



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

Civil Case 12 of 2003

DAVID ODHIAMBO AWINO.....PLAINTIFF

VERSUS

NATION MEDIA GROUP LIMITEDDEFENDANT

Coram

J. W. Mwera J.

D. Otieno for the plaintiff

Michuki for the defendant

Court Clerk Raymond – Interpreter English/Kiswahili/Luo

J U D G E M E N T

On 16th January 2003 David Odhiambo Awino, trading as Nyokumo Plumbing & Building Contractors, sued the Nation Media Group Limited in damages claiming that in the defendant’s publication of 18th January 2002, the plaintiff had been defamed. The pertinent part of the article complained of read:

“Residents Name Corrupt Civil Servants in Province.

By Nation Correspondents.

The public has submitted nearly 300 letters identifying alleged corrupt public officers to a newly launched anti-corruption team in Nyanza Province. Provincial Commissioner John

Nandasaba said residents were cooperating with the committee formed last month. He ordered the police to arrest the Contractor assigned to build the Yala Municipal Market last year over the alleged misuse of Kshs.1.3m.”

The other part of the newspaper report complained of, was to the effect that the Provincial Commissioner had ordered investigations in other public funded projects where misuse of funds was suspected. He dissolved some institutions and warned that corrupt public servants would be dismissed.

The plaintiff averred that he was the known contractor hired to build Yala Municipal Market in 2001. That the words above were false in that the plaintiff was neither a civil servant nor corrupt and that in fact P. C. Nandasaba had not uttered the words published by the defendant. The plaintiff had never been paid shs.1.3m. He did not misuse such a sum or any other that was paid to him on account of building the said market.

The plaintiff therefore pleaded that the newspaper report complained of had in its natural meaning and import portrayed and it was intended to portray the plaintiff, as corrupt civil servant who had been paid shs.1.3m to build a market yet he misused the money, thus he was a corrupt and untrustworthy. Further, that the defendant had not verified the words complained of vis a vis the plaintiff. So when the report was published the plaintiff was exposed to odium and ridicule whereupon right-thinking people no longer respect him. That further, the plaintiff suffered financial loss after the said report, being unable to deal with business people any more. The defendant declined to apologise and correct the statement in question. So the court was asked to award the plaintiff compensatory, aggravated and exemplary damages as well as general damages. And that this court should also direct the defendant to publish an unconditional apology in a prominent part of its newspaper, to correct the impression complained of. He prayed for costs and interest.

A defence filed here denied that the defendant published the words complained of and that the article was an accurate report of what P. C. Nandasaba said. The words did not give the plaintiff the right to sue, as his name was not mentioned there. The article could not be understood to mean that the plaintiff was a civil servant and its publication was not reckless at all. The words in question were not defamatory and could not be understood in that sense. Or otherwise those words were honestly supplied by P. C. Nandasaba and the defendant had

them published in the public interest and in the effort to fight corruption. They were published under qualified privilege. At the time of publishing the article, the defendant had no reason to doubt the words and it did not publish it in a reckless or false manner. It was pleaded that the defendant would rely on some provisions of the Defamation Act, on qualified privilege. Thus the plaintiff was not entitled to the awards of damages as prayed.

A reply to the defence did not accept any position taken in the defence.

When the trial opened the plaintiff (PW1) put forth a large bundle of documents from which many exhibits were produced. The defence had none.

The plaintiff told the court that he was a registered building contractor with the Ministry of Public Works, Ministry of Agriculture and also Ministry of Local Government to do jobs of up to shs.100m. Similarly he was a registered contractor with the Ministry of Water and he had done World Bank projects after the EL-NINO. PW1 gave examples of government projects he did in the past e.g. at Mbita Health Centre, Sino Dispensary, Uriri Health Centre. The court heard that between 1988 and 1997 he had been doing small jobs for individuals and others e.g. in 1992 and 1993 he built a house and a garage for one Shem Okeyo and a house for one Peter Raburu. In 1997 he build a district forest office at Kehancha etc.

