



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO 212 OF 2013**

**ROBERT ALAI..... PLAINTIFF**

**VERSUS**

**STANDARD GROUP LIMITED.....1<sup>ST</sup> DEFENDANT**

**JOHN BUNDOTICH.....2<sup>ND</sup> DEFENDANT**

**CHARLES OTIENO.....3<sup>RD</sup> DEFENDANT**

**TONY MOCHAMA.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. In his Complaint dated and filed on 6<sup>th</sup> June 2013, the Plaintiff sought the following reliefs :-

**a. Exemplary and aggravated damages for defamation.**

**b. General damages for defamation.**

**c. A permanent injunction to restrain the Defendants, whether by themselves, servants or agents, authorised representatives or any other person or authority from further making, printing, broadcasting, televising or publishing defamatory and libelous statements in articles against the Plaintiff.**

**d. Costs.**

**e. Any other remedies the Honourable Court deems just and expedient to grant.**

2. The Defendants entered Appearance on 24<sup>th</sup> June 2013. They filed their Defence dated 5<sup>th</sup> July 2013 and List of Witnesses on even date. On 6<sup>th</sup> June 2017, they filed a Witness Statement for Tony Mochama (hereinafter referred to as "DW 1") of even date. They subsequently filed their List of Documents dated 3<sup>rd</sup> January 2017 on 13<sup>th</sup> July 2017.

3. The Plaintiff's List of Witnesses and List of Documents were attached to his Complaint. His Reply to Defence was dated 8<sup>th</sup> August 2013 and filed on 12<sup>th</sup> August 2013. Pursuant to this court's directions of 17<sup>th</sup> December 2018, he filed a fresh Witness Statement alongside that of Hubert Nakitare (hereinafter referred to as "PW 3") which were both cross-referenced to the indexed and paginated Bundle of Documents dated 29<sup>th</sup> January 2019 on 31<sup>st</sup> January 2019. On 19<sup>th</sup> July 2019, the Plaintiff filed a Witness Statement for Suzanna Owiyo (hereinafter referred to as "PW 2") of even date.

4. Similarly, further to the court's directions, the Defendants filed a fresh Witness Statement of DW 1 that was cross-referenced to the indexed and paginated Bundle of Documents dated 25<sup>th</sup> February 2019 on 26<sup>th</sup> February 2019.

5. The Plaintiff's Written Submissions were dated 16<sup>th</sup> December 2019 and filed on 17<sup>th</sup> December 2019 while those of the Defendants were dated 16<sup>th</sup> January 2020 and filed on 21<sup>st</sup> January 2020. The Judgment herein is based on the said Written Submissions which all parties relied upon in their entirety.

## LEGAL ANALYSIS

6. The Defendants did not file any Statement of Agreed Issues. However, the Plaintiff's Draft of Agreed Issues were dated 13<sup>th</sup> March 2014 and filed on 25<sup>th</sup> November 2014. They were as follows:-

- a. **Whether the Defendants published the subject matter complained of.**
- b. **Whether the subject matter complained of was defamatory.**
- c. **Whether and to what extent the Plaintiff was entitled to the remedies sought.**

7. All the issues were related and were therefore dealt with together. It was not in dispute that the 1<sup>st</sup> Defendant published the Article that the Plaintiff complained of. What was in dispute was whether or not the said Article was defamatory of him.

