



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 160 OF 2015

DR. W M MPLAINTIFF

VERSUS

THE STANDARD GROUP LIMITED.....DEFENDANT

JUDGMENT

1. The Plaintiff, Dr. W M M was at all material times the [particulars withheld] Court of Kenya.
2. The Defendant, The Standard Group Ltd is the proprietor, printer and distributor of **The Nairobi**, a weekly newspaper with it's registered office in Nairobi, Kenya.
3. The Plaintiff filed this suit against the Defendant alleging that the Defendant in it's issue of **The Nairobi** of September 26th to October, 2nd, 2014 printed and published a defamatory article concerning the Plaintiff. That the article titled **"M DEFIES COURT AFTER MESSY DIVORCE *Exclusive:- Ex-wife in ill-tempered marriage rocked by cash rows, cruelty and accusations of infidelity sues Chief Justice for not paying sh150,000 monthly upkeep and "Pay up, former wife tells [Particulars Withheld] after divorce JUDGE'S CASE: M accused of failing to honour Sh.150,000 monthly payment in maintenance as directed by Court."***
4. The Plaintiff prays for judgment against the Defendant as follows:
 - (i) **An order that the Defendant do retract and withdraw the offending words and render a suitable apology in terms acceptable to the Plaintiff to be published by the Defendant in the same prominence as the offending words.**
 - (ii) **General damages for libel.**
 - (iii) **Exemplary damages for malicious libel.**
 - (iv) **General damages for malicious falsehood.**
 - (v) **A permanent injunction restraining the Defendant whether by itself, its servants or agents or otherwise, from further publishing or causing to be published the said or similar defamatory material of and concerning the Plaintiff.**
 - (vi) **Costs of this suit.**

5. The Plaintiff's claim is denied through the Statement of Defence filed herein. In the alternative, it is averred that the words complained of were matters of fact which constitute fair comment and were made in good faith and without malice in respect of a holder of a public office.

6. The Plaintiff filed a reply to the Defence and joined issues with the Defence save for the admissions made in the Defence. Essentially, the Plaintiff reiterated the contents of the Plaintiff.

7. The Plaintiff subsequently filed a Notice of Motion dated 25th June, 2015 which sought the following orders:

1. The Defence dated 2nd June, 2015 and filed on 3rd June, 2015 be struck out with costs to the Plaintiff.

2. The suit herein be set down for formal proof.

3. The costs of and occasioned by this Application be borne by the Defendant in any event.

8. The application was opposed through the grounds of opposition dated 26th June, 2015. The application was heard and the ruling herein dated 23rd October, 2015 delivered (Hon. J. K. Serگون, J). The application was allowed as prayed.

9. The case was subsequently set down for formal proof. As stated by the Court of Appeal in the case of **Hon Daniel Toroitich Arap Moi C.G.H v Mwangi Stephen Muriithi & another 2014 eKLR;**

“It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.”

10. During the hearing of the case, the Plaintiff, Dr. W M M in his evidence adopted his witness statement filed herein dated 23rd April, 2015. He produced the bundle of documents filed herein as his exhibits. In the witness statement, the Plaintiff described himself as the then [Particulars withheld] of the Court of Kenya, having been appointed to the said office after a rigorous public scrutiny. He gave his academic credentials as a holder of a Bachelor's Degree in Law from the University of [particulars withheld], a Master's Degree from the University of [particulars withheld] and a Doctorate Degree in Jurisprudence from Osgoode Hall Law School [particulars withheld], Canada. He further described himself as a scholar of international repute and former teacher of law at the University of [particulars withheld] where he also served as the Secretary General of the University Staff Union in the year 1979.

