



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 185 OF 2017

HON. FRANCIS KIGO NJENGA.....PLAINTIFF

VERSUS

THE STANDARD GROUP LIMITED..... 1ST DEFENDANT

ALPHONCE SHIUNDU.....2ND DEFENDANT

RULING

1. The plaintiff, *Hon. Francis Kigo Njenga* instituted suit against the defendants, the *Standard Group Limited* and *Alphonce Shiundu* by way of a plaint dated 29th August 2017. In the suit, the plaintiff sought several reliefs against the defendants including orders of injunction, exemplary, special and general damages for loss and damage to his reputation allegedly caused by the 1st defendant's publication of an Article penned by the 2nd defendant who was its employee.
2. On being served with the plaint, the defendants entered appearance and filed a joint statement of defence dated 2nd October 2017 essentially denying all the allegations made against them in the plaint.
3. On 3rd May 2018, the defendants filed a preliminary objection challenging the court's jurisdiction to hear the suit as filed on grounds that the court's jurisdiction under *Article 165 (3) (b)* of the *Constitution of Kenya 2010* had not been properly invoked as provided for under *Article 22 (3)* of the *Constitution* and the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules of 2013*.
4. The plaintiff opposed the preliminary objection through grounds of opposition dated 23rd October 2018 in which he contended that nothing in the Constitution ousted or limited the jurisdiction of the High Court to be heard and determine his suit and that the preliminary objection was thus incompetent and ought to be dismissed with costs.
5. By consent of the parties, the preliminary objection was prosecuted by way of written submissions which were highlighted before me on 31st January 2019 by learned counsel *Mr. Gitonga* who represented the defendants and *Ms. Nyaga* who held brief for *Mr. Maina* for the plaintiff.
6. Briefly, *Mr. Gitonga* in his written and oral submissions on behalf of the defendants contended that by virtue of *Article 34* of the *Constitution* which guaranteed freedom and independence of the media, this court lacked jurisdiction to enforce a person's rights under *Article 33 (3) of the Constitution*. He asserted that the drafters of the constitution deliberately qualified freedom of the media to only *Article 33(2)* and as media freedom was not made subject to *Article 33 (3)* which forms the basis of the tort of defamation, if the court were to entertain suits for defamation and grant the reliefs such as those sought by the plaintiff in this case, it would violate *Article 34 (2)* of the *Constitution*. To ground this argument, *Mr. Gitonga* submitted that by virtue of *Article 260* of the *Constitution*, the court was a state actor and under *Article 34 (1) (a) and (b)* of the *Constitution*, the state was prohibited from exercising control over or interfering or penalizing any person engaged in the broadcasting or print media save where the matter related to the exclusion specified under *Article 33 (2)* of the *Constitution*.
7. It was *Mr. Gitonga's* further submission that since *Article 34* was only made subject to *Article 33 (2)* and not to *Article 33 (3)*, persons aggrieved by any media publication or broadcasts can only have their grievances determined by the media council under its mandate donated by *Article 34 (5) (c)* of the *Constitution* and that the High Court can only exercise supervisory jurisdiction over the media council.
8. It was also the defendant's case that a party seeking intervention of the court under *Article 165 (3) (b)* of the *Constitution* must approach the court in the manner provided by *Article 22 (3)* of the *Constitution* and in accordance with the *Constitution (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules of 2013* and that the plaintiff's suit having been instituted by way of plaint and not as

a constitutional petition was incompetent.

9. The plaintiff in his brief submissions maintained that this court has jurisdiction to hear and determine his suit and that the preliminary objection should be dismissed with costs for lack of merit. The plaintiff took issue with what he described as the literal and restrictive interpretation given to *Article 34 (2)* by the defendants and submitted that the Constitution should be construed as a whole and that *Article 33 (3)* should be read together with *Article 24* which provides that the enjoyment of rights and freedoms of an individual should not prejudice the rights and fundamental freedoms of others.

10. After carefully considering the preliminary objection, the rival oral and written submissions made by learned counsel for the parties and all the authorities cited, I find that the only issue that arises for my determination is whether this court has jurisdiction to hear and determine the plaintiff's suit as filed.

11. I will begin addressing this issue by reproducing in full the provisions of *Articles 33 and 34* of the *Constitution* whose interpretation and application forms the basis of the defendants' preliminary objection.

Article 33: Freedom of expression

“(1) Every person has the right to freedom of expression, which includes—

(a) freedom to seek, receive or impart information or ideas;

(b) freedom of artistic creativity; and

(c) academic freedom and freedom of scientific research.

(2) The right to freedom of expression does not extend to—

(a) propaganda for war;

(b) incitement to violence;

(c) hate speech; or

(d) advocacy of hatred that—

(i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or

(ii) is based on any ground of discrimination specified or contemplated in Article 27 (4).

(3) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.