Before 17th January 2002 PW1 successfully applied for a contract to build Ahero Town Hall. He showed the court all the relevant documents. All went on well and plaintiff even moved on site. But he could not begin on the job because the provincial local government works officer was yet to countersign the contract. Then the publication complained of appeared on 18th January 2002. The council Chairman Ombori had heard the news on the radio that PW1 stole shs.1.3m. The councilors became wary of the plaintiff. Alarmed by that story the plaintiff, brought to the attention of Provincial Commissioner Nandasaba by way of letter of 17th January 2002 (Exh.P15) that the reports attributed to him would cost him a job. The Provincial Commissioner did not reply. Then on 18th January 2002 the “Nation” (and “Standard”) news-papers carried the story as reproduced above. The Provincial Commissioner had ordered the arrest of the contractor of Yala Municipal Market after he stole shs.1.3m meant for that project (Exh.P.16). The plaintiff was not allowed to continue with the Ahero Town Council project and no valid reason was given. The contract was re-advertised

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The witness went back to the Yala project, which was advertised on 9th June 2000. He tendered for it successfully (Exh.P.20) for 2.3m. So when the newspaper report spoke of the contractor who pocketed shs.1.3m from the Yala Municipal Market project, it put the plaintiff in the spotlight. He did not receive shs.1.3 million for that project. When PW1 moved to begin work, he issued an invoice of shs.350,000/= for mobilisation (Exh.P.22). But the council only paid him shs.190,000/= and no more. The plaintiff wrote letters to complain (Exh.P. 23,A,B). Shs.190,000/= could not do much on the site except to do excavation and build a store. PW1 even spent his own money. Provincial Commissioner Nandasaba had not ordered by name for the arrest of PW1 but he offered himself to the police at Siaya. He was locked in for 18 days. He was not a civil servant or corrupt. The defendant did not seek to verify its report attributed to the Provincial Commissioner before publishing it. Shs.1.3m was never paid to the plaintiff. The newspaper report was thus prejudicial and defamatory.

On 23rd February 2002 Luanda Town Council advertised for a project. The plaintiff applied and paid due fees. He was invited to go and collect bills of quantity for this job. He tendered for shs.6.1m. His tender was rejected (Exh.P28), because to him the tender committee referred to the defendant's report under question here. Tender meetings usually exclude bidders. How the plaintiff knew that the Luanda tender meeting referred to the report is not clear. Anyway the plaintiff then instructed his lawyers to protest to the defendant company (Exh.P29) informing it that he had suffered and lost millions of shillings in contracts because of their subject report. His subsequent applying for contract jobs earned the plaintiff nothing. He lost a bid for a job connected with early childhood project in KSU (Exh.P6,9, 10, 11). PW1 was second lowest in the bids at shs.6m.

In cross examination, PW1 said that he did the jobs he mentioned, but he did not have copies of his audited accounts to show that as a registered taxpayer, he earned money and paid tax. And that between 1995 and 2000 he did many projects. But he quoted only the one of Nyanchoka in 1997. And that when he was tendering for the Luanda project, he did not disclose the previous Yala Market which was still on, because that would be adverse to his bid for Luanda.

The plaintiff was not at the meeting where the Provincial Commissioner talked of looking for a contractor who misused shs.1.3m of a project but a Siaya councillor, chairman of the

Planning Committee told PW1 that the Provincial Commissioner did not specify the market project. So the defendant reported what Provincial Commission Nandasaba did not utter or even if there had been such utterances, PW1 was still justified to complain. And he had also sued the “East African Standard” for reporting more or less the same damaging remarks.

And that following Provincial Commissioner Nandasaba’s remarks, four Siaya councilors were arrested.

Apparently the Provincial Commissioner refused to see PW1 directly on this subject. He did not reply to his letter(s) either, asking him whether he indeed said what was reported. Siaya police even had PW1 charged with abuse of office but he was acquitted. One wonders how a charge of abuse of office would stick against the plaintiff – a non-public servant.

It was added that when potential employers saw the offending report they asked the plaintiff about it on the streets. Councilors and members of the public knew that PW1 was on the Yala project.

It was claimed that he offending report got him to lose the Ahero and Luanda projects. But the plaintiff could not say that Ahero Town Council told him that the contract there was being terminated because of the publication of the words the defendant published.

