REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 34 OF 2015

MARY KOLI KITONGA.....PLAINTIFF

-VERSUS-

GHETTO RADIO LIMITED.....DEFENDANT

JUDGMENT

1. Mary Koli Kitonga, the plaintiff herein, filed a suit by way of the plaint dated 28th January, 2015 and amended on 8th May, 2018 in which she sought for judgment against the defendant in the following manner:

> ***(a) An order that the defendant do make a full and unqualified apology.***
>
> ***(b) General damages for libel.***
>
> ***(c) Exemplary/aggravated damages for defamation.***
>
> ***(d) Costs of the suit.***
>
> ***(e) A permanent injunction restraining the defendant whether by itself, its servants or agents from publishing or causing to be published any photographs and/or words defamatory to the plaintiff.***
>
> ***(f) Interest on (b) and (c) above.***
>
> ***(g) Any other and further reliefs that the court may deem fit to grant.***

2. The plaintiff pleaded in her plaint that between 13th January, 2014 and 3rd April, 2014 the defendant through its Facebook page published a photograph of the plaintiff and further published the following words:

> **"Of paragraph 1 "#Niaje, naitwa Jane kutoka Lango..."Niaje, naitwa Jane kutoka Lango, I have been working as a conductor for the last six months but I had not told my boyfriend. He caught me red handed on sato nikiwa job n he broke up with me on the basis that he cannot date a woman who works as a makanga…I love this guy very much should I quit my hustle ama I let him go…"**

3. The plaintiff pleaded that the picture and correlated words published are defamatory to the plaintiff and are accessible to a large number of Facebook users both locally and globally.

4. It was also pleaded by the plaintiff in her plaint that as a result of the defamatory publication, her reputation and character have been subjected to ridicule and contempt by right thinking members of the society.

5. The defendant entered appearance and put in a statement of defence to deny the plaintiff's claim.

6. The defendant pleaded that there was no correlation whatsoever between the publication made and the plaintiff.

7. The defendant further denied the particulars of innuendo and meanings set out in the plaint, and the allegations of injury to the plaintiff's reputation.

8. When the suit came up for hearing, the plaintiff testified and called three (3) other witnesses to give evidence in support of her case. The defendant relied on the testimony of one (1) witness.

9. The plaintiff who was PW1 adopted the contents of her written and signed witness statement and also produced her list and bundle of documents dated 19th June, 2018 with the exception of document no. 8 (the letter dated 9th December, 2014 from the defendant's advocate to the former advocate for the plaintiff).

10. During cross examination, PW1 testified that it was her daughter who made her aware of and showed her the photograph and publication in question.

11. PW1 stated that whereas the name 'Jane' which was referred to in the publication is not hers, the said publication was placed alongside her photograph, triggering comments from members of the public.

12. It was PW1's evidence that as a result of the aforementioned publication, her marriage and her reputation suffered.

13. During her re-examination, PW1 stated that she worked as a conductor at the time of the publication and reiterated that she is the person whose image is captured in the photograph in question and that the matatu beside which she stood in the photograph was co-owned with her husband.

14. Nancy Mwende Kitonga who was PW2 equally adopted her signed witness statement in her examination in chief.

15. On cross examination, PW2 testified that on reading the post published by the defendant, she was able to identify the person in the photograph as her mother, the plaintiff.

16. The witness further testified that the post/publication did not refer to the plaintiff by name, neither did it mention that the person named 'Jane' was the person appearing in the photograph.

17. In her re-examination, PW2 reiterated that the matatu in the photograph was co-owned by the plaintiff and her step father.

18. In her testimony as PW3, Grace Ngoki Muthiu who also adopted her signed witness statement, gave evidence that she is a businesswoman and that she has known the plaintiff for a number of years now.

19. On being cross examined, it was PW3's evidence that the photograph in question was shown to her by a friend though she admitted that the post associated with the photograph made reference to a 'Jane' and not the plaintiff.

20. PW3 stated in re-examination that she believed the post was associated with the plaintiff since it was placed beside her photograph, further stating that following the publication and the plaintiff's consequent separation from her husband, the plaintiff lived with PW3 for a period of about five (5) months.

21. Kimathi Kithuka who was PW4 adopted his witness statement and gave evidence that the plaintiff is his estranged wife.

