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Libel Litigation and Its Impact on Journalists' Exercise of Freedom of Expression at Two Newspaper Publications in Kenya

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Abstract:

In countries that espouse the rule of law, interpersonal communication has to contend with legislation and ethical codes that allow for freedom of expression with limits. One such legal limit to expressive freedom is respect for the reputation of others. Courts of law and other administrative bodies exist to determine if there has been a violation of the right to reputation in the course of expressive freedom, and mete appropriate criminal and civil penalties on the culpable. This paper examines the communication dynamics in journalists' subsequent sourcing, processing and dissemination of news and information against the backdrop of threats to sue, suits and the courts' imposition of civil penalties on a newspaper defendant. The results of the inquiry conducted in Kenya show, among others things, that fear of being sued for defamation influenced newspaper content in terms of the quantity (removal of some material), quality (watering down stories) and structure (page placement of news articles). In a nutshell, some stories, including those of great public interest, were not published because of the threat of a libel action.

Keywords: Defamation, Journalist, libel, litigation, news, newspaper

1. Introduction

Journalism in developing nations faces more challenges that impede the moral authority of the press to provide information to the public. Members of the public sometimes get news through the grapevine about this or that scandal involving public officials, public figures and the corporate world but which never get published in newspapers, aired on radio or television, or even published on the internet. When newspapers avoid significant news stories that should otherwise be brought to the attention of the public is a dangerous trend and definitely bad for democracy. If citizens have no access to information, they will not be able to take stock of their surroundings and demand accountability from their leaders. Against this backdrop therefore, this study sought to examine whether threats to sue, and court decisions, have some influence on journalists' subsequent choice of news and the treatment they accord future news on sources or subjects who may have threatened them with suits or those who would have taken the writers or their colleagues to court, or others in similar circumstances.

1.1. Methodology

The inquiry adopted a qualitative approach, and the method of research was a multi-case study. To generate data, an Interview guide was used both for face-to-face individual interviews, and focus group discussions. Ten editors, five from each of Kenya's two leading newspapers (The Nation, The Standard), were purposively sampled for interviews. The on-site interviews were tape-recorded, and later transcribed. Four focus group discussions were held, two from each of the two newspaper firms. Twenty newspaper journalists (reporters) were purposively sampled – the researcher requested the top editors of the two newspapers to each select 10 reporters who formed two groups of five participants, who were later subjected to Focus group discussions. The Focus group discussions were tape-recorded, and later transcribed. Data was analyzed thematically.

2. Results

2.1. Libel Landscape in Kenya

According to reviewed literature, successive governments in independent Kenya have been uncomfortable with newspapers and journalists that have been critical of them. The government's reaction to such media has been predictable - bans and or suspension of the publications and or arrests of the journalists. However, with the restoration of multi-partyism in 1991, the use of the courts of law, through libel cases, to tame an errant press appears to have gathered momentum.

It is not in any way being suggested here that libel cases came on to the scene in the 1990s. After all, as early as in the 1920s, a few and far apart libel suits had been mounted against the Press. One of the earliest weekly newspapers, the Mombasa Mail was sued for libel for publishing a controversial letter, suspected to have been an in-house fabrication. The court was later to declare the paper bankrupt and it folded in 1904 (Karanja, p.29, 2000).

And in 1895, the Church Missionary Society rolled out one of the pioneering newspapers, the Taveta Chronicle. However, the paper was forced to close down in 1922 following a successful libel suit by one of the biggest landowners in the country whom it reported as having criticized the colonial government (Makali p.68, 2003).

The age-old subtle ways of influencing the operations of the media- the threat of libel law- appear to have regained momentum with the re-introduction of multi-partyism through the repeal of section 2A of the "Lancaster" Constitution of Kenya in 1991 and amendments to the Defamation Act a year later. The Press has since then found itself a frequent guest of the courts courtesy of complaints from government officials, politicians, the wealthy and the corporate world about uninformed, incorrect and defamatory writing.