That the defendant was entitled to report to the public matters in a true, fair and accurate manner. But they should verify the facts they want to report.

And that the plaintiff complained to the defendant on 13th January 2003 since 18th January 2002 and he sued on 16th January 2003.

The plaintiff claimed that he had been executing 3-4 projects a year and he lost all that after the offending report. In his tendering for nay project (e.g. at Ahero and Luanda) he chose what past projects to include to win the tender. He excluded the Yala project when tendering for Ahero and Luanda because he could not win if he mentioned the Yala one. He was not being dishonest with that. The defendant had no basis to report as it did and the report prejudiced the plaintiff.

There was an equally long reexamination before the next witness. Mathews Oniala Lieta (PW2).

PW2 was a retired driver who drove Provincial Commissioner Nandasaba to the meeting of 15th January 2001 at Yala where the latter allegedly uttered the words the defendant published. PW2 was with the Provincial Commissioner all the time during the trip to inspect development projects in Siaya. At Yala Provincial Commissioner Nandasaba spoke only on education, development and security. When PW2 read of the offending article he was surprised. He did not hear the Provincial Commissioner refer to a contractor who misused shs.1.3m meant for a market. PW2 who knew PW1 before, did not know that the latter was a contractor on the said market. PW2 knew that later. PW2 knew PW1 when he built a house for one Oburu (Raburu). It was a fine job and PW1 was not a fraudulent person at all.

In cross examination PW2 answered that he stood outside the Provincial Commissioner's car as the public meeting went on in the presence of the media. When he read the "Daily Nation" newspaper on this matter, it claimed to report what Provincial Commissioner Nandasaba said at the public meeting of 15th January 2002. When the police went to arrest PW1, he went to see the Provincial Commissioner about it. His name did not feature in the article. That closed the plaintiff's case.

The defence called Joseph Oluoch Awuor (DW1) a farmer and former councilor at Yala Town Council. At times he chaired council meetings including giving tenders. The plaintiff got one such tender to build a market. The work did not progress well and the council felt that its finances were being wasted. Elected leaders including DW1 complained to the Provincial Commissioner who visited the scene, among other projects, to address the complaint that the council chief officers and the contractor were not doing a good job. This was on 15th January 2002 when the Provincial Commissioner saw, at the site, dug trenches with material deposited since 2000 and no more. DW1 attended the meeting the Provincial Commissioner addressed. The Provincial Commissioner directed the local district Commissioner to cause an audit to be carried out on this project. When it was done, it resulted in the arrest of the town clerk (Bethwell Achieng) and the treasurer (Ayub Onyamo). Another officer was arrested so was the plaintiff and Councilor Joseph Owino. They were

charged in court and DW1 was a witness, in a prosecution that apparently did not go to the end.

At the meeting Provincial Commissioner Nandasaba uttered the words complained of but did not refer to PW1 by name. (Exh.P.16). The media reported accurately. DW1 did not know PW1 until the council gave him the market contract. He knew nothing adverse about him either. The witness did not know how much PW1 had been initially paid but he saw a letter from his lawyers (Exh.P23a) that shs.160,000/= was yet to be paid to him. DW1 could not say much about PW1 losing the Luanda bid but he agreed that the Yala market project caused much disagreement among the councilors. There were even moves to remove him. He knew that PW1 was the contractor Provincial Commissioner Nandasaba directed to be arrested. With that, the trial closed.

In submissions, Mr. D. Otieno for the plaintiff, analysed the pleadings then focused on the evidence. There was much presented to the court by way of authorities, cases and treatises which if not specifically quoted here, have the principles and points stated therein incorporated in the body of this judgement. In substance the court was told that the plaintiff was a respected person, who as a registered building contractor, made a name and a living by putting up objects ranging from health facilities to World Bank Projects (El-nino) and even constructing private residences. He tendered successfully for the Yala Municipal Market project. In or about February 2002 he got another to build a town hall at Ahero. When he moved on site the defendant published the article complained of. Ahero councilors heard of it in a radio broadcast. They knew the named contractor in the news was the plaintiff who was about to build their hall. They cancelled the contract, citing unforeseen circumstances and administrative limitations. It was the plaintiff's case that Provincial Commissioner Nandasaba did not utter the words the defendants published on 18th February 2008. The defendant somehow published those words affecting the plaintiff's reputation without so much as verifying their accuracy with the plaintiff. He was not a civil servant; he was not corrupt; he was never paid shs.1.3m on the Yala Market project so he did not misuse that sum at all. He sought the defendant's apology which was not forthcoming. It was also added that the plaintiff did not win the Luanda project because of the defendant's article complained of. Evidence above goes in more detail and need not be reproduced here at length. That had the defendant sought to verify its facts before reporting, it could have found that Yala Town