22. During cross examination, PW4 testified that he came to learn of the publication of his wife's photograph through his daughter and that soon thereafter, he and the plaintiff parted ways. The witness however admitted that the publication made no reference to the plaintiff by name, though he restated during re-examination that the plaintiff's image and PW4's matatu appeared on the photograph in question.

23. For the defendant, Julius Owino Odijo who was DW1 adopted his written witness statement and gave evidence that he at all material times worked for the defendant as a manager.

24. During cross examination, the witness testified that the photograph of the plaintiff was randomly selected with the intention of illustrating the stereotype associated with female conductors.

25. DW1 admitted to not having sought for and obtained the plaintiff's permission prior to posting her photograph on Facebook and further stated that the photograph was later pulled down since there was no intention of targeting the plaintiff specifically.

26. On cross examination, it was DW1's evidence that the post was not directed at the person whose image appeared on the photograph.

27. At the close of the hearing, this court called upon the parties to file and exchange written submissions.

28. I have considered the evidence tendered alongside the contending submissions and authorities relied upon. The following are the issues arising for determination:

> ***(i) Whether the publication in question is defamatory against the plaintiff; and***
>
> ***(ii) Whether the plaintiff is entitled to the reliefs being sought.***

29. In addressing the first issue, the plaintiff submitted that the defendant's witness admitted to having published the plaintiff's photograph in a platform which was available and accessible worldwide.

30. It was also the plaintiff's submission that the publication of her photograph and its association with the posting injured her reputation before right thinking members of the society and further played a key role in the collapse of her marriage.

31. The plaintiff urged this court to find that the defendant did not demonstrate the steps taken in ensuring the publication did not contain any libelous material before proceeding to release it to the public, placing reliance on the court's reasoning in **Daniel Muthee Ngeera v Nation Media Group Limited & another [2019] eKLR** that a defendant ought to consider whether his or her intended publication is defamatory before making it, otherwise such publication is made at the defendant's own peril.

32. On its part, the defendant contended that the plaintiff was not referred to by name in the publication, neither did the publication in any manner infer that the person being referred to in the publication was the plaintiff, hence the plaintiff did not satisfy the ingredients relating to the tort of defamation, more specifically libel.

33. The ingredients of a defamatory claim were laid out in the case of **Daniel Muthee Ngeera v Nation Media Group Limited & another [2019] eKLR** with reference to **J Kudwoli & another v Eureka Educational and Training Consultants & 2 others [1993] eKLR** in the following order:

> ***a) Whether the matter complained of was published by the defendant.***
>
> ***b) Whether the publication in question referred to the plaintiff.***

c) Whether the publication is defamatory in nature.

d) Whether the publication is malicious.

34. In respect to the first ingredient, I noted that the defendant did not deny that it made the publication complained of.

35. On the second ingredient, it is not in dispute that the written publication made reference to 'Jane' which name differs from that of the plaintiff in the present instance. The defendant does not deny that the photograph published alongside the written publication is that of the plaintiff, though DW1 indicated that the photograph was randomly selected from the internet.

36. Having considered the above, I am of the view that while it is apparent that a name different from that of the plaintiff was applied in the publication, the contents of the publication coupled with the inclusion of a photograph bearing an image of the plaintiff; who testified that she was at all material times a conductor and wore the appropriate uniform in the photograph; could in the mind of any right thinking member of society be inferred to mean that the person being referred to is the plaintiff notwithstanding the change of name.

37. In any case, the defendant did not in its publication make any clarifications to the effect that 'Jane' was not the person whose photograph appeared alongside the post.

38. This brings me to the question to do with whether the publication was defamatory. The plaintiff pleaded that the wording of the publication complained of would by imputation and innuendo be understood to mean that the plaintiff is *inter alia*, a person lacking in integrity, good morals and ethics.

39. The plaintiff's evidence that she parted ways with her husband following the publication was confirmed by the remaining plaintiff witnesses, including her estranged husband, PW4 who mentioned that the separation between him and the plaintiff occurred when his brother and friend informed him of the plaintiff's photograph and the associated post on Facebook.

40. Further to the foregoing, PW3 stated that the plaintiff subsequently applied for and was denied a loan from a sacco in which PW3 and the plaintiff were members, on the basis of the publication.

