



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL CASE NO. 9 OF 2019

JMK1ST PLAINTIFF

SCK2ND PLAINTIFF

VERSUS

THE STANDARD DIGITAL.....1ST DEFENDANT

THE STANDARD GROUP LIMITED.....2ND DEFENDANT

J U D G M E N T

1. The plaintiffs are advocates of the High Court of Kenya practicing law within [particulars withheld] County. They are also man and wife having tied the knot on 2/11/2013 and they were still married at the time of this suit.
2. By a plaint filed on 28/5/2019, they sued the defendants for alleged defamation and sought for unconditional apology, general, exemplary and aggravated damages, cost of the suit and interest.
3. They alleged that on 1/6/2018, the 1st defendant, with the 2nd defendant's knowledge and authority, published in all its social media handles; specifically on twitter on the handle "*The Standard Digital @standardkenya*", Facebook on "*KTN Kenya*" page on the standardmedia.co.ke link and on its main digital page, a video titled "*Tips for healing your marriage when trust is broken after infidelity*". The said video was widely circulated throughout the Republic of Kenya and around the globe.
4. The plaintiffs contended that the main photo for the said video was theirs depicting their faces. It also featured inside the said video suggesting that the plaintiffs were either the main object of the said video and/or significant part of it given that the said video sought to explicate stories of couples who encountered infidelity in their marriages.
5. They maintained that as at the time of the publication, they had been happily married for about five (5) years and at no time had there been any instance of infidelity in their union. That the photo was used without their knowledge and/or consent thereby infringing on their constitutional right to privacy and dignity.
6. They contended that the publication was calculated to and did in fact injure, discredit, intimidate and lower their estimation as advocates of the High Court of Kenya and church leaders, in the eyes of right thinking members of the society causing them to be shunned and exposed to hatred, public ridicule and contempt.
7. In their joint statement of defence, the defendants denied the plaintiffs' claim in *toto*. They contended that the video was published innocently. They had not intended to publish the same concerning the plaintiffs and did not know of the circumstances by virtue of which it might be understood to refer to the plaintiffs. They sought to rely on the defence of unintentional defamation under **section 13 of the Defamation Act, Cap 36 Laws of Kenya ("the Act")**.
8. The plaintiffs joined issue on the defendants on their defence. They contended that, having been made aware that the impugned video was defamatory of the plaintiffs, the defendants nonetheless continued to circulate the same without offering any apology or amends even as at the date of filing the suit.
9. At the trial, the plaintiffs called 4 witnesses whilst the defendant called one witness. The first plaintiff testified as **Pw1**. He told the Court that he is an advocate of the High Court of Kenya practising in the name and style of **Particulars withheld & [particulars withheld] Advocates**. That the 2nd Plaintiff is his wife and partner in practice. They have been married for 6 years and are blessed with two children

aged 4 ½ years and 2 months, respectively. That as an advocate, he is the chairman of the [particulars withheld] Committee of the [particulars withheld] Bar and serves in other capacities when called upon. That he is also a youth leader, member of both the youth and young couples at the [particulars withheld] Centre Church, Meru.

10. He stated that the subject video was shared and published on his Facebook wall where he has over 1,000 followers as well as the University of Nairobi Class of 2xxx, wall of advocates dubbed “particulars withheld” which has 200 members and on his twitter handle. That the publication injured his reputation and he desperately tried to explain himself to those who knew him.

11. In cross-examination, he admitted that he was tagged to the post in his Facebook page. He had originally posted the photo in his Facebook page. That despite the said publication, he was still undertaking his duties at the church. He reiterated that the publication was used by the defendants for commercial purposes and that the defendant’s apology was an afterthought as they had ignored the 72 hours’ demand for an apology.

12. **RN (Pw2)**, is an advocate of the High Court of Kenya and currently the [particulars withheld] Council of Governors’ Secretariat. She has known the plaintiffs for 13 years having been at the University of Nairobi and the Kenya School of Law together. While at those institutions, she knew the two as staunch Christians and held them with high regard. When she saw the video, she felt disturbed and the contemptuous of them as they seemed to preach water while drinking wine. The publication was discussed in various WhatsApp groups where there was a lot of contempt and negativity expressed towards the plaintiffs.