Council only paid shs.190,000/= mobilization fee, much less than the agreed shs.350,000/=, which sum the plaintiff used to carry out excavations and build a store at the site. Perhaps it may be pertinent to state at this point that the plaintiff told the court that he did not disclose in his tenders either to the Ahero or Luanda Town councils, that he once successfully tendered to build a market at Yala. The plaintiff told the court that disclosing earlier projects was in the discretion of the tenderer and not a mark of insincerity at all. So there remains the issue of evidence tendered, to prove that the plaintiff lost the Ahero and Luanda projects because of the claimed offensive article.

The evidence of Mathews Lieta (PW2) was brought into focus, that Provincial Commissioner Nandasaba whom PW2 had driven to the meeting of 15th January 2001 only spoke on matters of education development and security. He did not hear anything about the thieving contractor. PW2 knew PW1 before as not being fraudulent. He did excellent building jobs. PW2 had been present during the meeting.

Turning to the defence evidence Mr. Otieno submitted that Joseph Oluoch Owuor (DW1) testified that Provincial Commissioner Nandasaba uttered the words complained of after he toured the market site and concluded that the complaint directed to him from DW1 and others were justified. No work was going on two years after the plaintiff took over the site. DW1 was also in the meeting Provincial Commissioner Nandasaba addressed on 15th January 2002 giving rise to the complaint under review. But DW1's group did not tell the Provincial Commissioner that shs.1.3m was paid to the plaintiff. After the Provincial Commissioner's remarks, some councilors, a chief officer of the council plus the plaintiff were arrested. Charges were laid, not said specifically on what, but DW1 who was a witness never got to know what happened to the prosecution. Mr. Otieno tried to convince the court that DW1's assertion that the Provincial Commissioner uttered the offending words was not accurate and that DW1 attended the said meeting and/or this court to settle scores

On liability Mr. Otieno submitted that one is defamed when the statement complained of is defamatory, it referred to the plaintiff, it was published by the defendant and it was false. That statement must be interpreted/intended to bring the complainant into hatred, ridicule and contempt so that he is shunned or avoided and consequently he suffers in his office, profession or calling. That the plaintiff was lumped together with corrupt civil servants in

Siaya. On his part he allegedly misused shs.1.3m of the market project. The plaintiff was known to be the contractor on the project so even without putting forth his name, did not mean any another person. PW2 knew the plaintiff before as a contractor so, when it came to pass that he was the contractor at Yala, the witness was shocked.

It was stressed that it was DW1 and his group who told Provincial Commissioner Nandasaba that the contractor was paid shs.1.3m and did little with it on the project, which was not true. The plaintiff himself said that he was paid only hs.190,000/= and he spent it on the project. He had issued an invoice of shs.350,000/=, though, to the council. Yet the defendant had gone on to publish an article that injured the plaintiff. This was considered full of malice because the words were not published by Provincial Commissioner Nandasaba, and there had been no prior verification thereof and no apology issued – all against the defendant. It did not exercise caution and inquire into true facts first.

Further that the defendant did not demonstrate by evidence how it was protected under qualified privilege. DW1, the sole witness did not refer to that and he came forth to settle scores only (with the plaintiff?). The defendant could not argue that because other media houses reported the meeting of 15th January 2002 as nearly it did, so what it reported was accurate and so therefore no liability attaches. This report was not fair and accurate to afford the defendant protection under the law. The defendant not being duty - bound not calls evidence to prove that.

The defence of qualified privilege was discounted on the basis that such only applies if a statement is made by a person in the discharge of some public or private duty whether legal or moral or in the conduct of his own affairs in the matter where his interest is concerned, and that was not the case here.