11. He testified that he is also a jurist and a publisher of two books as well as many chapters in various books, essays and articles on human rights, law and society. He further testified that he established and served in many civil society organizations, among them the Legal Advice Centre (Kituo cha Sheria); the Law society of Kenya; the Council for Legal Education, Kenya; the Citizens Coalition for constitutional Change (4Cs); the Kenya Human Rights Commission; the East African Centre for Constitutional Development (Kituo Cha Katiba), Uganda; and the International Centre for Human Rights and Democratic Development (ICHRDD), Montreal, Canada.

12. That prior to his appointment as the [particulars withheld], he served as the Resident Representative of the Ford Foundation Eastern Africa Regional Office in Nairobi. That he has dedicated his life to the development of law, human rights, good governance and social justice and that his commitment to these ideals has entailed lifetime fidelity and personal sacrifices that include incarceration as a political detainee and exile.

13. He highlighted his contribution to the struggle for reform as having received several national and international honours and awards including Senior Counsel, 2003; Lifetime Achievement Award for the Protection and Promotion of Human Rights from the Kenya National Commission on Human Rights in 2003; the Jurist of the Year Award from the International Commission of Jurists Kenya Section in 2003; and the first Law Society of Kenya Distinguished Services Award for Constitutionalism, Rule of law and Human Rights in 1988, later named Father Kaiser Award.

14. The Plaintiff further stated that he believed that his credentials as a jurist, scholar, academic, author, teacher of law and agent of reform and his personal sacrifices in the quest of a more free and democratic Kenya have earned him a solid reputation and standing. He was aggrieved that despite what he described as his outstanding contribution to the welfare of the society through his public and private life, the Defendant without any justifiable cause, wantonly set out to disparage his character.

15. The Plaintiff described “**The Nairobian**” as a paper with a very wide circulation within and outside Kenya and on the worldwide web. That following inquiries from concerned and distraught friends both locally and internationally, he made a request to the Defendant to retract the article and apologize but the Defendant failed to do so. That the Defendant had not furnished him with a notice of the adverse intended publication nor contacted him for his side of the story before the publication of the article. He pointed out that in a subsequent publication of **The Nairobian** issue of 27th March to 2nd April, 2015, the Defendant published another article containing factual inaccuracies concerning him linking him to Allidana Visram Secondary School and improperly associated him to one Kamlesh Pattini.

16. The Plaintiff produced the following documents as exhibits:

1. **The Nairobian** dated 26th September to October 2nd 2014.
2. Judgment in HCCC Nbi Divorce Cause No. 179 of 2009.
3. Decree *Nisi* in HCCC Nbi Divorce cause No.179 of 2009
4. **The Nairobian**, dated March, 27th-April 2nd 2015, page 24
5. Plaintiff’s Demand Letter, dated 29th January, 2015
6. Further Correspondence with the Defendant:
 - a) Defendant’s letter dated 30th January, 2015
 - b) Plaintiff’s letter dated 2nd February, 2015
 - c) Plaintiff’s letter, dated 11th February, 2015
 - d) Plaintiff’s letter, dated 4th February, 2015

7. Papers and Speeches Delivered:

- e) Keynote speech by the [particulars withheld], Hon Dr. W M, at the Commencement of “the Judicial marches Week” Countrywide, 21st August, 2012
- f) Speech by W M, at the Centre for Strategic and International Studies Washington D.C, 7th September, 2012.
- g) Speech by W M, the Vision of the 2010 Constitution of Kenya, at the University of Nairobi, 19th May, 2014

17. During cross examination, the Plaintiff explained that there was a Consent Order for the payment of Ksh.150,000/= maintenance to his ex-wife for six months which order was to cease upon the settlement of the matrimonial property matters. The existence of the divorce cause was not denied. The Plaintiff also reiterated that the Defendant did not contact him to get his side of the story.

