



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 263 OF 2010

LUCY KAGWIRIA RUTERE..... PLAINTIFF

VERSU

THE STANDARD LIMITED 1ST DEFENDANT

CYRUS OMBATI 2ND DEFENDANT

DAVID OCHAMI..... 3RD DEFENDANT

PATRICK BEJA.....4TH DEFENDANT

PETER ORENGO 5TH DEFENDANT

JUDGEMENT

1. Lucy Kagwiria Rutere, the Plainiff herein, sued the Standard Ltd, Cyrus Ombati, David Ochami, Patrick Beja and Peter Orengo the 1st – 5th Defendants respectively vide the plaint dated 20th May 2010 in which she sought for judgement in the following terms:
 - a. *An order of injunction do issue to restrain the defendant s by themselves its servants and/or agents or otherwise howsoever from further utterance and or publication or causing to be published the words complained of or words similar to or in meaning to the words complained of or any words defamatory of the plaintiff.*
 - b. *An order do issue directed at the defendants to apologise retract and publish the retraction of the defamatory part of the reports contained in the edition of the standard newspaper of 2nd and 3rd June 2009.*
 - c. *General and exemplary and/or aggravated damages together with interest thereon for defamation*
 - d. *Costs of this suit with interest thereon.*
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 2nd and 3rd June 2009 the 1st defendant’s newspaper published an article indicating that the plaintiff was among the Kenyan women who had been arrested charged and convicted for drug trafficking offences in China and was to be jailed for between 20 and 25 years. The plaintiff claimed the said published article was defamatory and the defendants had malicious intentions against her and were further negligent and reckless 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. The defendants further stated that the publication was true in substance and form in so far as they were an accurate report of qualified privilege.
5. When the suit came up for hearing, the plaintiff was the only witness who testified in support of her case.

The gist of her evidence is summarised as follows: That she is a business lady who regularly visited China prior to 2009 and she produced her passport to support her testimony. At the time of the offending publication the plaintiff was in Kenya though in the recent past she had travelled to China and Hong Kong for business. She stated that while she was on her business trip to China, she was never arrested, charged, tried nor convicted for any offence. The plaintiff testified giving the full details on the effects of the publication on her business, family and social level. She said that as a result of the effects of the publication she had to transfer her daughter from All Saints Cathedral to another school. She also claimed that she had to close her thriving business due to the negative publicity which made people shun her and her business. She further stated that she was treated with contempt and suspicion.

6. On their part, the defendants tendered the evidence of Cyrus Ombati (DW1), 2nd defendant, whose evidence may be summarised as follows: It is D.W.1's evidence that he was following up on a story involving one Olivia Munoko, a Kenyan whom he alleged was arrested and jailed in China for drug trafficking. DW 1 stated that he contacted the Foreign Affairs Ministry in Kenya who furnished him with the list of Kenyans who had purportedly been arrested and jailed in China for drug trafficking and amongst those names he was given was that of Lucy Kagwiria Rutere which he said, is a notorious Meru name and therefore not necessarily a reference to the plaintiff. The witness further stated that they published the story innocently and without intending to defame the plaintiff and that the matter was of public interest as it touched on the subject of drug trafficking.
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 8 statements of issues, the same maybe summarised to two main issues namely:

- i. **Whether there is defamation**
- ii. **What is the quantum of 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 drug trafficking hence everyone is entitled to make fair comment. It is the submission of the defendants that the publication was made in utmost good faith and without any malice towards the plaintiff. It is said that the defendants had a moral and social duty that they publish the same. The defendants further cited the defamation Act which provides for qualified privilege and fair comment.
9. The defendants further pointed out that the plaintiff cannot claim to have been defamed when she has failed to prove how the publication harmed her reputation and loss of reputation from business associates and colleagues that resulted to the loss of business. The defendants also argued that the plaintiff's name is a common Meru name and that the plaintiff failed to prove that the person mentioned in the article was indeed her. I have already outlined the plaintiff's arguments. From the outset, the defendants admit having published the offending articles. The defendants further admit that they received a demand notice from the plaintiff's advocate. In the demand, letter the plaintiff inter alia, demanded for the immediate correction and apology, cessation of further publication and admission of liability as well as an offer for amends. The defendant did not honour the plaintiff's demands. Under Section 13 (1) (a) of the Defamation Act, it is clearly stated that where a person publishes words said to be defamatory to another, that person may if he claims the words were published innocently in relation to the plaintiff, make an offer for amends and if the offer is accepted by the plaintiff and is performed then no proceedings for libel shall be taken

out. In my estimation, the defences raised by the defendant that the publications were unintentional, did not refer to the plaintiff and was without malice are no longer available to the defendants in view of the aforementioned provision.

10. The defendants have argued that the publication was without malice neither was it negligent. The plaintiff complained to the defendants about the publication but the defendants did not take steps to tender a full apology as envisaged under Section 12 (2) of the Defamation Act. It is therefore difficult to rely on the defence because despite having been notified, the defendants did not take steps to correct the erroneous report. The defence of absence of malice in the circumstances cannot stand.
11. The other defence raised by the defendants is fair comment upon a matter of public interest. A reading of the offending publication will reveal that the same are not in the nature of comments nor opinions but were reports made by the defendants based on alleged written list provided by the Ministry of Foreign Affairs. The defendants failed to avail the list to assist this court to determine their veracity. The list would have shown the passport numbers of the persons named. In fact DW 1 admitted that he did not make any attempt to verify the full particulars of the alleged convicts from the Chinese Embassy, Nairobi. It would appear the defendants solely relied on the list which they failed to present to this court in evidence. This omission makes the defence crumble.
12. The defendant also pleaded the defence of justification and privilege. Unfortunately, the defendants did not tender any evidence to establish the above defences.
13. Having come to the conclusion that the defences put forward by the defendants cannot stand, it is important to determine whether or not the plaintiff has tendered credible evidence to prove that she had actually been defamed. Defamation involves a false derogatory statement made against a person without lawful justification. The offending statement must be one that harms a person's reputation, decreased the respect, regard or confidence in which a person is held. The alleged offending statement is reproduced verbatim in paragraph 5 of the plaint as follows:

On Tuesday the 2nd June 2009 in "The Standard" edition of that day the defendants published as its headline of and concerning the plaintiff the following words

"EXCLUSIVE"

5 Kenyans to hang over drugs in China Six others face life in prison, while 20 have been jailed for up to 22 years for drug trafficking. Majority are women".

By Cyrus Ombati Five Kenyans have been sentenced to death in China after they were found guilty of drug trafficking.

Six others have been condemned to life imprisonment in Chinese jails for drug peddling. The Standard has established.

And 20 others, majority of them young women, are serving a cumulative jail term of 150 years. Some of them may not even have known that they were carrying drugs. These are among more than 200 Kenyans currently being held in various jails in china, India, Pakistan, UK and other Asian countries over drug-related offences.

Some of those already serving jail terms were university students before they were lured to serve as drug couriers. Among those sentenced to death are Mr. Peter Amisi Obonyo, 36, who was arrested in Shezhen, China. Others are Ms Josephone Achieng Onim, 25, and Ms Grace Lucy Omondi, 57 both arrested in Guangzhout on different dates.

Ms Leah Muthoni Mweru Kimaniadn Christine Nyabera Ongowo, 47, were also

sentenced to death after being arrested with drugs in Guangzhou.

Those sentenced to life imprisonment are Margaret Mudisis Engesia, 36, Ms oliviah S. Munoko, 26, Ms Peris Mumbi, 39 Jemimah Wairimu Wangai, 43; Ms Catherine Wambui 39, and Ms Jecinta Wambui Kuria, 44.