8. The Plaintiff's case was that on or about 21<sup>st</sup> September 2012, the Defendants published words whose intention was to malign, defame and undermine his integrity. He stated that the words were contained in an Article in the Pulse Segment of the 1<sup>st</sup> Defendant's Newspaper known as The Standard titled "**Bothersome bloggers.**" The words complained of were as follows:-

**" Robert Alai is a Kenyan blogger... and a most controversial one at that...it is not the techno-babble, but the social muddles he has gotten himself into, that have made Robert Alai household name-in the same way one may get used to a housefly in a nyama chama joint.**

**In September alone as soon as the Pulse exclusively broke the piteous plight of Conjestina Achieng' in a mental facility and faced with the possibility of eviction, celebrities like Shaffie Weru of Kiss FM swung into action.**

**...Meanwhile, Robert Alai (a self -proclaimed voice of the voiceless) went into action and provided a phone number where funds for M-pesa for Conjestina could be forwarded.**

**The next day Saturday, September 8, this writer got a call from Sherrie "Tiny" Bailey, a close friend and former boxing sponsor of Conjestina, who made it clear in no categorical terms that the number was a hoax. She gave another number for well-wishers to support the falling boxing heroine.**

**...Alai himself will want to forever erase...Friday of February, 2012. That is the day bloggers went live with the video of him screaming after being mercilessly mauled by the security guards at i-Hub. A quick recap the day before, Nokia CEO, Stephen Elop, had come to give a talk to Nokia folks and media at thei-Hub and Alai saw a chance to elope with the agenda.**

**But security was having nothing of it and threw the blogger out with a warning of bugger beatings, to which Alai responded with loud, blood-curdling wails.**

**His case began last Thursday for a mid-August Twitter posting, where he accused Machakos governor aspirant Dr Alfred Mutua of having ordered the killing of University of Nairobi GP Oulu human rights' activist Oscar King'ara after branding them Mungiki.**

**He further abused the then Governor spokesman as a "foolish pig intoxicated with power."**

9. It was his contention that the ordinary and natural meaning of those words meant and were understood to mean that he was a fraudster, a conman, a bothersome nosy person, meddler, a disrespectful person with loose morals, a frequent trespasser, a busy body, opportunistic, manipulative, abusive, that he had no decorum, sense of decency and social responsibility, he was guilty of crimes and was not worthy of good reputation that he possessed as a businessman, journalist and/or writer.

10. During his Cross-examination, he conceded that that he asked Conjestina Achieng's friends to send money through his phone 072XXXXX30. He further stated that no one asked him to account for the money he collected through his phone which he said a sum of under Kshs 100,000/= was remitted to the family.

11. He also admitted that he wrote several tweets about another celebrity namely, Akothee accusing her of taking cocaine, of having gone to Switzerland to abort and that she smelt like fart. He said that that it was his opinion of how she smelt and that he was not being insensitive. As regards another celebrity namely, Vera Sidika, he said that his tweet meant that she should sell more exotic cats than the man in the photo in a newspaper article was found skinning.

12. He denied that he disrespected women because if he did, he would not have raised funds for Conjestina Achieng'. He was emphatic that the fact that Dr Alfred Mutua had a case against him did not mean that he was guilty of any crime.

13. On her part, PW 2 testified that she and other celebrities joined the Plaintiff who had been tweeting about the plight of Conjestina Achieng' and together, they all started a campaign called PAMOJA CONJE to raise funds for her. It was her evidence that they opened a Paybill Number and an account at Family Bank where well-wishers were asked to contribute money. She pointed out that they also organised a dinner and boxing match towards raising the funds.

14. She said that she was surprised to read in the Pulse Magazine of The Standard that the online campaign the Plaintiff was running was a hoax. She was categorical that the funds that they raised during the campaign were forwarded to the boxer's family and that the claims in the Article complained of were false.

15. PW 3 corroborated PW 2's evidence that the celebrities joined the aforesaid campaign to assist Conjestina Achieng' and that when funds were raised, the same was forwarded to her family. His testimony was that the Article in The Standard was malicious and was intended to taint the Plaintiff's image.

16. When PW 2 and PW 3 were cross-examined, they both expressed surprise that the Plaintiff had asked well-wishers to send contributions to his phone. They were, however, both emphatic that the Plaintiff was part of the initiative of raising funds for Conjestina Achieng and that the efforts were collective and genuine and not a hoax.

