whether it was just or unjust.’**

It is therefore clear from the foregoing that the Plaintiff has satisfied the Court that the notice published by the Defendants was not only reckless and negligent but also malicious. As pointed out earlier, as the Defendants did not adduce any evidence to prove any truth in the contents of the public notice it is deemed to have been malicious. See **KL vs Standard Limited [2014] eKLR**.

The Plaintiff has also claimed damages for false imprisonment. He was arrested and detained for 12 (twelve) days when he surrendered himself to the police in Siaya before being released without any charges being preferred against him. He and PW2 testified that he was held on suspicion that he had murdered the 1<sup>st</sup> Defendant’s mother yet the culprit was well known in Siaya as he (culprit) happened to be the 1<sup>st</sup> Defendant’s nephew. As already noted, there was no evidence adduced to rebut these assertions; therefore it is proper to assume that it is the 1<sup>st</sup> Defendant who was responsible for the complaint leveled against the Plaintiff.

As to whether the matter terminated in the 1<sup>st</sup> Defendant’s favour, it goes without saying that he was released without any charges being levelled against him.

On whether the 4<sup>th</sup> Defendant acted without reasonable and probable cause it is evident from the testimonies of the witnesses that the police did not carry out independent investigations on the culpability of the Plaintiff. Instead, they detained him in a cell for twelve days on mere allegations that he had committed murder. There was no probable cause to detain him and the conclusion is that it was actuated by malice as they only sought to appease the Plaintiff. Accordingly, there was no justifiable cause for the Plaintiff’s incarceration in cells. He is therefore entitled to a claim of false imprisonment.

I will now consider what damages are due to the Plaintiff. In doing so I have taken into account the Plaintiff’s submissions, including the cases and other authorities cited.

It is the Plaintiff’s case that the public notice in the newspaper belonging to the 3<sup>rd</sup> Defendant caused injury to his credit, character and reputation, particularly in his profession as he was dismissed from employment ‘to go and solve the criminal issues with the police...’. He has also stated that his character and reputation were brought into ridicule and contempt; and that he suffered considerable pain and mental anguish, trouble, inconvenience and anxiety.

In his testimony-in-chief he stated that the public notice and subsequent detention had serious adverse consequences on him and he continues to suffer as he is still branded a criminal. He further stated that he cannot secure employment due to the extent to which he was defamed.

It must be noted that the Plaintiff's claim is based on both defamation and false imprisonment. The court will take into account such proved damage to the Plaintiff on account of both claims as they were both pleaded and proved to the required degree.

If a plaintiff claims that his character and reputation is damaged, he must provide some evidence tending to prove such damage. The same applies to any alleged damage to his prospects and fortunes. This is for purposes of assessment of damages.

Apart from his statement, there was no other evidence regarding damage to the Plaintiff's character and reputation or to his prospects or fortunes. He did not call to testify any friend or professional colleague who may have shunned him on account of the publication. PW2 testified that he knew this as a case of mistaken identity and that hence his opinion towards his brother did not change. The Plaintiff did not tender any evidence of any application he may have made seeking employment and consequent rejection on account of the publication.

But the Court bears in mind that the whole ordeal must have caused the Plaintiff and his family much distress and inconvenience. There would probably be, at least initially, some uneasiness or awkwardness on his part and on the part of his friends and professional colleagues in socializing together immediately after the incident.

Whereas Section 16A of the Defamation Act (Cap 36 Laws of Kenya) provides that in any action for libel, the court has the discretion to award such amount it deems fit, the proviso to that section is to the effect that where the libel committed is with regard to an offence punishable by death, the amount assessed shall not be less than 1 Million shillings. The offence for which the plaintiff would have been charged for fell under section 204 of the Penal Code whose punishment is death.

In **Hon. Amb. Chirau Ali Mwakwere vs Royal Media Services Limited HCCC No. 57 of 2004**, the Plaintiff was awarded Kshs. 3,000,000/- for libelous publications against him.

In **Kenya Tea Development Agency Ltd vs Benson Ondimu Masese T/A B O Masese & Co. Advocates Civil Appeal No. 95 of 2006**, the Court of Appeal reduced an award of Kshs. 10,000,000/- awarded by the High Court to Kshs. 1,500,000/- yet the Plaintiff in that case was an Advocate who had been libeled.

In **Abraham Kiptanui v Francis Mwaniki and 4 others (HCCC No. 42 of 1997)(unreported)** a former Comptroller of State house was awarded general damages on account of libelous statements published against him amounting to Kshs. 3,500,000/-.

The cases quoted concerned political elites, senior civil servants and Advocates whose reputations, character and standing needed a lot more protection. That is not to say that the Plaintiff in this case did not have a reputation to uphold but being a private citizen, a fewer number of people would be captivated by the public notice published.

Learned counsel for the Plaintiff in their submissions suggested general damages of KShs 3 million on account of defamation and 2.5 Million on the false imprisonment claim.

It is my considered view that Kshs. 1,200,000/- is adequate compensation for the Plaintiff in this case.

As for the claim of false imprisonment, it is to be expected that any unwarranted detention will cause a certain amount of anxiety and distress to the person so detained. There will be attendant trouble and inconvenience and in the Plaintiff's words he had to engage the services of a Counsel as he was expected to report to Siaya every two weeks.

In **Nyeri HCCA No. 88 of 2001 Samuel Ndirangu vs Patrick Wachira Nderitu [2004]eKLR** the Plaintiff was awarded Kshs. 25,000/- for two (2) days unlawful detention.

In **Juma Khamisi Kariuki vs East Africa Industries & Grace Okoko [1986]eKLR** Kshs 20,000/- was awarded for wrongful arrest, false imprisonment and malicious prosecution.

Taking all these factors into account, including the fact that all these happened some eight years ago (which means that the Plaintiff must have long since moved on), and doing the best that I can, I will award the Plaintiff a sum of Kshs. 500,000/-.

The Plaintiff claimed special damages of KShs 25,000/00, the same being his legal expenses connected with his defence and court fees. This amount was strictly proved by way of receipts. I will award that sum.

The Plaintiff also prayed for an unqualified apology. Considering the length of time that has passed between the publishing of the notice and this decision, memories are bound to have faded and therefore an apology would not serve the same purpose it would have served seven (7) years ago.

As for aggravated damages, which are meant to compensate the Plaintiff for any additional injury going beyond that which would have flowed from the defamatory words, the Plaintiff did not establish that he was injured beyond that which flowed from the words complained of. Therefore, I decline to award any damages under this head.

In summary I enter judgment for the Plaintiff against the Defendant for the total sum of KShs. 1,725,000/-. The general damages will carry interest at court rates from the date of delivery of judgment while the special damages will carry the same interest from the date of filing suit, until payment in full. The Plaintiff shall have costs of the suit. Those will be the orders of the court.

***Dated, signed and delivered at Nairobi this 7<sup>th</sup> day of October, 2015.***

**A. MBOGHOLI MSAGHA**

**JUDGE**