



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL SUIT NO. 319 OF 2011

HONOURABLE HENRY ONYANCHA OBWOCHA.....PLAINTIFF

VERSUS

HEAD LINK PUBLISHERS LIMITED ....DEFENDANT

**JUDGMENT**

1. The plaintiff via his plaint dated 4th August 2011 claims as against the defendant general and exemplary damages for defamation and a permanent injunction restraining the defendant, its agents and or servants from continuing to repeat publishing, publication and dissemination of the said articles to the like effect in future of and concerning him plus cost and interest of the suit.
2. The plaintiff claims that on or about the week starting 2<sup>nd</sup> to 8<sup>th</sup> May 2011, the defendant entered, published and distributed or caused to be written and published an article concerning the plaintiff in the way of his political career and ambition. That in the said newspaper at page 19 of the said newspaper under the caption, the following words were written “**Former Minister Onyancha unmasked**”

*“And the choice of Obwocha and his lieutenants in Ford People Leadership is strategic since they are dyed-in-wool Nyachae sycophants and yes man who cannot be relied upon to implement the retired politician’s feudal, archaic agenda without question. In west Mugirango, reactions have ranged from dismissal to anger as many see him as a retrospective leader whose past three terms as M.P. was the worst for residents who talked on conditions of anonymity describe him as a total wreck whose family life is disgraceful and a shame to the community while his leadership was marred by sexual immorality, theft and mismanagement of public funds (CDF) track record 2003-2007 and the raw sycophancy of Mzee Nyachae instead of keeping an independent mind to be able to effectively serve his voters. On the family front, the man’s three wives are said to have rebelled and rarely share much for reasons best known to the public. Ominously, in reaction, the former MP has resorted to illicit love affairs more so (sic) unsuspecting small girls who go to him pleading for jobs. Sources say he has established permanent lodging rooms in Kisii town, Nakuru and Nairobi.*

*“Now during his recent term in parliament went on a stealing spree of public funds and specialized in stealing on CDF projects and other funds from the constituency”*

*“personally pocketed much of the loot to fund his prostitution escapades and that an estimated over Kshs. 20 million meant for CDF project was embezzled under his watch and locals wonder why the Kenya Anti-Corruption Commission has never brought him and his lieutenants to book”.*

3. He avers that the words in their ordinary meaning meant and were understood to mean:- that the

- plaintiff is not an independent leader but a sycophant and yes man of another leader and thus is untrustworthy of any future leadership position in Gusii community; is a dishonest person who has stolen and embezzled CDF funds; is an immoral person preying on vulnerable young girls seeking employment and engaging in totally unsafe sexual relations with prostitutes which immorality has wreaked havoc on his family. As a result of the said publication the plaintiff claims his credit, character and reputation has been greatly injured and has brought him into hatred, contempt and ridicule and lowered him in the estimation of right thinking members of society; that the words were calculated to disparage the him in his career and has suffered public ridicule, odium and loss of esteem as the publication has caused him distress and embarrassment.
4. The defendant despite being served with a copy of the said plaint and summons as evidenced by the return of service dated 19<sup>th</sup> September 2011 did not enter appearance or file a defence and interlocutory judgment was subsequently entered against it on 16<sup>th</sup> April 2013.
  5. The matter came for hearing on 4<sup>th</sup> June 2014. The plaintiff adopted his statement dated 9<sup>th</sup> August 2011 and testified as follows; that the defamatory articles were published by the defendant Head link Publishers Limited in their weekly citizen; that before the said publication he had been a Member of Parliament for 3 consecutive terms and had just been elected as the Chairman of Ford People. He denied being a sycophant of Mr. Nyachae and indicated that he did not know Mr. Nyachae when he first joined parliament back in 1992. He also denied the allegations of being polygamous stating he was happily married to one wife and the publication had caused him and his family a lot of anguish; that as a result of the publication he was denied a chance to be elected as Senator in Nyamira County and that he learnt of the publications from his son who stays in the UK and his daughters called him to clarify the story. He urged the Court to grant him general and exemplary damages.
  6. PW2 was Dalline Mokeira Onyancha. She adopted her statement dated 4<sup>th</sup> August 2011 and testified that she was the only wife to the plaintiff and was traumatized by the allegations in the publications and stated that they were not true; that his husband contested for the position of Senator but did not win and that he was the Chairman of Ford people.
  7. PW3 was Victor Omariba Nyang'ayo. He testified that he was in KNUT for 15 years; that Onyancha was his MP in West Mugirango Constituency and refuted the allegations in the article adding that the publication was portraying the plaintiff as a corrupt person and should be disregarded; that the same came after the plaintiff was elected as a Chairman of Ford People and confirmed that the plaintiff ran for the Senator's position but did not win.
  8. The plaintiff in his submissions highlighted the background culminating to this suit; it was submitted that it was difficult to see how the plaintiff was a sycophant when in 1992 his political interest were divergent and having been elected for 3 consecutive terms it would be hard to term such a person as another's politician's sycophant hence the publication was not only false but also malicious.
  9. On sexual immorality and fraud it was submitted that the plaintiff's wife had testified that they are in a monogamous marriage and that the plaintiff did not have any other wives hence the defendants publication were wild concocted defamatory statements actuated by malice; that polygamy was not defamatory per se but accusing a person who had contracted a monogamous marriage was tantamount to infer that the person was committing bigamy further the allegation that he had permanent lodgings in Kisii, Nakuru and Nairobi was meant to infer that the plaintiff was highly immoral and engaged in unsafe sex to the detriment of his alleged wives; that the plaintiff had stolen over Kshs. 20 million of CDF money was a false statement and the same was not supported by evidence.
  10. It was further submitted that the said defamatory articles had the tendency to injure and did injure the reputation of the plaintiff which he has built over a long period of time. The articles lowered the estimation of right thinking members of society and contributed to the loss of his senatorial seat in Nyamira County and thus the defendant is liable to pay the plaintiff damages.
  11. On quantum of damages it was submitted that the award of general and exemplary damages is at the discretion of the Court and it ought to take into account a number of guiding principles. He relied on the case of *The Standard Limited –vs- G. N. Kagia t/a Kagia & Company Advocates [Nairobi Civil Appeal No. 115 of 2003]* where it was held that; “a trial court has a wide latitude in assessing damages to award in libel cases and when such award is made an appellate Court cannot interfere with the trial Court's discretion in the matter.”