The bulk of the cases against the Press are civil in nature. However, criminal libel, which is punishable by a jail term or fine or both jail term and fine, though rarely invoked, is also used against the Press. For instance, journalist Kamau NoHo was charged with criminal libel over a story he penned about a powerful Kenyan politician and businessman. Kenya's Attorney General, Amos Wako was later to withdraw the charge against him and temporarily suspend the operations of Section 194 of the Penal Code. However, Mburu Muchoki of the Alternative Press was not so lucky. He was later arrested, charged and jailed for criminal libel (Mathu Nguri, Mumbi Risah & Esther Kamweru (eds), 2009).

With regard to civil cases, what stands out from the court decisions meted so far is the amount of monetary compensation awarded to persons who appear before them on account of being defamed by the media. The Defamation Act, the Kenyan law that protects reputations, was amended in 1992. Following the amendment, the High Court, in HCCC No.1203 of 1993, was later to order the Daily Nation to compensate Nairobi lawyer George Odinga Oraro to the tune of Kenya Shillings 1.5million in damages for libel, ("an award that was 15 times higher than any libel award previously slapped on the media in independent Kenya") (Makali p.181, 2003). Hitherto the Courts highest award against the media was in *Godwin Wanjuki Wachira V Okoth* in which Ksh100, 000 was awarded.

Courts of law in Kenya have since the amendments always handed down mind boggling compensatory awards against journalists and their employers, who it would appear, more often than not, they find liable for defamation. Justice Alnashir Visram, then a Commissioner of Assize, appears to have 'set the ceiling' in December 2000 when, in HCCC No. 1067 & 1068 of 1999, he awarded Kipyator Nicholas Kiprono Biwott, then a cabinet minister in Former President Moi's Government, Kenya Shillings 30 million in damages for libel by six defendants (*ibid* .183). In the words of Visram,

"... I fully recognise that the award made by this court is the highest ever made in the country for the tort of libel. However, the fact that such an award has not been made in the past, does not mean it cannot be made at this time, or whenever appropriate circumstances present themselves. I believe that time is propitious to send a clear message to all those who libel others with impunity, and get away with ridiculously small awards, that courts of law will no longer condone their mischief. No person should be allowed to sell another person's reputation for profit where such person has calculated that his profit in so doing will greatly outweigh the damages at risk" (*ibid*. 578)".

Other Judges appear to have been persuaded by Visram, now a Judge in Court of Appeal of Kenya. Sample this. In March 2002, Justice Joyce Aluoch, in HCCC No. 2143 of 1999 condemned The People newspaper to pay a total of Kenya Shillings 20 million in compensatory and exemplary damages after she found it liable for defaming Kipyator Nicholas Kiprono Biwott, then a Cabinet Minister in Former President Moi's Government (*Ibid*. 562). In the judgement, the judge noted that The High Court of Kenya had adopted a stern approach to libel by the media and high awards of damages for libel would be given ("not to stifle them, but to encourage mature and responsible journalism"). Critics interpreted her words to mean that a new judicial policy of special protection to libel plaintiffs had been introduced at the expense of freedom of expression (*ibid*. 183).

In September, 2001, Justice Kasanga Mulwa had ordered the Nation newspaper, in HCCC No. 1709 of 1996, to pay Kenya Shillings 10 million after he found it liable for maligning a Nairobi lawyer, John Machira (*ibid*: 584). In November, 2001 Justice Alnashir Visram, in HCCC No. 4856 of 1990, directed Kenya Times newspaper to pay a Nairobi firm of lawyers, Waruhiu and Muite, Kenya Shillings 10 million after he found it liable for publishing malicious falsehoods (*ibid*. 584). Ironically, seven years later lawyer Paul Muite was quoted as saying of the libel awards meted out by the courts: ("The awards are astronomical and ridiculously high. Bad precedent has been set and i read them as an attempt to stifle the media"), African Press International, 2008.

It is safe to conclude that within a year of the massive award in the Biwott case, three of four Kenyan newspapers at the time, had been fined Kenya shillings 40million in only three libel suits. "There is no doubt that during the same period the media became increasingly timid and cautious in their reporting of and concerning prominent personalities. The self censorship is apparent in reports about wrongdoing or certain activities that are attributed to "a son of a prominent politician" (Makali, 2003, p.185. Even where a libel action is unlikely to succeed, the very spectre of taking chances in court only to be handed down heavy damages induces media houses to make out-of-court settlements in undeserving cases (*ibid*, p.190).