MORE ARRESTS

The Ministry of Foreign Affairs confirmed the number but said the figure could be higher as more Kenyans had been arrested last month on drug-related offences and their particulars remained unclear.

The acting Head of Press and Communications Unit at the Foreign Affairs Ministry, Mr. Kiboi Waituru, however, clarified that none of those handed death sentences has been hanged yet.

The Standard has also established that many other Kenyans are serving jail sentences in jails around the world for drug-related offences, but the Government is unaware because they used fake documents, or were not registered with Kenyan missions abroad. A number of them have died in foreign jails.

“It is unfortunate that some of our missions do not have records of Kenyans arrested or serving sentences on drug charges because many of them do not register with the embassies as required. Some only do so when seeking assistance when they encounter problems, said Waituru.

Most of the convicts were caught carrying a kilo or less of the drugs, which range from cocaine to heroin and amphetamines. The traffickers are usually paid between shs.200,000 and shs.300,000 on delivery of the drugs. Waituru said police in other countries contact the Kenyan Mission to verify the nationality of suspects arrested while travelling on Kenyan passports.

The Government too assists the families of those in custody to travel abroad to visit their relatives.

A list of names of the traffickers in Chinese jails alone, a copy of which was obtained by The Standard, show that some Kenyans were given death and life sentences after pleading “guilty” to the charges.

Many of the traffickers in Hong Kong, Shenzhen, Guangzhou and Beijing on diverse dates between 2007 and last month.

“Some of them have had their sentences commuted to life imprisonment for good behaviour while in jail. They are hardly executed, Waituru said.

SOME CONFESSED

A big number of the Kenyans in custody have allegedly confessed they had been recruited by a Nigerian drug kingpin-a Mr. Ken Amadu Obina Obina Okuoma- in Nairobi. Okuoma has since been deported.

Okuoma had operated a drugs empire in Kenya for more than a decade until early this year when he was caught in a dramatic police operation. He was also linked to the arrest of former Miss Tourism and Fashion model Ms Loise Ambasa., who was found with 4.2kg of cocaine valued at sh21 million on arrival at Nairobi’s JKIA airport from Accra, Ghana, in 2005. She was released in November last year after police failed to

produce a bag that they had earlier claimed contained the drugs.

Police Investigations show that drug barons operating from Nairobi have been recruiting couriers, especially young women, who are lured with the promise of large amounts of money and lavish lifestyles.

Head of CID's anti-Narcotics Unit Ms Judy Auma said the number of Kenyans in custody over drug offences abroad could be higher because some of the cases go unreported."

In paragraph 6 of the plaintiff the defendants are also alleged to have published as follows:

"Wetangula to visit China over Kenyan Smugglers"

BY STANDARD TEAM

Foreign Affairs Minister Moses Wetangula bowed to pressure from MPs and promised to travel to China to help save the lives of six Kenyans who have been sentenced to death for drug trafficking.

This came even as MPs praised the Chinese action as timely and worthy of emulation by Kenya.

But Mr. Wetangula said he would go to China to plead with Beijing to commute the sentences to life imprisonment.

This was in response to The Standard story yesterday detailing why more than two dozen Kenyans face the death penalty or life in prison for drug offence. Wetangula.....
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Drugs : Wetangula to take up cases of Kenyans in China

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told parliament he would negotiate a prisoner exchange protocol with the Chinese government to enable these and other Kenyans convicted in China to serve the prison sentences in Kenya.

"I intend to visit China to see how we can commute the death sentences to life and see how we can exchange prisoners so that they can serve sentences in Kenya " he said.

The minister gave a breakdown of 27 Kenyans in China's jails, including 22 "very young girls" and five boys and girls on death row.

MPs expressed shock and outrage that the economic plight of Kenyan youngsters in China and overseas, their susceptibility to manipulation by international criminals and the likelihood that they did not receive a fair trial in China's courts.