13. The 2nd plaintiff testified as **Pw3**. She stated that she is an advocate of the High Court of Kenya currently working at the County Government of [particulars withheld] at the [particulars withheld] Department. She was married to **Pw1** on 2/11/2013. That as an advocate, she sits on boards and tribunals. She also holds other positions as a mother of two and wife in society. As a youth leader in church, she participates in various mentorship programmes. She corroborated the testimony of Pw1 and stated that the publication had greatly injured her reputation.

14. **Bishop EK (Pw4)** is a Senior Pastor, at [particulars withheld] Centre Church which is part of the larger, [particulars withheld] International which has 410 branches in East Africa. **Pw1** is his son while **Pw3** his daughter in law. He saw the publication through WhatsApp. The Church therefore decided to relieve **Pw1** of his duties as a youth leader. However, after he explained himself and the falsehood of the video established, he was reinstated to his position.

15. **Dennis Odour (DW1)**, the Head of Innovation for the Defendants testified on their behalf. He conceded that the video was published on 1/6/2018 through the defendants’ online platforms. The video was created using an online platform called Lumen 5 that enables the creator to use multimedia content using photos, videos, music and text. The plaintiffs’ photo was obtained from the library content of the Lumen5 platform. That the materials belong to Lumen5 or 3rd party licensors and that the defendants did not know the plaintiffs at the time the video was published.

16. He told the Court that the video was published innocently and the defendants did not know the meaning it would be attached to. That the same was pulled down on 11/6/2018 and an apology offered to the plaintiffs.

17. On 30/4/2020, the parties recorded a consent whereby they admitted the certificate of electronic evidence dated 11/9/2019 certified by **Francis Musyoka Munyao**. They proposed timelines on the filing of submissions and to receiving this judgment electronically.

18. It was the plaintiffs’ submission that, by virtue of their photograph being on the cover of the widely published video, the consequent implication was that they became a topic of discussion. That people believed that one of them had engaged in extra marital affair despite their being staunch Christians. This had lowered their estimation in society.

19. That **section 13 of the Defamation Act** was unavailable to the defendants for they had failed to pull down the offensive video when it was demanded of them. That the apology was only triggered by the filing of this suit.

20. On breach of the plaintiffs’ personal rights, it was submitted that the terms and conditions of the build in stock media library of Lumen5 did not apply in Kenya and the defendant were prohibited from using the same for commercial purposes. That the image contained the defendants’ trade mark and was created in a way that could be accessible to thousands of platforms and could be disseminated further via other social media platforms.

21. They submitted for Kshs.10,000,000/- each for general damages, Kshs. 5,000,000/- each for breach of personality rights and Kshs. 2,000,000/- each for aggravated damages.

22. In support of their submissions, the plaintiffs relied on various cases including; **Phineas Nyaga v Gitobu Imanyara [2013] ekr**, **Alnashir Visram v Standard Limited [2016] ekr** and **Wilson Kalya and Another v Standard Limited & 2 others [2002] ekr** among others, all of which the Court has considered.

23. On their part, the defendants submitted that they used the Lumen5 platform to access the subject photo. That the plaintiffs had admitted having posted the photo on the 1st plaintiff’s Facebook account. In this regard, the photo could be seen, re-shared and/or downloaded by 3rd parties. That there was no evidence that the publication was widely disseminated.

24. It was further submitted that, there was no evidence that the publication was with actual and deliberate malice. Reliance was placed on **section 13 of the Act** on the ground that, the defendants took reasonable care before publishing the impugned video, they pulled down the video before receiving the demand letter and had made an apology to the plaintiffs.

25. On the alleged breach of the plaintiffs right to privacy, it was submitted that by having posted the photograph on their Facebook page, the plaintiffs impliedly gave consent to its use. The plaintiffs did not also prove that the defendants commercially benefited from the impugned video.

26. They therefore submitted for Kshs.400,000/- each for general damages and Kshs.100,000/- each for violation of the right to privacy.