17. On his part, DW 1 was categorical that the Article he wrote was not about the Plaintiff alone but rather it was about different bloggers who had gained notoriety in the social media space and that he used him as an example. Whereas he did dispute that there was a campaign to assist Conjestina Achieng', he took issue with the fact that the Plaintiff asked well-wishers to send money to his phone, which fact was brought to his attention by the said Sherry "Tiny" Bailey, Conjestina Achieng's cousin.

18. He added that the tussle he referred to between the Plaintiff and the security personnel was on social media and that it was also true that the Plaintiff had been charged in court for sending abusive messages to Dr Alfred Mutua. He pointed out that the Plaintiff hung up the phone when he called him to find out his side of the story.

19. On being re-examined, he pointed out that he wrote the story to highlight the unregulated nature of the online world and it was a matter of public interest. He contended that it was Conjestina Achieng's coach who reached out to him to stop the collection of money by the Plaintiff because it was not authentic. He averred that accountability was difficult where a celebrity collected money through his personal number.

20. In support of his case, the Plaintiff relied on the cases of Samuel Ndung'u Mukunya vs Nation Media Group Ltd & Another [2015] eKLR, Phineas Nyagah vs Gitobu Imanyara [2013] eKLR, Joseph Njogu Kamunge vs Charles Muriuki Gachari [2016] eKLR amongst several other cases to buttress his argument that the words related to and referred to him by name, that they were communicated to third parties, that the words were published maliciously and that the Defendants had failed to demonstrate the defence of justification.

21. On their part, the Defendants placed reliance on the cases of Selina Patani & Another vs Dhiranji V. Patani [2019] eKLR, Phineas Nyagah vs Gitobu Imanyara (Supra), Rumba Kinuthia vs Judith A. Achar & Another [2016] eKLR amongst other cases to support their argument that the Plaintiff had not discharged his burden of proof to demonstrate that the ingredients of what constitutes defamation were present in his case.

22. Notably, the Plaintiff and the Defendants were agreed on what constitutes defamation. The cases they each relied upon were on all fours to each other's position. They were, however, not agreed on the question of whether what was published by the 1<sup>st</sup> Defendant was defamatory of the Plaintiff herein.

23. In the Halsbury's Laws of England 4<sup>th</sup> Edition Volume 28, which they each relied upon, it has been stated that:-

**“A defamatory statement is a statement which tends to lower a person in the estimation of the right thinking members of the society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt ridicule to convey any imputation on him disparaging or injuries to him in office, profession, calling, trade or business.”**

24. The Plaintiff admitted that he informed well-wishers to send contributions to assist Conjestina Achieng' on his personal line. It was not clear whether this information was given after well-wishers were notified of the Paybill Number or it was before the PAMOJA CONJE campaign commenced. Both PW 2 and PW 3 did not specify which date the Paybill Number was set up and the bank account opened. They, however, both said that they would be surprised if there was another mode of collecting the contributions other than the modes that had been agreed upon by the Committee.

25. Suffice it to state that the Plaintiff's request that well-wishers send their money to his personal line was contained in a tweet of 2<sup>nd</sup> September 2012. In response to the said tweet on the same date, questions were being asked regarding that line. There was a person who had enquired to find out whose line that was while another wrote that the presenter at Kiss FM had announced that there was no number to Mpesa. On 19<sup>th</sup> November (year not given), a person referred to the Plaintiff as a scammer and that he had been caught with his hands in the cookie jar. This may or may not have not been influenced by the Article that was published on 21<sup>st</sup> September 2012. The words to the effect that the Plaintiff had provided a phone number where funds of Mpesa could be sent were not false. The statements in the Article complained of could not therefore be said to have been not false.

26. The Defendants' assertion in the Article that the Plaintiff was caught in an altercation at the i-Hub could not be deemed to have been untrue or made maliciously for the reason that he did not controvert or deny the same when he adduced evidence. DW 1 testified that the altercation was caught on video that was circulated in the social media.