18. PW2 Erada Ahmed Abdirahman, the Vice President Africa's Young Entrepreneurs who works in South Africa and Nigeria in her evidence adopted her witness statement. PW2 stated that by the material date she had known the Plaintiff for over five years and had followed his career, work and life achievements and had interacted with him both socially and professionally. PW2 described the Plaintiff as her mentor and stated that she had at all times been impressed by the Plaintiff's dedication to duty, his professional standing, reputation, discipline and integrity, humility and selflessness. PW2 further testified that she was horrified and shocked by the article especially the contents touching on the Plaintiff's public office and telephoned the Plaintiff to express her disappointment. That the Plaintiff insisted that the article was false and he would ensure that the same was retracted and an apology given but that this never came to be. PW2 stated that she therefore remained with lingering doubts concerning the Plaintiff's character.

19. During cross examination, PW2 stated that she read the online version of the article from Johannesburg in South Africa and later read the hard copy of the publication during the meetings with the Plaintiff's lawyers. According to PW2, although she talked to the Plaintiff, he no longer remained as much a mentor as before.

20. At the close of the Plaintiff's case, the learned counsel for the respective parties opted to file written submissions. I have considered the said submissions alongside the authorities cited.

21. This is a suit 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.”

22. The relevant part of the article in question stated as follows:

“M DEFIES COURT AFTER MESSY DIVORCE *Exclusive:-* Ex-wife in ill-tempered marriage rocked by cash rows, cruelty and accusations of infidelity sues Chief Justice for not paying Sh.150,000 monthly upkeep.

A case filed by W M ex-wife, Prof B M L, demanding payment of Sh.150,000 in maintenance as directed by a divorce court may not have been concluded despite hearing being set for May 16 last year, The Nairobiian can exclusively reveal.

In the said ruling of July, 26, 2012, Justice GBM Kariuki asked the [particulars withheld] to pay the money for a period of six months from the date of judgment, or until law suits related to division of matrimonial property were heard and determined.

A perusal of the Court's online records also suggest that rulings on all three matters affecting Kenya's top jurist and head of one of the arms of government, are yet to be made...."

23. The Plaintiff's evidence regarding the falsehoods in the said article remained unshaken during cross examination. The Plaintiff in his evidence stated that he did not disobey a court order, did not use his position as [particulars withheld] to delay the conclusion of the divorce proceedings; was not found guilty of any matrimonial offence in the divorce proceedings and did not default in any of his obligations arising from the divorce proceedings as insinuated in the article.

24. In the judgment in **HCC Nbi Divorce cause No. 179/2009 Dr. W M M v B M L** which was delivered on 26th July, 2012, Hon. G.B.M. Kariuki Sc, Judge (as he then was) made the following order, *inter alia*.

"I order that the Petitioner shall pay to the Respondent monthly maintenance of Shs.150,000/= for a period of 6 months from the date of this judgment or until suits numbers H.C.C.C. 33 of 2011 (O.S) and H.C.C.C. No. 44 of 2011 (O.S) for division of matrimonial of properties are heard and determined, whichever date comes first."

25. The Decree *Nisi* issued on 12th September, 2012 reflects the same position regarding the monthly maintenance. The article in question was published in **The Nairobi** Edition of September, 26 - October 2, 2014. By then the Judgment and the Decree *Nisi* were part of the court's records. A simple verification exercise could have therefore revealed the correct position of the court cases 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**).

26. After analyzing the Plaintiff's evidence, this court is satisfied that all the elements of defamation have been proved. It is not in dispute that the article was written by the Defendant and concerned the Plaintiff. The article was published. The article in its ordinary meaning was defamatory to the Plaintiff. As demonstrated by the evidence of PW2, the article lowered the Plaintiff's reputation before the right thinking members of the society. The aspersions cast by the article were that the Plaintiff who was the [particulars withheld] of the Court of Kenya was in disobedience of court orders, unsuitable to hold the office of the Chief Justice, an immoral person etc.

27. Having held that the article was defamatory, I now embark on the question of assessment of damages. The Plaintiff has prayed for general damages and exemplary damages. In the circumstances of the instant case, 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**).