27. In support of those submissions, the defendants relied on, *inter alia*, **C Mehta & Co. Limited v Standard Bank Limited [2014] eKLR, Nation Newspapers Ltd v Gibert Gibendi [2002] eKLR, Kenya Tea Development Agency Ltd v Benson Ondimu Masese & Co. Advocates [2008] eKLR, and Johnson Evan Gicheru v Andrew Morton & Another [2005] eKLR**, which the court has considered.

28. Having considered the evidence and submissions of learned Counsel, the issues that fall for determination are; ***whether the publication was defamatory of the plaintiffs; whether the publication was unintentional in terms of section 13 of the Defamation Act; whether the plaintiffs' right to privacy was breached and what reliefs, if any, the plaintiffs are entitled to.***

29. In order to prove defamation, it must be shown that the words are defamatory, in that, they have a propensity to lower a person's reputation in the eyes of right thinking persons. Or, that the words tend to cause the person to be rejected, disliked, ridiculed or avoided by people. In this regard, the words must be shown to have injured one's reputation, character or dignity.

30. It must also be proved that the defamatory matter was published and that it referred to the claimant. Publication is dissemination of the defamatory matter to 3rd parties. See **Zamzam Hussein Aligele v Joseph Lekuton [2020] Eklr.**

31. In **Joseph Njogu Kamunge v Charles Muriuki Gachari [2016] eKLR**, the Court held: -

"The gist of the torts of libel and slander is the publication of matter (usually words) conveying a defamatory imputation. A defamatory imputation is one to a man's discredit, or which tends to lower him in the estimation of others, or to expose him to hatred, contempt or ridicule, or to injure his reputation in his office, trade or profession, or to injure his financial credit. The standard of opinion is that of right-thinking persons generally. To be defamatory an imputation need have no actual effect on a person's reputation; the law looks only to its tendency".

32. In **Musikari Kombo v Royal Media Services Limited [2018] Eklr**, the court held that the test for whether a statement is defamatory is an objective one. It is not dependent on the intention of the publisher but on what a reasonable person reading the statement would perceive.

33. In **Halsbury's Laws of England 4th Edition Vol. 28 at page 23**, the authors opine: -

"In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand them in a defamatory sense."

34. In the present case, the bone of contention is the publication of a video entitled "***Tips and ways to heal your marriage after infidelity***". The Court watched the video. The same begins with a description of various instances famous people have been caught up in cases of infidelity. It then proceeds to attach continuous still photos of persons entangled as couples with a back voice of marital advice.

35. Amongst the still photos is that of the plaintiffs. Their photo was also used as the inviting photo to the article in the social media links. The plaintiffs produced evidence that the link to the video was shared widely through various social media platforms. Publication was not disputed.

36. The plaintiffs contended that as a married couple practicing Christianity and advocates of the High Court of Kenya, the words meant that either of them had been involved in extra marital affair(s).

37. That this had lowered their reputation in the eyes of right thinking members of the society. They were supported by **Pw2** and **Pw4** who testified that they laid a lot of significance to the title of the publication which inferred that the plaintiffs had been engaged in infidelity.

38. **Pw2** stated that it is only after clarification that she was able to reconcile with the plaintiffs. **Pw4** confirmed that the church relieved the plaintiffs from their positions as marriage counsellors and youth leaders as a result of the publication.

39. In their defence, the defendants stated that they relied on the Lumen5 app to extract the subject photo. That they did not therefore require the Plaintiffs' consent before the publication.

40. In support of their said contention, they produced in evidence the terms and conditions of their contract with Lumen5 **Clause 17.1** provides the governing law to be that of the province of *British Columbia*. **Clause 17.4** provides that the service is intended for visitors located within *Canada and the United States*. Access to the service in countries or territories or by individuals where such access is illegal is prohibited.

41. Clearly, Kenya is not one of the territories intended for use of the materials in the said Lumen5. The defendants were therefore not entitled to use the same. Even if they were entitled to use them, it must not have been in the manner in which they used the material.

42. It was the defendants' contention that the plaintiffs had consented to the use of their photo having posted the same in their Facebook

account. That contention does not hold. There was no evidence to show that the photo was downloaded from Facebook in any event, there was nothing to show that the plaintiffs had consented to the photo being used in an article that would infer infidelity on their part.