Mr. Otieno then moved to the next level of damages – an aspect that will follow after the court has reviewed the defendant's analysis on liability.

Submission on this aspect encompassed the pleadings and the evidence on record by Mr. Gichuki.

It was submitted that the article was an accurate report of what Provincial Commissioner Nandasaba said because other media houses reported the same. While the plaintiff was not at the subject meeting, his witness Lieta (PW2) was not credible. He sat in the Provincial Commissioner's official car and did not even refer to installation of a chief— another function Provincial Commissioner Nandasaba performed on that same day.

Further, that the plaintiffs name did not feature in the article and he should thus not have brought this suit. Getting the Yala tender was not published so the public did not know that the plaintiff was connected with the Yala market project. The plaintiff did not identify himself as the person defamed. Even PW2 did not know until the plaintiff told him that was the contractor in the newspaper report of 18th January 200. The plaintiff was not a civil servant and there was no malice or recklessness in publishing the article.

That the defendant was protected by statute under qualified privilege when it reported fairly and accurately proceedings at a public meeting in furtherance of public concern. Here development was the focus when Provincial Commissioner Nandasaba spoke. And that the plaintiff did not prove that he sent a letter for an explanation from the defendant on 13th January 2003.

Deciding this aspect of liability first, this court is minded to hold that on 15th January 2002, Provincial Commissioner Nandasaba held, a public meeting near Yala and he spoke as the defendant's report says. This is not because the defendant sought refuge in the claim that other media houses reported the same thing, but because the court believed Owuor (DW1) who was present and was concerned with the project as a councilor. He had no grudge with the plaintiff and so no reason could be put forth that he testified the way he did in order to settle scores with the plaintiff. The plaintiff did not claim that bad blood ran between them. As for Lieta (PW2), he may have been present at the meeting and all he heard was education, general development and security. That is too general a statement. What did the Provincial Commission actually say about each? He did not just utter those three words and sit down. PW2 was not clear on this and his evidence may not be relied on much, that he did not hear Provincial Commissioner Nandasaba talking of corrupt civil servants and a contractor who had misused shs.1.3m on the market project. PW2 could have been present but failed to get

this bit when Provincial Commissioner Nandasaba for instance spoke on general development. The plaintiff himself was not at that meeting anyway.

As to whether the defendant published the offending article, this court readily agrees. True it did not describe the plaintiff by name. But when he read the article he knew that he was the one being referred to. He won the Yala tender. Owuor (DW1) did not need to read the offending article to know that the plaintiff was the alleged corrupt contractor. The council in which DW1 was a councilor did award the tender to the plaintiff. He, with others complained to Provincial Commissioner Nandasaba about the poor progress of work. But it did not come out clearly whether it was Owuor (DW1) or which of the complaining elected people gave the sum of shs.1.3m to the Provincial Commissioner. It remains that this officer referred to such a sum. He did not come here to deny it. However other than the newspaper being read by the public who else gleaned from it that the alleged corrupt contractor was the plaintiff? There may be many but how many came forth to say so here besides PW1 himself? None, except Lieta (PW2) who only learnt later, perhaps after the plaintiff had been arrested and he went to the Provincial Commissioner's office to seek clarification. There he met Lieta, an old acquaintance, and told him of his tribulations. But it is no doubt that the article appeared in a wide-circulating publication of the defendant. So who are these right-thinking members of the public who view the plaintiff with ridicule and odium thereby casting him in lesser esteem than before the article was published? May we see that presently.

The defendant sought protection under the Defamation Act and argued that the report was fair and accurate of the proceedings at a public meeting in furtherance of a public concern. But accuracy, while relating to the proceedings does not absolve the reporter from verifying the accuracy of the facts from the named party. Otherwise any accurate reporting at a public meeting may end up injuring a private individual, without recourse to any relief. One can say that that individual should seek a correction of the picture but why do so at his expense if and when the reporter would have verified the "facts" uttered at the meeting first, before publication? There is nothing to say that the law prohibits/ excludes such a course. Here had the defendant sought out the plaintiff, he had his records at Yala Town Council, it would have been found that he was only paid shs.190,000/= and done some work on the site. There was no urgency in the report and such a cautionary step would have saved the plaintiff the problem he got into. The defendant was not malicious but it did not act with the basic

caution before publishing the article to the effect that the plaintiff misused shs.1.3m. Even if one has the protection of law, it does not mean that all caution is thrown to the wind. Others could be unnecessarily hurt. That report not being true made the plaintiff feel defamed. The defendant did not tender an apology when a letter was sent by a private courier to it on/about 13th January 2003. Copy of the letter plus a way bill was produced (Exh.P. 29,30).