28. 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 (supra)** and **Kagia cases (supra)**). In the instant case, the evidence on record has established that the publication was actuated by malice. There was recklessness in that there was failure to verify the facts. The Plaintiff was not contacted by the Defendant prior to the publication of the article. There was no apology or retraction of the article despite the formal demand through the Plaintiff's Advocates. This must have added to the Plaintiff's odium.

Nothing was done by the Defendant mitigate the circumstances. Instead the Defendant published a subsequent article on Allidana Visram Secondary School which has been shown through the Plaintiff's evidence to contain falsehoods. The article in question appeared as a headline. It was a sensational headline. The intention must have been to boost the sales of the newspaper taking into account that the Plaintiff was the head of the Judiciary.

29. The Plaintiff's counsel submitted for an award of Ksh.20 million as an award of general damages for

libel. He relied on the following cases:

- (a) **Joshua Kulei v Kalamka Ltd HCCC No. 375 of 1997**, where a former comptroller of State House was awarded Ksh.10,000,000/=.
- (b) **Charles Kariuki T/a Charles Kariuki & Co. Advocates HCCC No. 5 of 2000 (Meru)** where an award of Ksh.20,000,000/= was made to an advocate for libel.
- (c) **Daniel Musinga T/a Musinga & Co. HCCC No. 102 of 2000 (Mombasa)** where an award of Ksh.10,000,000/= was made to an advocate for libel.
- (d) **John Machira v Wangechi Mwangi & Nation Newspapers Limited HCCC No. 1709 of 1996** where an award of Ksh.8,000,000/= was made to an advocate.
- (e) **Obura v Tom Alwaka & others** an award of Ksh.17,000,000/= was made to a former ex-minister
- (f) **Kalya & another v Standard Limited [2002] 2 KLR** where an advocate was awarded 9,000,000/=
- (g) **Johnson Evans Gicheru v Andrew Morton & another Civil Appeal No. 314 of 2000** where a sum of Ksh.6,000,000/= was made to the then Chief Justice.
- (h) **Amirita Bhagwanji shah v Standard Limited & another Civil Case 1073 of 2004** where a retired Court of Appeal Judge was awarded Ksh.6,000,000/=.

30. In computation of exemplary damages, the Plaintiff's counsel cited the following authorities:

- (a) **Amirita Bhagwanji Shah (supra)** where an award of Ksh.1,000,000/= was made as exemplary damages to a retired Court of Appeal Judge.
- (b) **Hon. AMB Chirau Ali Makwere v Royal Media Services Ltd HCCC No. 57 of 2004** where a politician was award of Ksh.1,000,000/= as exemplary damages.
- (c) **C A M v Royal Media Services Limited [2013] eKLR** where a cabinet Minister was awarded Ksh.500,000/= as exemplary damage
- (d) **Mwangi Kiunjuri v Wangethi Mwangi & 2 others [2016] eKLR** where a politician was awarded the sum of Ksh.1,000,000/= as exemplary damages.
- (e) **Gideon Mose Onchwati v Kenya Oil Co. Ltd and Nation Media Group Ltd [2015] eKLR** where the Plaintiff an employee of the Defendant was awarded Ksh.12,000,000/= as exemplary damages

31. The Defendant's counsel submitted for a composite award of Ksh.2,000,000/=. He relied on the following cases:

- (a) **J. P. Macharia T/a Macharia & Co. Advocates v Kamau Kanyanga & another HCCC, No. 612 of 1996** where an advocate was awarded Ksh.10,000,000/= general and exemplary damages was reduced by the Court of Appeal to Ksh.1,500,000/=.
- (b) **Hon. AMB Chirau Ali Makwere (supra)** where the Plaintiff who was a former ambassador and a politician was awarded Ksh.3,000,000/= as general, exemplary and aggravated damages.
- (c) **Martha Karua v Standard Limited & another Nairobi HCCC No. 295 of 2004** where a cabinet minister was awarded Ksh.4,500,000/= as general and aggravated damages.