43. The defendants further contended that they published the article as a matter of public interest in exercise of their right under **Article 33 of the Constitution**, the right to freedom of expression. That may be so but the right under that **Article** must be exercised reasonably and with due regard to the rights of others. Had the plaintiffs been involved in the so called infidelity, then the defendants would have been entitled to publish the material they did. Since there was no infidelity to be communicated to the public, the plaintiffs are entitled to the protection of the law.

44. As regards malice, the same is to be inferred from the recalcitrant conduct of the defendants. Despite receiving the demand on 14/06/2018 they never apologised until after the suit was filed. Neither was it clear when the subject video was pulled down.

45. The title to the photo inferred infidelity on the part of the plaintiffs. There was no truth in that fact. From the evidence tendered, it exposed the plaintiffs to ridicule, contempt and public odium. **Pw2** shunned them until they explained themselves. There were many others who saw the publication whom the plaintiffs could not reach and explain themselves to them as they did of **Pw2** and **PW4**. The Court is satisfied that the material was defamatory of the plaintiffs.

46. The second issue is whether the defamation was unintentional. It was the defendants' contention that the defamation was unintentional. They relied on the defence set out in **section 13(1)(a) of the Act**.

47. **Section 13(1)** provides: -

“(1) A person (in this section referred to as the defendant) who has published words alleged to be defamatory of another person (in this section referred to as the plaintiff) may, if he claims that the words were published by him innocently in relation to the plaintiff, make an offer of amends under this section, and in any such case—

a) ...

(b) if the offer is not accepted by the plaintiff, then, except as otherwise provided by this section, it shall be a defence, in any proceedings by him against the defendant in respect of such publication, to prove that the words complained of were published by the defendant innocently in relation to the plaintiff and that the offer was made as soon as practicable after the defendant received notice that they were or might be defamatory of the plaintiff, and has not been withdrawn”.

48. It is clear from the foregoing that, the defence of unintentional defamation under that section is only available if the conditions set out in **section 13(5) of the Act** are satisfied. These are; that the defendant did not intend to publish the words of and concerning the plaintiff and did not know the circumstances by which they might be understood to refer to the plaintiff, or that the words were not defamatory on the face of them and the defendant did not know of the circumstances by virtue of which they might be understood to be defamatory of the plaintiff. In either case, the defendant must take reasonable care.

49. In addition to the foregoing, a defendant must make an offer for amends. The offer for amends should be made as soon as practicable after the defendant has received notice that the words were or might be defamatory of the plaintiff. The said offer for amends must be accompanied by an affidavit setting out the facts that the defendant relies on to show that he published the offensive material innocently.

50. In the present case, the publication was made on 1/6/2018. The words insinuated that the tips being given were in respect of the couples whose still photos were being shown, the plaintiffs included. It inferred that they had fallen into infidelity and their marriages had either healed or had overcome the infidelity.

51. In the opinion of this Court, for a married couple, those words were on the face of it defamatory. By publishing the plaintiffs' photo alongside the title/words complained of, the impression given was that the words referred to the plaintiffs. Those words were on the face of it defamatory of the plaintiffs.

52. The other aspect is the offer for amends. The defendants alleged that they pulled down the offensive video on 11/6/2018. They produced **DExh.1 pages 12 to 15** which was an apology to the plaintiffs and stated that it was published on 1/7/2019.

53. There was no evidence to show that the offensive video was pulled down on 11/6/2018 as alleged. If that had been the case, nothing would have been easier than for the defendants to have responded to the plaintiffs' advocates demand dated that was received on 14/6/2018. The defendants would have indicated that they had already pulled down the offensive video.

54. The defendants stated that they had made amends by publishing an apology on 1/7/2019. That was over one year ever since the demand was served upon them and way after having filed their defence on 27/6/2019. That apology was neither accompanied by an affidavit setting out the facts relied on nor did it state that it was being offered as required under **section 13(2) of the Act**. Further, it was not given within a reasonable time as required under **section 13 of the Act**.

55. In view of the foregoing, the Court is satisfied that the defence of unintentional defamation under **section 13 of the Act** is not available to the defendants.