CRIMINAL SYNDICATES

According to the minister's figures, the five on death row include a very young boy who, together with the other 26 Kenyan convicts, was lured into drug trafficking as couriers by "criminal syndicates from West Africa.

The minister did not elaborate on the alleged West African criminals, but disclosed that the Kenyans were students in China and other Asian nations when they were lured into

drug crime.

Among those sentenced to death are Peter Amisi Obonyo, 36, who was arrested in Shnzehen, China, Josephine Ochieng Onim, 25 and Grace Lucy Omondi, 57, who were arrested in Guangzhou on different dates and sentenced to death.

Leah Muthoni Mweru Kimani and Christine Nyabera Ongowo 47, were also arrested carrying drugs in Guangzhou and sentenced to death.

Those jailed for life are Margaret Mudasis Engeisa, Oliviah Munoko, Peris Mumbi, Jemimah Wairimu Wangai and Jecinta Wambui Kuria.

Wetangula asked parents to counsel their children before sending them to study overseas. But MPs suggested that Kenyan and Chinese governments are not blameless in the matter.

Mr. Yususf Chanzu (Vihiga, ODM) demanded an inventory of all Kenyans held and executed in foreign jails.

“There are more Kenyans held, not just in China but also other countries and some have already been executed. We want the minister to give us statistics of all Kenyans held or executed abroad, said Chanzu.

Ms Millie Oddhaimbo (Nominated ODM) alleged Kenya did not give legal support to Kenyans held in China.

“I grew up with one of these ladies (convicts) in Parklands and I am surprised to learn that many of them did not get legal counsel in China. Kenya failed miserably by not availing (sic) legal counsel to her citizens,. She said.

Mr. Danson Mungatana (Garsen, Narc-K) claimed the Kenyans were tried and convinced due to the “failure” by the Kenyan High Comission in Beinjing, which he alleged had not supported the convicts.

Mr. Gitobu Imanyara (Imenti Central, CCU) claimed the Kenyans, most likely did not get a fir trial because China’s justice system “does not meet international standards.”

PUNITIVE SENTENCE

He said the sentences are punitive and demanded justice and fair treatment for Kenyans in China.

More Kenyans could be languishing in jails around the world for drug related offences, but the government is unaware because they use fake documents, or are not registered with Kenyan missions.

Yesterday, Imams backed the Chinese action of sentencing drug traffickers to hang or jailing them for life.

A haul of bhang netted by police (PHOTO:JFILES/STANDARD)

Under the Council of Imams and Preachers of Kenya (CIPK), they urged Kenya to borrow a leaf from China and introduce stiffer penalties to deter drug barons who have ruined thousands of youths, especially at the Coast.

CIPK National Chairman Sheikh Mohammed Idris, treasurer Sheikh Hassan Omar,

Assistant treasurer Sheikh Hassan Suleiman and organising secretary Sheikh Mohamed Khalifa also urged the government to declare drug sale and consumption a national disaster. They said this would intensify the campaign, save lives and boost the war against HIV and Aids.

At the Coast, the Imams of Mombasa, Mariakani, Mtwapa, Soouth Coast, Kilifi, Malindi and Lamu are hard hit and thousands of youths have fallen victim to drugs sold widely in the region. Sheikh Idris said youths were fast turning into zombies and contracting HIV due to drugs.

Yesterday, it emerged that some families of Kenyans held abroad over drug trafficking have travelled there more than twice to see their kin, the Ministry of Foreign Affairs said yesterday. Ministry head of Press Unit Kiboi Waituru said they organize for the families to travel whenever they request so.

PROVIDE INFORMATION

“The ministry’s role in some of the cases is limited and there is very little we can do. Maybe we can request the transfer of some of those in custody to Kenya on the demand of one’s family, he said.

Some relatives declined to comment on the matter when reached for comment yesterday, claiming they were traumatized by their jailing of the children.