27. The Defendants adduced in evidence an extract from the Daily Nation showing the Plaintiff in a Nairobi Court on 22<sup>nd</sup> August 2012 where it was stated that he had been charged with (sic) posting abusive messages about Government Spokesman Alfred Mutua. It added that the case would be heard on 13<sup>th</sup> September 2013.

28. The Article published the same words that had been published in the Daily Nation. The said words were as follows:-

**“ The court heard that Mr Onyango posted a message on August 16, claiming that Dr Mutua ordered the killing of University of Nairobi GP Oulu human rights’ activist and Oscar King’ara, by branding them Mungiki.**

**Three years ago, gunmen shot dead Mr Oulu and Mr King’ara in unclear circumstances as they drove on a highway nears the halls of residence.**

#### **The accusations**

**According to the prosecutor, another message also claimed that the Spokesman was also out to eliminate him (Alai). The blogger was further accused of calling Dr Mutua, a “foolish pig intoxicated with power.”**

29. As the Plaintiff did not also rebut the Defendants’ assertions that he had been charged for abusing Dr Alfred Mutua and/or uttering the words he was said to have uttered and the fact that he admitted that he had been charged, the words in the Article complained of could not be said to have been defamatory or false or maliciously published. Evidently, the Article regurgitated what had been published in an Article that was carried in a different Newspaper about a month or so earlier than the complained Article.

30. Further, the Defendants submitted in evidence tweets where the Plaintiff had abused celebrities known as Akothee and Vera Sidika. Since they were not parties to the proceedings herein, this court did not find it necessary to set out the words that were used to describe them. To say the least, the words could not be reproduced in a public document such as a judgment without causing offence to the general public who might come across it and read it. The court noted that the Plaintiff’s explanation of what he had said about the said Vera Sidika vis-a vis the Article relating to one James Kimani who had been charged in court for skinning a cat did not convince this court. Although the Plaintiff had freedom of speech, he appeared to have compared her in very unpalatable terms without any provocation.

31. Bearing in mind that there were several tweets about different people and they all bordered on being abusive, it was the considered view of this court that the Title of the Article “Bothersome bloggers” was not defamatory of the Plaintiff. The word “Bothersome” was a mere adjective describing those bloggers who were bothersome. This was an opinion that was expressed by DW 1 and he was also entitled to his opinion. The court could not therefore fault him of having used the word to describe those bloggers which in his opinion included the Plaintiff herein.

32. The Plaintiff was under a duty to present to court, a water tight case and prove the assertions that he had made in line with Section 107 of the Evidence Act Cap 80 (Laws of Kenya) that provides that:-

**“1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”**

33. Further, Section 109 of the Evidence Act states that:-

**“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”**

34. Save that the Article referred to the Plaintiff by name and the contents therein were communicated to at least one other person other than to him, he did not demonstrate the following:-

- a. That the matter complained of was defamatory in nature;**
- b. That the statements were false;**
- c. That the defamatory statement was published maliciously.**

35. He did not also demonstrate how his character, reputation and/or profession had been injured. The words used in the Article were sensational and bordered on the offensive side. However, in their natural and ordinary meaning, the words complained of did not meet the threshold of proving that the Plaintiff was defamed. They were fair comment and the Defendants could rely on the defence of justification more so as the Plaintiff declined to discuss the matter further with DW 1 when he called him for a comment.

36. Consequently, having applied the law of defamation to the facts of this case, it was the considered view of this court that the Plaintiff had not proved his case on a balance of probability.

#### **DISPOSITION**

37. For the foregoing reasons, the upshot of this court’s decision was that the Plaintiff’s suit that was filed on 6<sup>th</sup> June 2013 was not merited and the same is hereby dismissed with costs to the Defendants.

38. It is so ordered.

**DATED and DELIVERED at NAIROBI this 30<sup>th</sup> day of July 2020**

**J. KAMAU**

**JUDGE**