(d) **Andrew Mukite Musangi v Standard Group Limited, Nakuru HCCC No. 331 of 2009** where an advocate was awarded general damages of Ksh.3,000,000/= and Ksh.500,000/= for exemplary damages.

(e) **Kenya Tea Development Agency Limited v Benson Ondimu Masese T/a B. O. Masese & Co Advocates [2008] KLR 149** where an advocate was awarded Ksh.10,000,000/= general damages and exemplary damages was reduced by the Court of Appeal 1,500,000/=

32. In the case at hand, the Plaintiff was at all material times the [particulars withheld] of the Court of Kenya. Indeed in the article complained about correctly in my view described him as a top jurist and head of one of the arms of the Government of the Republic of Kenya. However the damages to be awarded must not only reflect his position in society but must also be comparable with similar awards. As stated in the **Kagia case (supra)**.

“...there is need in having regard to comparables even in terms of the standing of the libeled person because both the law and the level of awards must of necessity continue to be certain and predictable”.

33. 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 Evan Gicheru (supra)** 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.”

34. I have taken into account the evidence herein and the submissions of the counsels for the respective parties. The case of **Johnson Evan Gicheru (supra)** and **Amirita Bhagwanji Shah (supra)** involved Judges of the Court of Appeal. By the time of the Court Appeal decision in the **Johnson Evan Gicheru (supra)** case, he had by then ascended to the office of the Presiding Judge of the Court of Appeal and later to the office of the Chief Justice. In the case under consideration, the Plaintiff was the [particulars withheld] Court of Kenya by the date of the publication. Although **The Nairobiian** is a weekly paper, the evidence on record has established that it is widely circulated in Kenya and outside Kenya and on the worldwide web.

35. I have also noted the observations made by the Court of Appeal in the **Johnson Evan Gicheru (supra)** case regarding the awards made in some of the defamation cases involving prominent politicians, high ranking civil servants and advocates as follows:

“my considered opinion of the awards so made is that they lack juridical basis, they may be found to be manifestly excessive and should not at all be taken as persuasive or guidelines of awards to be followed by trial courts, since the trial judges concerned appeared to have ignored basic fundamental principles of awarding damages in libel cases.”

The Court of Appeal further observed that compensation is a solatium more than a monetary recompense for harm measurable in money

36. In the case at hand, I find that the sum of Ksh.10,000,000/= is a reasonable solatium for the Plaintiff as

general damages for libel. I assess the exemplary damages at Ksh.2,000,000/=.

37. One of the orders sought by the Plaintiff is an order that the Defendant do retract and withdraw the offending words and tender a suitable apology to the Plaintiff. In assessing the exemplary damages, I have taken into account that there was no apology or retraction of the article. It's too late in the day for any meaningful apology. However, retraction of the online version of the article can still be done.

38. The Plaintiff has sought an order of a permanent injunction to restrain the Defendant from publishing or causing to be published defamatory material concerning him. The Plaintiff's apprehension in this regard is supported by an article in **The Nairobi** weekly edition of March 27th to April 2nd, 2015 titled "**in spirit: M, Balala & Pattni are old Allidinians.**" The Plaintiff's evidence has established that this article is also untrue. Thus there is a danger of continued defamatory publication being made by the Defendant. Consequently, I issue an order of injunction as prayed in the plaint.

39. With the foregoing, I enter judgment for the Plaintiff against the Defendant as follows:

- a) General damages for libel Ksh.10,000,000/=
- b) Exemplary damages Ksh. 2,000,000/=
- c) A retraction of the article in question from the Defendant's online editions.
- d) A permanent injunction restraining the Defendant whether by itself, its servants or agents or otherwise, from further publishing or causing to be published the said or similar defamatory material of and concerning the Plaintiff.
- e) Costs of the suit.

Date, signed and delivered at Nairobi this 24th day of Oct, 2017

B. THURANIRA JADEN

JUDGE