14. In their ordinary meaning, the published words meant and were understood to mean that the plaintiff is a drug trafficker and that she was arrested in China while engaging in the vice of drug trafficking. The publication was also understood to mean that the plaintiff has been charged, tried and convicted before a court of law. In short, the publications depicted the plaintiff as a criminal. The plaintiff has tendered evidence which has shown that the contents of the publications were false. I have come to the conclusion that the plaintiff tendered plausible evidence to show that the publications were false, wrongful and defamatory. I am also convinced that as a result of the publications, the plaintiff was exposed to public scandal, ridicule, contempt and embarrassment. In the end I find that on a balance of probabilities, the tort of defamation was established against the defendants.

15. Having determined the question of liability, let me now determine the question of quantum. The defendants urged this court to find that the defendants did not in any way act negligently nor in a reckless manner when publishing. The defendant pointed out that the plaintiff had failed to establish what adds value to her reputation and how the publications led to lowering her moral and social standing that led to the loss of her business. The defendants further argued that the plaintiffs cannot prove how much she is worth hence care has to be taken when making the awards. The defendants cited **Mombasa H.C.C.C 436 of 2002 Azziz Kassim Lakha = vs = E. A Standard** where a sum of kshs.500,000/= was awarded as general damages.

16. They also cited the case of **Nashon Oluoch = vs = Kenya Times media Trust Ltd and another (2006) eklr in** which the court made an award of kshs.1,500,000/= as general damages.

17) The defendants proposed an award of kshs.500,000 as sufficient award on damages.

The plaintiff on her part urged this court to award her ksh.2,800,000/=

There are ample authorities which have set out the principles to be considered in assessing damages in defamation cases.

17. It suffices to cite the case of **Ole Kaparo = vs = Standard ltd & others (2009) 2 E.A, 360** in which the court stated making an award the following guidelines will apply:

- a. *The award must be sufficient to convince those who knew of the defamation that the plaintiff was wrongly accused.*
- b. *The award must cover the injure feelings, the anxiety and uncertainty undergone in the litigation.*
- c. *Failure to contradict the libel, insistence of defences of justification and absence of apology will aggravate damages.*
- d. *The conduct of the defendants at the time of publication and thereafter will also be a factor.*

18.I will apply the above principles in assessing damages in this case.

19.The plaintiff tendered evidence showing that she was a business lady engaged in the importation and sale of merchandise from China and other countries. She also informed this court that as a result of the negative publication, her business collapsed. I must hasten to state that I am satisfied that the plaintiff’s business may have gone down because of the publication but there is no empirical evidence to link the offending publications to the collapse of the plaintiff’s business. What came out clearly from the evidence is that the plaintiff’s friends, business associates, clients etc begun to treat her with suspicion. Her reputation was obviously dented by the publication.

20.Under Section 16A of the Defamation Act, the law stipulates inter alia that where libel is in respect of an offence punishable by imprisonment for a term of not less than 3 years the amount assessed shall not be less than kshs.400,000/= or kshs.1,000,000/= where the offence is punishable by death. The evidence tendered by the plaintiff show that the plaintiff fell in a category of persons for imprisonment for a term between 10 years and 25 years.

21.Applying the above principles I enter judgement in favour of the Plaintiff and against the Defendant in the following terms.

i. The defendants are ordered and directed to apologise, retract and publish the retraction of the defamatory part of the reports contained in the edition of the Standard of 2nd and 3rd June 2009 within a period of 30 days.

ii. Under Section 16 A of the Defamation Act, the plaintiff is awarded the minimum of.....kshs.400,000/=

iii. General damages for defamation taking into account all relevant factors.....kshs.1,200,000/=

iv. Additional damages under Section 7A (6) of the

Defamation Actkshs.300,000/=

Total **kshs.1,900,000/=**

v. Costs of the suit.

Dated, Signed and Delivered in open court this 11th day of November, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

.....for the Defendant