Article 34 : Freedom of the media

(1) Freedom and independence of electronic, print and all other types of media is guaranteed, but does not extend to any expression specified in Article 33 (2).

(2) The State shall not—

(a) exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; or

(b) penalise any person for any opinion or view or the content of any broadcast, publication or dissemination.

(3) Broadcasting and other electronic media have freedom of establishment, subject only to licensing procedures that—

(a) are necessary to regulate the airwaves and other forms of signal distribution; and

(b) are independent of control by government, political interests or commercial interests.

(4) All State-owned media shall—

(a) be free to determine independently the editorial content of their broadcasts or other communications;

(b) be impartial; and

- (c) *afford fair opportunity for the presentation of divergent views and dissenting opinions.*
- (5) *Parliament shall enact legislation that provides for the establishment of a body, which shall—*
 - (a) *be independent of control by government, political interests or commercial interests;*
 - (b) *reflect the interests of all sections of the society; and*
 - (c) *set media standards and regulate and monitor compliance with those standards.”*

12. From a reading of the above Articles of the *Constitution*, it is clear that while *Article 33* guarantees freedom of expression for all persons, the drafters of the *Constitution* and the people of Kenya deliberately incorporated *Article 34* as a stand-alone provision which protected freedom of the media exclusively. This is not to say that media freedom as guaranteed under *Article 34 of the Constitution* is absolute. Media freedom is not one of the fundamental rights and freedoms that under *Article 25* of the *Constitution* cannot be limited.

13. Though I am in full agreement with *Mr. Gitonga’s* submissions that the exercise of media freedom as guaranteed by *Article 34* is only expressly limited to publications that would amount to propaganda for war, incitement to violence, hate speech or advocacy for hatred of the nature described in *Article 34 (2) (d)*, it is my considered view that this freedom does not give the media an open cheque to publish or disseminate information recklessly or irresponsibly in a way that may injure or violate the rights and fundamental freedoms of other persons. Media freedom is subject to *Article 24* of the *Constitution* which sets out the circumstances under which a right or fundamental freedom in the Bill of Rights can be limited.

14. Having analysed the defendants’ submissions, I concur with the plaintiff’s submissions that in raising their objection, the defendants were advancing the view that *Article 34* should be read and interpreted in isolation without regard to other provisions of the *Constitution*. This is a wrong approach to the interpretation of the *Constitution* which being the supreme law of the land must be interpreted not only liberally but also holistically in order to give effect to not only the letter but also the spirit of the *Constitution*.

15. Regarding what constitutes holistic interpretation of the *Constitution*, the Court of Appeal in *Standard Limited & 2 Others V Christopher Ndarathi Murungaru, [2016] eKLR* when deciding an appeal emanating from a ruling made by the High Court in an objection similar to the one made in this case addressed the subject by adopting the interpretation given by the Supreme Court in the matter of the *Kenya National Human Rights Commission, SC Advisory Opinion Ref No. 1 of 2012* in which it was held that holistic interpretation meant:

“Interpreting the Constitution in context. It is the contextual analysis of a Constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explanation of what the Constitution must be taken to mean in light of its history of the issue in dispute and of the prevailing circumstances.”

16. In view of the foregoing, though the pivotal role played by the media in a democratic state like Kenya cannot be gainsaid, the media in the conduct of its business in publishing and disseminating information for consumption by members of the public must be careful to ensure that the information published is true and that it does not extend not only to information prohibited under *Article 33 (2)* but that it also respects the constitutional rights of other persons including the right to human dignity and privacy which are encompassed in the right to reputation.

17. Another argument put forth by the defendants is that *Article 34 (5)* of the *Constitution* has ousted or limited the jurisdiction of the High Court donated by *Article 165 (3)* which provides that subject to *clause 5*, the High Court shall have *inter alia*, unlimited original jurisdiction in criminal and civil matters as well as jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened with violation. *Clause 5* is not applicable to the issues under consideration here since it denies the High Court jurisdiction to adjudicate on matters reserved for the Supreme Court or the specialized courts established under *Article 162 (2)* of the *Constitution*.

18. As stated earlier, the defendants’ contention is that an aggrieved party who feels that his or her reputation has been damaged by the media can only seek redress from the media council which is the body established pursuant to *Article 34 (5)* with a mandate to set media standards and ensuring compliance with the standards as set.

19. A reading of the functions of the media council as provided under *Section 6 (1)* of the *Media Council Act* does not show that one of the functions of the media council is the adjudication of complaints filed by citizens seeking a remedy for damage caused to them by the manner in which the media or journalists working for the media had published information in reference to them. As admitted by *Mr. Gitonga* in his submissions, the media council does not have power to award damages or any relief to compensate an aggrieved party for damage to reputation caused by the media. The media council is not therefore statutorily mandated to function as a court of law. Its mandate confines it to act purely as a regulator in the media industry.

