



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL CASE NO. 1607 OF 2002**

**J.P. MACHIRA P/A MACHIRA & COMPANY ADVOCATES....1<sup>ST</sup> PLAINTIFF**

**VERSUS**

**WACHIRA WARURU.....1<sup>ST</sup> DEFENDANT**

**THE STANDARD GROUP LIMITED.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff instituted this suit vide a plaint dated 18<sup>th</sup> October, 2002. The Plaintiff seeks damages for defamation for libel. The Plaintiff's case is that he was at all material times a prominent Advocate of the High Court of Kenya practicing in Nairobi when the Defendant's published a defamatory article concerning him.
2. It was pleaded that on 8<sup>th</sup> February, 2002 the Defendants at page No. 8 of their Newspaper the East African Standard published an article headed "**Magugu case set aside**" wherein the following words were printed. "**The court held that the Deputy Registrar of the High Court erred when he certified the Ksh.6,000,000/= costs which were excessive and oppressive to Magugu.**"
3. The claim was denied as per the Statement of Defence dated 10<sup>th</sup> February, 2002. The Defendant admitted having published the article in question but stated that the same was a fair and accurate report of court proceedings and that the same is absolutely privileged. That in the alternative the publication was protected by qualified privilege. That a correction was published and a payment made in court as an offer of amends.
4. The Plaintiff filed a Reply to the Defendants' Defence, joined issues with the Defendants and reiterated the contents of the plaint.
5. During the hearing of the case, the Plaintiff, John Patrick Machira (PW1) testified and also adopted his Witness Statement as his evidence. He also produced his list and bundle of documents as exhibits herein. He pointed out that his firm name appears in the article and stated that the words "**excessive**" and "**oppressive**" did not appear in the ruling of the court. That the said words portrayed him as an advocate who charged excessive and oppressive fees and disparaged his reputation both in his personal and professional capacity.
6. The Plaintiff further testified that he has had similar cases of libel with the Defendants and stated that there was malice on the Defendants' side due to bad blood between them. That he exercised his right of reply but the correction published by the Defendants was unsatisfactory and that the Defendant continued to deny the claim and went ahead to file a Defence and failed to settle the matter amicably.
7. The Plaintiff described the payment in court of Ksh.50,000/= by way of amends as contemptuous and stated that the paltry sum was unacceptable. He further stated that the ruling of the High Court that set aside his costs which were taxed at Ksh.4,500,000/= and Ksh.1,500,000/= was set aside by the Court of Appeal and the said amounts which had been taxed by the Taxing Master reinstated.
8. PW2 Stephen Njoroge Wachira and PW3 Paul Thuita Kiiru testified in support of the Plaintiff's case. Essentially, their evidence is that they read the article in question which they stated reflected the Plaintiff as a person who was oppressing his clients by charging exaggerated bills of costs. The two witnesses who are also Advocates of the High Court of Kenya testified that the Bills of Costs taxed by the Taxing Master were reinstated by the Court of Appeal which meant the said bills were not excessive and oppressive. Both testified to having not seen the correction in **The Standard** until the same was pointed out to them by the Plaintiff. They both viewed the apology as insufficient.
9. The Defendants closed their case without calling any witnesses. Written submissions were subsequently filed by both parties and I have

considered the same.

10. Defamation is defined in **Winfield in J.A. Jolowicz and T. Ellis Lewis – Winfield** on Tort 8<sup>th</sup> Edition, thus:

**“Defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of the society generally, or which tends to make them shun or avoid that person.”**

**A defamatory statement, according to Gatley on Libel and Slander 8<sup>th</sup> Edition by Phillips Lewis paragraph 4 page 5 discredits a man or 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.”**

11. The suit herein is founded on the tort of defamation. The Court of Appeal in the case of **Wycliffe A Swanya v Toyota East Africa Limited & another Nairobi CA No. 70 of 2008** set out the elements of defamation thus:

**“It is common ground that in a suit founded on defamation the plaintiff must prove:-**

- i. That the matter of which the plaintiff complains is defamatory in character.**
- ii. That the defamatory statement or utterance was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.**
- iii. That it was published maliciously.**
- iv. In slander subject to certain exceptions that the plaintiff has suffered special damages.”**

12. The publication of the article in question is not denied. The said article which is in bold and is headed **Magugu case set aside** has been produced as an exhibit. I have carefully read the article which states amongst other things that **“the court held that the Deputy Registrar of the High Court erred when he certified the Sh.6 million costs which were excessive and oppressive to Magugu.”**

13. The ruling of the High Court that is the subject of the article has also been produced herein. I have perused the said ruling. It is not stated anywhere in the said ruling that the Taxing Master erred in taxing costs that were excessive and oppressive. The article identifies the Plaintiff’s firm, Machira & Company Advocates as the firm to be paid the Ksh.4,500,000/= and Ksh.1,500,000/= by the Magagus. The article then went further to state that in one suit Mr. Machira took over from another firm of advocates. There is no doubt that the article referred to the Plaintiff.