Makali (2003) may well be right in his claims, but what is clear is that his conclusions are not based on an empirical study. The media style of presentation of news, which he claims is testimony of the chilling effect the mind-boggling libel awards had on journalists, could have been informed by the media's coming to terms with the legal requirement not to treat persons suspected of crime as criminals.

Both the Lancaster Constitution of Kenya (now repealed) and the Constitution of Kenya 2010 provide that every person who is charged with a criminal offence shall be presumed to be innocent until proven guilty by a competent court of law or pleads guilty on his own. This is similar to what is provided for at Article 11 (1) of the Universal Declaration of Human Rights (1948): ("Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence").

Despite the hefty libel awards meted out by the courts, the media appears to have remained unrelenting in its coverage of the wielders of power and money in society irrespective of whether they have previously sued them for libel. It is intriguing for instance, that former Gichugu Member of Parliament and Kenya's former minister for Justice and Constitutional Affairs, Martha Karua continues to receive media coverage despite having dragged most media houses (including The Nation, The Standard and Radio Africa) to court enough times and, in some instances, been awarded hefty compensatory damages against some of them.

Others who continue to receive substantial media coverage are President Uhuru Kenyatta and Kiambu County Governor William Kabogo. According to Freedom House (2015), President Uhuru Kenyatta (then a Deputy prime minister) sued the private Kenya Television Network (KTN) in 2011 for airing a 2008 interview with Prime Minister Raila Odinga in which he claimed that Kenyatta had links with an outlawed ethnic militia, the Mungiki. A High Court judge was later to order KTN to pay Kenyatta 7 million shillings (\$77,250). The governor for Kiambu county, William Kabogo (then a member of Parliament) sought an injunction against KTN and the Standard to prevent them from publishing or broadcasting allegedly libelous reports about his alleged links to illegal drug trade; the High Court ruled in favor of the injunction in 2011 (Ogutu, 2011).

From the reviewed literature, it would appear court decisions could turn out to be the other single compelling reason why some news stories are never published. The law is the enemy of free speech, according to Lord Lester of Herne Hill QC (The Independent, 2010). Public officials, public figures and the corporate world are increasingly using the courts to stifle criticism.

2.2. Threat of Filing Libel Suits and Its Effect

From individual interviews and focus group discussions, it was noted that Journalists fear defamation/libel for a number of reasons: it harms reputations of the subjects of their newspaper articles and the relationships between the subjects and the media; because it was costly- fees paid to lawyers, time spent going to court and damages that may be imposed.

In the words of an editor:

"It has a huge influence. You are so careful, careful almost to a fault because you do not want to have another run in with the company in question. At the level of investigation, you are almost reluctant, you would want to say let this thing cool off so that we can come back and investigate. So it has a psychological effect on you going forward and in terms of say money, so you have to ask reporters to stop for some time writing about the firm."

The research found that the threat of libel influenced the manner of sourcing and selection of stories for publication. For instance, some reporters declined assignments to cover public officials/ figures especially those who always threaten to go to court and those that set in motion efforts to. According to an editor, editors too decided to 'kill' stories about the litigants, effectively denying the public the information they have a right to know and in essence abdicating their duty to give information to the public."

The threat of libel influenced also the angle of a news story and the content of an article. In the words of an editor: ("There are things that you can remove. Instead of putting everything, you walk on the sides").

The threat of libel also influenced the placement (priming) of a story in the newspaper. To quote an editor: "Where do you put a story? In the front page, you have more attention. If you change the angle line, then you reduce the magnitude of the story. Instead of going to the front page, you now use it at page 10. In terms of content, if you have 10 personalities now you have 2. Like the story on fuel crisis, what the public was reading was not even half of what the documents available contained. An editor will be blamed if all details were published especially when companies involved want to announce profits".