We now turn to damages. Beginning with compensatory, aggravated and exemplary damages again Mr. Otieno brought to the attention of court more cases to support the proposal that the plaintiff be awarded shs.20m (compensatory) shs.3m (aggravated) and shs.1m (exemplary). General damages were put at shs.500,000/= all coming to a grant total of shs.24.5m. It was argued that the defamation here touched on the plaintiff's integrity, profession and honour. That the plaintiff was thus entitled to the quoted compensatory sum. The exemplary award was suggested on the basis that the defendant knew it was committing a tort but nonetheless went on to publish it in a reckless manner. And there was no apology. The cases: NAKURU HCCC 306/2004 NAHASHON OLUOCH VERSUS KENYA TIMES MEDIA TRUST & ANOTHER, MOMBASA HCCC 102 OF 2000 DANIEL MUSINGA T/A MUSINGA & COMPANY ADVOCATES VERSUS NATION NEWSPAPERS LIMITED, {2005} Eklr, JOHNSON EVAN GICHERU VERSUS ANDREW MORTON & ANOTHER, MACHIRA VERSUS MWANGI {2000} IEA 100 were cited to guide this court on the damages sought. In perusing them this court noted the persons and professions of the complainants, the extent of the defamation and such other aspects in each case so as to appreciate the various levels of damages. For example in the Daniel Musinga case a sum of shs.10m was considered reasonable compensation while in the Johnson Evans Gicheru, a composite sum of shs.6m represented a fair award. Nahashon Oluoch got shs.1.5m compensatory damages.

On its part the defendant considered that the plaintiff did not deserve the awards words which anyway tended downwards (after the Johnson Evan Gicheru case). The court was urged to follow that trend bearing in mind that the plaintiffs in those cited cases were mainly high ranking politicians, professionals etc. On his part Mr. Gichuki also cited many cases which included the Daniel Masinga case, Nahashon Oluoch etc. To the defence, the plaintiff would get shs.500,000/= as fair compensation, if this court so found.

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Having considered all the above, this court has already found that the defendant, without taking precaution first, did publish material that to an extent defamed the plaintiff. The publication was such that from the circumstances of this case, we can confine it to the plaintiff alone. He called no evidence from people who discerned that the article defamed him.

And such witnesses could only be of his class in society or higher. A retired driver who did not, on reading the article know that the alleged corrupt contractor was the plaintiff, did not appear to fall in the categories of people in whose estimation the plaintiff was viewed with ridicule and therefore one to be avoided. But the court noted that the defendant did not apologise even when so called up by letter of 13th January sent by a private courier.

The court was also not satisfied that the plaintiff lost financially at Ahero and Luanda. He did not appear to be that prominent in the building industry. He did some small jobs and between some periods he seemed to do nothing. He may have been a good builder but he did not show the court that since registration he did 3-4 projects yearly as he claimed. He did not have the records of this. Audited accounts if produced would have shown the level of his income and therefore his activities as a builder. We had neither information. Although the court was told that the plaintiff did not disclose in his bids to Ahero and Luanda that earlier he had the Yala project out of choice that may have been so. But that did not sound convincing enough. If the Yala project, was not that important, why did the report about it cause the plaintiff to loose the projects at Ahero and Luanda, if he did? There was no evidence that the Yala matter filtered to Ahero and Luanda project owners and as a result the plaintiff failed to get them or any other projects for that matter.

In sum this court is minded to award the plaintiff shs.500,000/= in general damages plus costs and interest at the lower court rates.

Judgment accordingly.

Delivered on 4th June 2008.

J. W. MWERA

J U D G E

JWM/mk.