41. Having considered the contents of the post alongside the photograph of the plaintiff, I am convinced that by way of innuendo and the particulars thereof, the post is defamatory of the plaintiff since in any event, the defendant made no effort to distinguish the publication complained of from the photograph which as I have already stated, could be interpreted to mean that the post is linked to the plaintiff, the implication being that the plaintiff suffered injury to her reputation as evidenced.

42. Further to the foregoing, the defendant did not demonstrate that the post was intended to apply in a general sense as claimed since it is apparent that the post was premised on a question raised by 'Jane.' In addition, the defendant made no attempts to show that in making their comments, members of the public were aware or could reasonably have known that 'Jane' and the plaintiff as appearing in the photograph were two (2) distinct persons.

43. On the ingredient of malice, going by the evidence tendered by DW1, it is apparent that no precautions were taken by the defendant in ascertaining who the person in the photograph was or in obtaining the plaintiff's permission prior to linking her photograph with the post. According to the testimony of DW1 the photograph in question was picked at random.

44. In that regard, I am satisfied that the defendant has not shown that its action of publishing the photograph alongside the defamatory post did not constitute malice since the courts have held that malice can be inferred from negligent or reckless behavior or from an ignorance of facts.

45. Drawing from the above, I am satisfied that the plaintiff has established a claim for defamation

against the defendant.

46. I will now deal with the second issue which concerns itself with whether the plaintiff is entitled to the reliefs being sought.

47. On general damages and exemplary/aggravated damages, the plaintiff proposed the respective sums of Kshs.5,000,000/ and Kshs.1,000,000/ citing the authorities of **K L v Standard Limited [2014] eKLR** where the court awarded Kshs.4,000,000/ on general damages and Kshs.500,000/ for aggravated damages to a singer/actress; and **Daniel Muthee Ngeera v Nation Media Group Limited & another [2019] eKLR** where awards of Kshs.5,000,000/ and Kshs.1,000,000/ were made to a retired civil servant on general and punitive damages respectively.

48. The defendant on its part suggested an award of Kshs.500,000/ quoting **Nelson Havi v Headlink Publishers Limited [2018] eKLR** where the High Court made an award of Kshs.5,000,000/ for general damages to an Advocate of the High Court.

49. The authorities cited by both parties are in respect to persons of different status from that of the plaintiff who indicated that she was a conductor in the matatu business at all material times, which matatu was co-owned between her and her husband.

50. I have considered the case of **Josphat Kithembe Kyalo v Webster Muema Kyalo [2019] eKLR** where the High Court upheld an award of Kshs.700,000/ on general damages given to a businessman. I have also considered the composite award of Kshs.1,000,000/ given to a person engaged in business in the case of **Charles Kinoti Akwalu v Josephine Kananu Nkwene [2018] eKLR.** Both these cases involved persons of a societal status comparable to that of the plaintiff.

51. I therefore find that an award of Kshs.700,000/ on general damages would be reasonable in the circumstances.

52. On aggravated/exemplary damages, though I noted DW1's evidence and the defendant's submission that the photograph of the plaintiff was subsequently pulled down, there was no evidence of a formal apology being made by the defendant in a bid to mitigate the damage already occasioned to the plaintiff's reputation in the public eye, noting that the publication had a wide circulation.

53. I am therefore satisfied that the plaintiff is entitled to an award of exemplary damages.

54. On the subject of a permanent injunction against the defendant, the plaintiff did not advance any arguments in that regard, hence I am not inclined to make any orders to that effect.

55. In the end and having considered the evidence before this court, the submissions from the parties and the law applicable, I hereby enter judgment in favour of the plaintiff and against the defendant as follows:

a) General damages of Kshs. 700,000/.

b) Exemplary damages of Kshs.200,000/.

c) In view of the awards made in a) and b) above, the total award is Ksh.900,000/.

d) The defendant shall publish a full and formal apology in its radio station and social media pages within 30 days from the date of this judgment.

e) The plaintiff shall have costs of this suit and interest on the total award of Ksh.900,000/ from the date of judgment until payment in full.

Dated, Signed and Delivered at Nairobi this 21st day of January, 2020.

……..…….

J.K. SERGON

<u>JUDGE</u>

In the presence of:

……. for the Plaintiff

……. for the Defendant