Hereunder follow other views from the focus group discussions and interviews with editors. Journalists feared libel because it could cost them jobs. Libel gave an employer an excuse to lay off the journalist who may have generated it. The fear of losing jobs for publishing libellous stories had made Journalists, especially editors, keep a close eye on stories on not only the public officials/figures but also private figures. The fear of being sued again had made journalists cautious when dealing with persons who had sued them and reluctant to publish contentious stories about them unless they were the kind that must be told.

To go round the threats, the research showed, journalists made sure they thoroughly investigated stories, ensured they were accurate and fair before unleashing them to the public.

Defamation or the threat of it, according to a member of one FGD, ("if anything ...serves to make us journalists much more careful").

Because of fear of defamation/ libel causes, some media houses have to sleep over a story and wait for others to break the ice or first seek comments from those adversely mentioned in the report before penning anything.

In some instances, the fear of libel forced journalists to publish a story that excluded those who they had failed to reach or those who had declined to comment on the story previously published by the competition.

2.3. Journalists' Awareness of Courts' Libel Awards

Most journalists (reporters and editors) displayed their awareness of defamation cases and the attendant compensatory damages the Kenyan courts had awarded. Among the cases most referred to were Biwott versus Kalamka Ltd (Kshs 20million was awarded against media); Biwott versus authors Dr Ian West and Chester Stein (Kshs 30million); Biwott versus Bookpoint book store (Kshs10m); For the Biwott cases, most of the participants decried the colossal damage awards. Other cases mentioned included: Martha Karua versus Radio Africa; Mwangi Kiunjuri versus Nation (Nation won); Mwangi Kiunjuri Versus Royal Media services (Kshs5m award against media); Njoki Ndungu versus SMG (Kshs 2.5m); Uhuru Kenyatta versus Standard media group (Ksh7m against KTN); Uhuru Kenyatta versus the Nation Media Group; Francis ole Kaparo versus the Standard (Ksh7million against the media house). Martha Karua versus Standard (Kshs 5m); Gibson Kamau Kuria; Koigi Wamwere versus Standard (Kshs 3.5); Kamotho versus Standard; Nyachae versus Standard (Kshs 4.5m); Maoka Maore versus Standard newspaper and; David Makali(sic) and Derrick Otieno(sic).

Most of the foregoing court decisions in these cases can be accessed on the National Council for Law Reporting website(Kenyalawreports.org); Muthoni et al (2005); and L Obonyo and E Nyamboga (2011).

However, the research found that some of the journalists were not very familiar with the facts of some of the cases and did not know the fate of those cases. Others did not know which cases were defamatory or gave examples of cases that were clearly not in the category of defamation acts. For instance, Republic versus David Makali was a theft case and Derrick Otieno versus Lucy Kibaki was a Private Criminal Prosecution of a case of assault and malicious damage to property. Some journalists did not know defamation cases filed against the media houses they worked for or against their colleagues. Ironically some of them could recall cases filed against other media houses or against journalists from other media houses. Some journalists in the newspaper industry did not know cases filed against their employer or fellow colleagues but knew cases filed against broadcast media.

The study found that suits against media houses had led to responsible journalism and dissemination of information in general i.e. investigation of facts and verification of the truth was now prioritized.

“Defamation cases make us conscious of the legal mine fields when we are handling stories of those who have sued us or persons in similar circumstances, you don’t get too excited about allegations because when you publish them, you invite trouble from the news subjects. For me as an editor, it comes like a learning experience. It is part of those skills which you learn on job, you can never learn them elsewhere. So that is where I get it but the problem is that you see an editor of a publication has so many writers, has so many subeditors”, (Editor).

Editors, on receiving a judgement against a media house, ensured that staffs were sensitized; everyone was urged to be careful with contentious stories and ensure thoroughness in sourcing of stories. However, some participants said they were not made aware of judgements against their media houses. (“Journalists would have used defamation cases/ awards as learning lessons, but most were not even aware of the decided cases”) (Editor).

Another editor had this to say

“...it is like a policy of the management to keep some of these cases away from journalists. This is why in many media houses, they duplicate libel. Publish a story today within the week there is a demand letter nobody knows. So a reporter is following a story or a similar one, goes to the library takes that cutting, duplicates because the information is not there. Even those who have committed libel maintain silence until the legal officer comes around asking what this is. And so what would have been a very good learning lesson is lost” (Editor).