20. Besides, if the people of Kenya in promulgating *Article 34* intended to oust the jurisdiction of this court from hearing and determining actions for defamation filed against the media, nothing would have been easier than to expressly say so by including in the Article some clear, express and specific ouster clauses. The Supreme Court in *Judges & Magistrates Vetting Board & 2 others V The Centre For Human Rights & Democracy & 11 Others. SC. Petition. Nos. 13 A, 14 and 15 of 2013* defined ouster clauses in the following terms:

“Ouster clauses are provisions in the constitution or a statute that take away, or purport to take away the jurisdiction of a competent court of law. They deny the litigant any judicial assistance in the relevant matter, and at the same time deny the courts the scope for making any arbitral contribution with respect to the relevant matter. In short, ouster clauses curtail the

jurisdiction of the court, as the relevant matter is rendered non-justiciable before the courts.”

21. Given the definition of ouster clauses as shown above, I see nothing in the entire provision of *Article 34* of the *Constitution* including *Article 34 (5)* that ousts or limits the jurisdiction of this court from entertaining defamation claims filed by private citizens against the media. I wish to add that the court in entertaining such claims and in granting remedies such as sought in this case where the same are deserved would not be controlling, interfering or penalizing the media as submitted by *Mr. Gitonga* but will be fulfilling its mandate under *Article 159* of the *Constitution* which vests judicial authority in the courts and tribunals established by and under the *Constitution*.

22. The High Court is established under *Article 165* of the *Constitution* and as stated earlier, the people of Kenya gave it *inter alia* original and unlimited jurisdiction in civil and criminal matters and jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights had been denied, violated or threatened with violation.

23. The Court of Appeal in *Standard Limited & 2 Others V Christopher Ndarathi Murungaru, [2016] eKLR, (supra)* pronounced itself on whether *Article 34 (5)* of the *Constitution* denied this court jurisdiction to enforce rights and fundamental freedoms of citizens against the media. The court expressed itself as follows:

“In our reading of Article 34(5) of the Constitution, which provides for the establishment of a media regulatory body, there’s absolutely nothing that constrains, limits or otherwise affects the jurisdiction conferred on the High Court by Articles, 22, 23 and 165 (3) (b), to enforce rights and fundamental freedoms. The Media Complaints Commission, whose membership is largely drawn from media and related practitioners, is first and foremost in the nature of a self-regulatory body that provides remedies in cases of breach of the code of conduct by journalists. The Commission has no powers, under section 38 of the Media Council Act to award the kind of remedies that the Constitution contemplates for violated or infringed rights and fundamental freedoms including a person’s right to reputation and dignity. It cannot therefore be seriously argued that such a body is a substitute for the High Court in matters of enforcement of rights and fundamental freedoms.”

24. By parity of reasoning, it is my finding that *Article 34 (5)* of the *Constitution* does not in any way oust or affect the civil jurisdiction of the High Court to try all suits of a civil nature which includes suits for defamation. This jurisdiction is conferred on the High Court by *Section 5* of the *Civil Procedure Act* and is reinforced by *Article 165 (3) (a)* of the *Constitution* which as stated earlier gives this court original and unlimited jurisdiction in both civil and criminal cases.

25. Regarding *Mr. Gitonga’s* submission that the plaintiff’s suit as filed is incompetent as it was instituted by way of a petition instead of a petition under *Article 22* of the *Constitution*, I do not with respect find any substance in this argument since a perusal of the petition dated 29th August 2017 reveals that the plaintiff was not seeking any remedy for alleged violation or threatened violation of any of his Constitutional rights. The plaintiff sought damages for defamation complaining that his reputation and standing in the society had been damaged by the defendants’ publication of an Article in reference to him which was false and malicious.

26. I fully associate myself with the holding of *Kamau J* in *Jasper Ndeke Shadrack V The Standard Group Limited & Another, HCCC No. 247 of 2016*, that defamation is a civil wrong which is classified as a tort. An action in defamation is purely a civil case which this court can hear and determine under the *Civil Procedure Act* and in the exercise of its jurisdiction under *Article 165 (3) (a)* of the *Constitution*.

27. As the plaintiff’s suit was not premised under *Article 22 (1)* of the *Constitution* which gives every person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights had been denied, violated or infringed or was threatened with violation, he could not have moved the court through a petition in the manner prescribed under the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules of 2013* as submitted by the defendants. My view is that the plaintiff’s suit being a civil suit was properly instituted by way of a petition.

28. For all the foregoing reasons, I am satisfied that the plaintiff’s suit as filed is competent and is properly before this court. I consequently find no merit in the defendant’s preliminary objection dated 3rd May 2018 and it is hereby dismissed with costs to the plaintiff.

It is so ordered.

DATED, SIGNED and DELIVERED at **NAIROBI** this 24th day of May, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Ms. Nyaga holding brief for Mr. Maina for the plaintiff

Ms. Muragwa holding brief for Mr. Gitonga for the defendants

Mr. Salach: Court Assistant