Also the case of **ROCK –vs- FAIRRIE [1941] 1 ALL ER 297** where it was held that; “*the latitude in awarding damages in an action for libel is very wide and the one thing a court of appeal must avoid doing is to substitute its own opinion as to what it would have awarded for sum which has been awarded by the judge below*”.

12. It was submitted that the court considers the conduct of the defendant. For this the plaintiff relied on the case of **PRAED –vs- GRAHAM 24 QBD 53, 55**, where it was held that, “*in an action for libel the whole conduct of the defendant from the time the libel was published down to the time the verdict is given. It may consider where his conduct has been before action, after action and in court during trial.*”
13. It was submitted that damages are awarded to vindicate the plaintiff to the public and as a consolation to him for a wrong done. The plaintiff relied on the case of **URN VS JOHN FAIRFAX & SONS PTY LTD 117 CLR 115, 150** where it was held that; “*it seems that the properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he has injured his reputation that is simply because he was publicly defamed. For this reason, compensation is here a solarium rather than a monetary recompense for harm measurable in money.*”
14. It was further submitted that the plaintiff loss of the senatorial seat was highly attributed to the defendant’s attack on his character by the defendant’s paper and the offending story greatly distressed and traumatized the plaintiff; that the defendant’s article was to enhance readers and thrived on publishing unsubstantiated stories about leading personalities with a view to extort money from victims or boost their stories which constitutes malice.
15. On exemplary damages it was submitted that the plaintiff is entitled to exemplary damages as it is clear that the defendant publication of the defamatory article was reckless whether the same was tortious or not. He relied on the case of **MANSON –VS- ASSOCIATED NEWSPAPER LTD [1965]2 ALLER 954** where it was held that, exemplary damages may be awarded; “*in a case in which a newspaper quite deliberately published a statement which either knows to be false or which it publishes recklessly, carelessly whether it be true or false.*”
16. In the plaintiff case the defamatory articles touched on his personal integrity, his political reputation, his honor and morality which he argues are the core attributes of a person’s personality. He relied on the case of **BIWOTT –vs- CLAYS LIMITED & 3 OTHERS [2007] KLR 597**. The then cabinet minister had been accused of killing his colleague Dr. Robert Ouko. He was awarded Kshs. 25 million in general damages and Kshs.5 million exemplary damages; that noting the award was made some 14 years ago the damages in present case should be around Kshs. 120 million.

He also relied on the case of **CHARLES KARIUKI t/a CHARLES KARIUKI & CO. ADVOCATES MERU HCCC No. 5 of 2000** where a lawyer who claimed to have lodged fraudulent accident claims with a view to defraud insurance companies was awarded Kshs. 20million in general damages, which current value is close to 80 million. He also relied on the case of

**OBURE VS TOM ALWAKA & OTHERS NAIROBI HCCC 856 OF 2013** where an article had been published by the “weekly citizen” that he had stolen another man’s wife. He was awarded Kshs. 17 million. Noting that in the above case the defamatory statement only touched on the plaintiff’s moral character while in the current case the statement refers to the plaintiffs integrity, moral character and political leadership and as such the award for damages should be higher than the 17 million awarded in the above case which was made some 11 years ago and which would translate to Kshs. 68 million today. Having this in mind the plaintiff proposed an award of Kshs. 25 million in damages and Kshs. 5 million exemplary damages which amounts to Kshs. 30 million.