56. The next issue is whether the plaintiffs' right to privacy had been breached. It was the plaintiffs' contention that their right to privacy and dignity had been violated. That the defendants had used their photo for commercial purposes thereby breaching their rights under **Articles 31, 28 and 40 of the Constitution**. The cases of **Jesica Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 Others [2017]**

eklr and J W I & Another v Standard Group Limited & Another [2015] eklr were relied in support of those contentions.

57. Relying on the South African case of Berstein v. Bester NO (1996) (2) SA 751, the defendants submitted that by having posted their photo in the 1st plaintiff's Facebook account, the plaintiffs had consented to the same being seen, accessed, re-shared or downloaded through 3rd party service providers. That the plaintiffs' right to privacy had not been violated as there was no unlawful intrusion on their personal privacy or disclosure of their facts.

58. They denied that they had used the photo for a commercial purpose. They contended that the contract between them and Lumen5 permitted them to use the said photo. They relied on the Canadian Supreme Court decision in Sattva Capital Corp. Creston Moly Corp. 2014 SCC, 53 [2014] 2 SCR 633 for that submission.

59. The right to privacy and dignity is recognized and protected by our Constitution in **Articles 31(c), 28 and 40(1) of the Constitution**. Our Courts have variously pronounced themselves on these rights as is evident from the cases referred to by Learned Counsels **Mr. Walukwe** for the plaintiffs and **Ms. Koske** for the defendants.

60. In Jessica Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 Others [2017] Eklr, Mativo J delivered himself thus:

“It is axiomatic that the right of publicity, often called personality rights, is the right of an individual to control the commercial use of his or her name, image likeness, or other unequivocal aspects of one’s image and likeness. It is generally considered a property right as opposed to a personal right.

Personality rights are generally considered to consist of two types of rights: the right of publicity, or to keep one’s image and likeness from being commercially exploited without permission or contractual compensation, which is similar to the use of a trademark; and the right of privacy, or the right to be left alone and not have one’s personality represented publicly without permission. ...

A commonly cited justification for this doctrine, from a policy standpoint, is the notion of natural rights and the idea that every individual should have a right to control how, if at all, his or her ‘persona’ is commercialized by 3rd parties. Usually, the motivation to engage in such commercialization is to help propel sales or visibility for a product or service, which usually amounts to some form of commercial speech”.

61. In J W I & Another v Standard Group Limited & Another (supra), the court stated: -

“Protecting privacy is necessary if an individual is to lead an autonomous, independent life, enjoy mental happiness, develop a variety of diverse, independent interpersonal relationships, formulate unique ideas, opinions, beliefs and ways of living and participate in a democratic, pluralistic society. The importance of privacy to the individual and society certainly justifies the conclusion that it is a fundamental social value, and should be vigorously protected in law. Each intrusion upon private life is demeaning not only to the dignity and spirit of the individual, but also to the integrity of the society of which the individual is part”.

62. In Roshanara Ebrahim v Ashleys Kenya Limited & 3 others [2016] Eklr, the court held: -

“I would agree and add that the protection of privacy must serve a lawful purpose for the preservation of the applicant’s dignity in conduct that accords with the law. I do not consider that the right to privacy may properly be invoked to protect private photographs the taking of which constitutes a criminal offence or which capture illegal acts, or which depict reasonably objectionable conduct. This would agree with Ackermann’s formulation of reasonably private - that a person’s privacy extends to those aspects in which a legitimate expectation of privacy can be harboured, as “a subjective expectation of privacy ... that is reasonably recognized as objectively reasonable.”

63. The use of the subject photo is not denied. It was the defendants' contention that the plaintiffs had given their consent to its use by having posted it on Facebook. That contention cannot hold. The purpose for posting of that photo on Facebook was not for its use by everyone. It must have been posted there for a purpose. That purpose did not include its use by either the so called Lumen5 or the defendants in the manner it was used, to publicize issues of infidelity. Accordingly, the Court finds that the photo was used without the authority and consent of the plaintiffs.

64. As regards the contention that the photo was properly sourced from Lumen5 library store, the Court has considered the terms and conditions of Lumen5 services. The Court has already found that the services are meant for use in Canada and the United States of America. The use in other countries where they would be illegal is expressly prohibited.