14. It has been contended by the Defendant’s side that the contents of the article are a fair and accurate report of court proceedings and therefore absolutely privileged. As stated by the Court of Appeal in the case of **Nation Media Group Ltd & another v Alfred N. Mutua [2017] eKLR**

**“28. To sustain the defence of fair comment, the appellants were required to demonstrate that the words complained of are comment, and not a statement of fact; that there is a basis of fact for the comment, contained or referred to in the article complained of; and that the comment is on a matter of public interest [See Gatley on libel and slander 8<sup>th</sup> edition 1981 (Sweet & Maxwell) at paragraph 692 at page 291].”**

15. Section 6 Defamation Act provides as follows:

**“A fair and accurate report in any newspaper of proceedings heard before any court exercising judicial authority within Kenya shall be absolutely privileged:**

**Provided that nothing in this section shall authorize the publication of any blasphemous, seditious or indecent matter.”**

16. On qualified privilege the Court of Appeal expressed itself as follows in the case of **Musikari Kombo v Royal Media Services [2018]eKLR:**

**“Was the defence of qualified privilege available to the respondent. The essence of this defence is an attempt to balance two competing but vital interests in society; the individual’s right to have their character and reputation protected and safeguarded from false, unwarranted and malicious or scurrilous attacks on the one hand, and the public’s right to know as exercised and fed by freedom of expression, which is an indispensable feature of a free and democratic society as well as a major tool for public accountability. See Kagwiria Mutwiri Kioga & another v Standard Limited & 3 others [2015] eKLR. The defence is entrenched under Section 7 of Defamation Act.”**

17. In the case at hand, the words excessive and oppressive are a creation of the Defendants. The said words are not either directly or indirectly used in the said ruling of the High Court and neither are they a fair and accurate report of the ruling. The application before the High Court succeeded on the basis that the taxation under review had been undertaken prematurely.

18. The ruling of the High Court was available to the Defendant’s reporter for a verification of the facts. The Plaintiff’s uncontroverted

evidence is that the Defendants' never called him to get his side of the story. The Defendants were reckless. A simple verification exercise could have therefore revealed the correct position of the court case the subject of the article. There was therefore malice on the Defendant's side.

(See for example **Hon. Uhuru Muigai Kenyatta v Baraza Limited [2011] eKLR; Phineas Nyagah v Gitobu Imanyara 2013 eKLR**).

19. With the foregoing, I find that the Plaintiff's side has proved all the elements of defamation. The article referred to the Plaintiff. The article, as put by the Plaintiff, was published to the whole world. The Defendants have not denied that they have a wide circulation in Kenya and beyond. Indeed PW2 and PW3 in their evidence confirmed that they read the said article and received several inquiries about it from friends and colleagues. I find the Plaintiff has proved his case on a balance of probabilities.

20. The Plaintiff has prayed for unqualified apology, general, aggravated and exemplary damages. The Plaintiff is entitled to general damages to compensate him for the harm caused to his reputation and the distress and humiliation caused by the defamatory publication (See for example **Ken Odondi & 2 others v James Okoth Omburah T/a Omburah & Co. advocates [2013] eKLR; Standard Ltd v G. N. Kagia T/a Kagia & Co. Advocates [2010] eKLR**)

21. As stated by the Court of Appeal in the case of **Miguna Miguna v The standard Group Ltd & 4 others [2017] eKLR** while quoting the case of **John v GM Limited [1993] QB 586**

**“Aggravated damages will be ordered against a defendant who acts out of improper motive e.g. where it is attracted by malice; insistence on a flurry defence of justification or failure to apologize.”**

22. Exemplary damages go beyond compensation. They are meant to punish the wrongdoer and act as a deterrent from similar conduct in future (See for example **Ken Odondi & 2 others (Supra)** and **Standard Ltd (Supra)**)

23. The Plaintiff's counsel submitted for an award of Ksh.16,000,000/= as general damages, Ksh.2,000,000/= as damages in lieu of an apology, Ksh.2,000,000/= as aggravated damages and Ksh.2,000,000/= as exemplary damages. The total proposed is Ksh.22,000,000/=. The Plaintiff referred the court to several authorities in support thereof which this court has considered.

24. The Defendants' side submitted for a dismissal of the suit and did not propose any figure for award of damages.

25. The principles to be considered by the court in awarding damages in a defamation suit were set out by the Court of Appeal in the case of **Johnson Evans Gicheru v Andrew Morton & another Civil Appeal No. 314 of 2000** while quoting from the English decision of **Jones v Pollard [1997] EMLR 233,243** as follows:

**“1.The objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published, and any repetition;**

**2. The subjective effect on the plaintiff feelings not only from the prominence itself but from the Defendant's conduct thereafter both up to and including the trial itself;**

**3. Matters tending to mitigate damages, such as the publication of an apology;**

**4. Matters tending to reduce damages;**

**5. Vindication of the plaintiff's reputation past and future.”**

26. In the case of **Johnson Gicheru (supra)** the Court of Appeal held that compensation is a solatium more than a monetary recompense for harm measurable in money.

27. Having considered the cases cited herein and other cases (e.g **Martha Karua v Standard Limited & another Nairobi HCCC No. 295 of 2004**, and **Miguna Miguna Supra**) I award a sum of Ksh.5,000,000/= as general damages.

28. I have considered the article complained of and the correction published by the Defendants. I agree with the Plaintiff's submissions that the correction does not have an interest grabbing title and that the same was in small print and was tacked away. The correction was not satisfactory and the sum of Ksh.50,000/= paid in court by way of amends was insufficient. The Defendants also insisted on denying liability to the end. The Plaintiff is therefore entitled to aggravated and for exemplary damages. It is also too late in the day for any meaningful apology. I award Ksh.1,000,000/= to cover the heads of apology, aggravated and/or exemplary damages.

29. In the upshot, I enter judgment for the Plaintiff against the Defendants jointly and severally for the sum of Ksh.6,000,000/= plus costs.

**Date, signed and delivered at Nairobi this 17<sup>th</sup> day of December, 2020**

**B. THURANIRA JADEN**

**JUDGE**