### **Issues for determination**

- i. Whether the alleged articles were defamatory?
- ii. Whether the plaintiff is entitled to general?
- iii. Whether the plaintiff is entitled to exemplary damages?

17. The statements alleged to be defamatory are contained in a newspaper article. A libel is a defamatory statement ..... *made in writing or printing or some other permanent form .....*” The elements of the tort of defamation are that the words must be defamatory, the words must refer to the plaintiff and the words must be malicious. The words must be defamatory in that they must tend to lower the plaintiff’s reputation in the eyes of right-minded persons, or must tend to cause him to be shunned or avoided. The burden of proof is upon the person alleging that the said words to be defamatory to show that a reasonable man would have understood them as such.
18. The article published by the defendant in its newspaper is quoted by the plaintiff in paragraph 5 of his plaint as follows;

***“The choice of Obwocha and his lieutenants in Ford People Leadership is strategic since they are dyed-in-wool Nyachae sycophants and yes man who cannot be relied upon to implement the retired politician’s feudal, archaic agenda without question. In west Mugirango, reactions have ranged from dismissal to anger as many see him as a retrospective leader whose past three terms as M.P. was the worst for residents”.*** This statement imputes on the plaintiff character as a person who lacks leadership skills and a puppet leader who is used by others. This I find is calculated to discredit his political career.

19. The article further states ***“Now during his recent term in parliament went on a stealing spree of public funds and specialized in stealing on CDF projects and other funds from the constituency”*** and ***“that an estimated over Kshs. 20 million meant for CDF project was embezzled under his watch and locals wonder why the Kenya Anti-Corruption Commission has never brought him and his lieutenants to book”.*** These statements go to discredit the plaintiff’s personal integrity and imputes that he cannot be trusted with public funds.
20. The article further states ***“the former MP has resorted to illicit love affairs more so (sic) unsuspecting small girls who go to him pleading for jobs. Sources say he has established permanent lodging rooms in Kisii town, Nakuru and Nairobi”*** and ***“personally pocketed much of the loot to fund his prostitution escapades”.*** These statements go to impute the moral character of the plaintiff portraying him as an immoral person who engages in irresponsible sexual acts.
21. I therefore find that the statements as published by the defendant were defamatory. It is also not in doubt as to whom the said statements refer to as the article was published under the heading of ***“Former Minister Obwocha unmasked”*** and also bears the caption of the plaintiff. I also find that there is no basis or evidence supporting the various allegations levied against the plaintiff as such I find the said defamatory was malicious. On this am guided by the case of ***Godwin Wachira vs. Okoth [1977] KLR 24;*** where it was held that, ***“Malice here does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice. 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 but the law does not weigh in a hair balance and it does not follow merely because the words are excessive, there is therefore malice.....the failure to inquire into the facts is a fact from which inference of malice may properly be drawn. Any evidence, which shows that the defendant knows the statement was false or did not care whether it be true or false, will be evidence of malice.”***

The plaintiff called witnesses who confirmed that the allegations were untrue.

22. Having analyzed the evidence and the plaintiff’s submissions. I find that the said article was libelous and therefore defamatory. This now takes me to analyze the award in damages as sought by the plaintiff. Section 16A of the Defamation Act Cap 36 Laws of Kenya provides: ***“In any action for libel, the court shall assess the amount of damages payable in such amount as it may deem just:***

From the reading of the said defamatory statements the plaintiff’s career in politics the imputation of his personal integrity will discredit him before right thinking members of public as a person not capable of being entrusted to hold public office or entrusted with public funds. I have also considered the weighty words used by the defendant in the said article and find the same are calculated to injure. The imputation on his moral character will in no doubt cause strain within the plaintiff’s family

weakening his family ties as such I find that the plaintiff has proved his defamation claim. Guided by the cited cases, on the award of damages as against the defendant I find an award of (fifteen million) Kshs.15, 000,000/- is adequate general damages.

23.On exemplary damages the defendant herein on the various days between 2nd to 8th May 2011 continued publishing and distributing the offensive article in its weekly newspaper without care whether the said allegations were true or not. I find that this publication by the defendant was reckless and careless. It is important to note that the defendant also never offered any apology or made any efforts to make amends as such I find the plaintiff is entitled to exemplary damages and award him exemplary damages of Kshs. 5,000,000/-. See the case of **MANSON –VS- ASSOCIATED NEWSPAPER LTD (supra)** and **PRAED –vs- GRAHAM (supra)**.

24.I therefore enter judgment for the plaintiff against the defendant for the sum of Kshs. 20,000,000/ together with costs and interest from the date of this judgment until the same is paid in full. The plaintiff shall also have cost of this suit.

Orders Accordingly.

**Dated, signed and delivered this 4<sup>th</sup> day of December 2014.**

**R.E. OUGO**

**JUDGE**

**In the presence of:-**

.....**For the Plaintiff**

.....**For the Defendant**

.....**Court Clerk**