Judgements against media houses only scared new kids on the block but also soon the new kids on the block outgrew the fear and only saw the judgements as a moment to be cautious in handling subsequent stories. Defamation cases had made some publishers reluctant to use names of their news subjects on contentious stories. Defamation awards had made journalists to consider ethical and legal implications before publishing a story.

Hefty libel awards were a constant reminder of the need to verify information before publication. For instance, filing a story based on a list of lawyers, against whom complaints had been made, released by LSK without verifying the currency of the information contained therein cost a media house Sh20million in damages.

Awareness of defamation awards made journalists always check for legal errors before passing an article for publication. Both the editors and reporters (focus group discussions) interviewed considered the libel awards meted out by the courts “unjustified, excessive and outrageous”. However, some thought most of the awards were reasonable except for those meted out in favour of politician, Nicholas Biwott (Kshs 30 million).

Journalists in the Focus Group discussions did not mind to be held responsible if they defamed others without justification arguing that libel awards would make them more careful in handling subsequent stories. In the words of a member in one of the groups:

“But we want to see we are punished fairly When the punishments seem to look completely out of proportion with the crime you have committed, which is how some of these judgments are made, I think it is unjustified.”

Hefty defamation awards stirred so much in media including making them realize the need to train journalists on how to deal with the risk of defamation/ libel. An Editor had this to say: “Media owners may in public talk tough and criticize the awards for their excessiveness but in the media houses they sit to reflect on the awards and how not to get into trouble again. Journalists themselves retreat to strategize on how not to get in to trouble with the court.”

Hefty libel awards could close down media houses. Here are some of the views of an editor:

“A sh20 million defamation award against the People, threw them into disarray”. “For smaller and young newspapers, even if they were hit by five million shillings in damages, they will still be in a lot of trouble. For others, even if they were hit by two million shillings, it will paralyze other hopes because that will throw their budget into disarray.”

According to most of the editors, fear of defamation/libel awards had raised standards of gate keeping. It was a key obligation for Editors to ensure that stories published were libel proof to save their media houses from paying libel awards. They, therefore, worked round the clock to minimize libel awards so that fewer news sources got to file suits against the media.

To some editors, fear of being sued or the likelihood of defamation/libel awards had made media houses invest heavily in libel training for their staff.

The editors observed that reporters “now” understand the importance of being meticulous in sourcing for information for instance, they more than ever record interviews they have had with sources- this ensures accuracy in reporting because recorded work allows journalists to go over the tape and cross-check with notes taken and the article penned.

According to participants in one of the focus group discussions, the “insincerity” of politicians, who are a major news source for media houses, ensured that defamation remained a threat to journalistic practice.

However, according to an Editor, defamation awards did not “really change your perception so much but there are certain cases you also look at and after serious consideration and re-evaluation you get you went overboard. In such a case you blame yourself. There are also certain cases you see are kind of petty. In such cases you blame whoever went to court”.

Another Editor noted (“There are instances where the media published stories very well knowing that they were potentially libelous but had to do so in public interest”).

The research found that journalists knew they required training in defamation (libel and slander) if they were to practice free of fear and if the libel risk was to be eradicated.

3. Conclusion

From the research findings, the researcher concluded that fear of libel suits, and courts’ awards in libel cases played a pivotal role in news production, and had, in one vein, positively influenced journalistic practice by ushering in a sense of being mindful of news subjects.

It was also concluded that it was sometimes difficult for media to report on some matters of importance and to facilitate public debate of issues of public interest because of fear of being sued and the likelihood of the courts making a finding against them.

Defamation concerns therefore, restricted news production. The research affirmed that fear of being sued for defamation influenced newspaper content (the quantity - removal of material, quality - watered down stories and structure- placement- of news articles). Some stories, including those of great public interest were not published because of the threat of a libel action.

It can also be concluded that hefty libel awards, though having a chilling effect on journalistic practice, did not necessary deter journalists from further publication of defamatory material. Journalists in Kenya have continued to publish defamatory material even after the Kenya shillings 30 million awarded to politician, Nicholas Biwott.

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