65. The Court did not understand the defendants to argue that it is lawful in Kenya to invade the privacy of an individual. As rights expressly protected by the Constitution, their violation cannot be otherwise but unlawful. That is the net effect of **Articles 28, 31 and 40 of the Constitution**. The Court does not accept the contention that the contract between the defendants and the said Lumen5 permitted the use of the said services in Kenya, and in particular, in a manner against the dictates of the Constitution.

66. From the cases relied on by the parties, it is clear that for a claimant to successfully mount a claim for unlawful use of name or image, the claimant must establish three key elements; these are, the use of a protected attribute, that the use is for exploitative purpose and that the use was without consent. (See Jessica Clarise Wanjiru case (supra)).

67. In the present case, the plaintiffs were able to prove that there was use of their protected attribute and that it was without their authority or consent. They contended that the same was for commercial purposes. That the topic under discussion was a lifestyle topic heavily branded with the defendants' trademark and created to allow further dissemination.

68. To this Court's mind, the cardinal principle of evidence is that he who alleges must prove. The Court viewed the video severally and carefully considered the still photo and the words accompanying it. There was no evidence that the same was used to advertise the services of the defendants. While it may be true that the defendants exist as profit making entities by virtue of being quoted at the stock exchange, that perse does not make each and every endeavour they undertake to be for commercial purposes. Other endeavours may be for the enlightenment of society. In this regard, there was no prove that the photo was used for commercial purposes. The claim for violation of personality rights was therefore not proved.

69. The final issue is the reliefs due to the plaintiffs. Although the plaintiffs are man and wife, they are separate and distinct from each other. They were wronged separately and in their individual capacities. It was not their marriage that was wronged but their individual reputation. They are entitled to damages

70. Of course, the plaintiffs are entitled to damages for defamation. In Standard Limited v G.N. Kagia t/a Kagia & Company Advocates [2010] Eklr, the Court of Appeal stated: -

“In situations where the author or publisher of a libel could have with due diligence verified the libellous story or in other words, where the author or publisher was reckless or negligent, these factors should be taken into account in assessing the level of damages;

the level of damages awarded should be such as to act as a deterrence and to instil a sense of responsibility on the part of authors and publishers of libel. Personal rights freedoms and values should never be sacrificed at the altar of profiteering by authors and publishers”

71. In Ahmednassir Maalim Abdullahi v Star Publications Limited [2019] Eklr, the court awarded as sum of Kshs. 3,500,000/= on account of general damages. In Radio Africa Ltd & another v Nicholas Sumba & another [2015] Eklr, the Court of appeal maintained an award of Kshs. 3,000,000/-.

72. The above cases are similar and of persons of the same profession as the plaintiffs. I have considered the said awards and I do find that a sum of Kshs. 4,000,000/- each would suffice on account of general damages.

73. The defendants acted recklessly in the manner that they caused the defamatory material to be published. They stated however that they pulled down the publication and attempted to make amends by publishing an apology. This mitigates against any award for aggravated and exemplary damages. Those claims are therefore declined.

74. As at the time the suit was filed, no apology had been made or given. It came way after the suit was filed. In my view due to the passage of time, I do not think that the giving of an apology at this point will suffice. I would award Kshs.400,000/- to each plaintiff in lieu of apology.

75. Accordingly, judgment is hereby entered for the plaintiffs against the defendants, jointly and severally, for: -

- a) **A declaration that the impugned video produced by the defendants was defamatory of the plaintiffs.**
- b) **A declaration that the defendants were not entitled to use plaintiffs' photographs in the impugned video or at all.**
- c) **General damages for defamation Kshs.4,000,000/- for the 1st plaintiff and Kshs.4,000,000/= for the 2nd plaintiff.**
- d) **Kshs.400,000/- to the 1st plaintiff and Kshs.400,000/- to 2nd plaintiff in lieu of apology.**
- e) **The claim for breach of the plaintiffs right to privacy is dismissed.**
- f) **The claim for aggravated and exemplary damages is dismissed.**
- g) **Interest on (c) and (d) above from the date of this judgment until payment in full.**
- h) **Costs and interest thereon at court rate.**

DATED and **DELIVERED** at Meru this 18th day of June, 2020.

A. MABEYA

JUDGE