



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI  
CIVIL DIVISION  
CIVIL CASE NO 498 OF 2001

ALICE W. MWANGI.....PLAINTIFF

VERSUS

HARON G. NYAKUNDI.....DEFENDANT

**J U D G E M E N T**

1. The Plaintiff's claim in this suit is in defamation. She seeks general and exemplary damages plus interest thereon at court rates. The words complained of were published in a **letter dated 18<sup>th</sup> December, 2000 (Exhibit P1)** addressed by the Defendant to the Plaintiff and copied to a number of other persons. Those words are -

**“18<sup>th</sup> December, 2000**

**Qs Alice Mwangi,**

**Postal Corporation of Kenya,**

**Fax: 243698.**

**Dear Madam,**

**Ref: UTTERANCE OF MURDEROUS WORDS AGAINST ME:**

**“This is to confirm that you have today uttered words to QS MATHENGE at 3.45 pm on phone, to the effect that you would kill me for interfering with your project (AFRALTI HOSTEL).**

**Please note that I have been appointed by CCK to do some work and I have nothing personal against you.**

**Indeed prior to meeting you in the course of my duties, I did not know you.**

**Your intention to appeal to BORAQS is welcome.**

**Yours faithfully,**

**(Signed)**

**HARON G. NYAKUNDI**

**Cc. QS Mathenge,**

**The Director General, CCK,**

**Arch. Buttuk,**

**Chairman BORAQS,**

**OCPD Central Police Station.”**

2. The Plaintiff pleads that the words complained of were false, malicious, and highly libellous of her as more particularly set out in paragraphs 8, 9, 10, 11 and 12 of the **plaint dated 12<sup>th</sup> February, 2001**. The Plaintiff has also pleaded that the words complained of were actuated by malice.

3. It is the Plaintiff’s case that as a result of the publication of the words complained of, she has suffered injury to her character, reputation and esteem; injury to her credibility as a professional; injury to her integrity; injury to her employment; and injury to her civic standing as a law abiding citizen.

4. Finally the Plaintiff has pleaded that she gave the Defendant notice of intention to sue and invitation to offer apology and amends, but that the Defendant has failed to do either.

5. The Defendant entered appearance and filed **defence dated 7<sup>th</sup> May, 2001**. He admitted publication of the words complained of but pleaded that the words were addressed to the Plaintiff in good faith and in confidence, and further that what was stated in those words as having been uttered by the Plaintiff were uttered to him by one QS Mathenge. He denied that the words were false or maliciously published. He also denied that the words complained of were defamatory of the Plaintiff as pleaded.

6. The Defendant also pleaded in the alternative and without prejudice that the words complained of were published in justifiable and privileged circumstances. Particulars of “justifiable circumstances” and privilege are pleaded at paragraph 10 of the defence.

7. Finally the Defendant denied that the Plaintiff suffered loss and damage as pleaded. Though he admitted receipt of notice of intention to sue, he denied that he was liable to the Plaintiff in defamation, and that therefore he was not under any duty to offer apology or amends.

8. In response to the defence, the Plaintiff filed a **reply dated 21<sup>st</sup> May, 2001**. She joined issue with the Defendant upon his defence. She did not plead any particulars of malice under the old **Order VI, Rule 6A (3)** (now **Order 2, Rule 7(3)** of the **Civil Procedure Rules, 2010**). It is therefore deemed that the Plaintiff no longer intended to allege that the Defendant was actuated by express malice.

9. Trial of this case commenced on 13<sup>th</sup> October, 2008. The Plaintiff closed her case on 19<sup>th</sup> February, 2009. The Plaintiff testified and called one witness. Defence hearing eventually commenced on 17<sup>th</sup> November, 2009. The Defendant testified in part. Further hearing of the defence was scheduled for 24<sup>th</sup> February, 2010. I was in the meantime transferred to another station out of Nairobi. After I was transferred back to Nairobi the matter was placed before me for further hearing. After many false starts, the Defendant went back to the witness box on 17<sup>th</sup> July 2014 and completed his testimony. He called one witness on the 28<sup>th</sup> October, 2014 and closed his case.

10. The parties put in written submissions. The Plaintiff's submissions were filed on 6<sup>th</sup> November, 2014 while the Defendant's submissions were filed on 26<sup>th</sup> November, 2014. Judgement was reserved on notice. It has not been possible to prepare and deliver judgement earlier due to pressure of work at my new single-judge station to which I had already reported when I completed this trial. The delay is however regretted.

11. I have considered the testimonies of the parties and their witnesses. I have also considered the submissions of the parties, including the cases cited.

12. Publication of the words complained of is not in dispute; the Defendant admits writing the letter to the Plaintiff containing those words. It was sent to the *fax* machine of the Plaintiff's immediate boss who handed it to her. The letter was copied to several other persons. Although the Defendant stated in his testimony that he did not send the letter to the persons copied, there is no independent evidence that those persons did not receive their copies of the letter. In any event one of them, **Architect Buttuk**, is the one who received the Plaintiff's copy and gave it to her as it was received on his *fax* machine. He must have looked at its contents as the letter was also copied to him. **QS Mathenge** (PW2) also received his copy and responded to it in writing (**Exhibit P5**). I therefore consider that the main issue to be decided is whether the words complained of were defamatory of the Plaintiff as pleaded or at all.

13. The Defendant's main defence, though not expressly stated in terms, is that the words complained of were true, in that the Plaintiff uttered them to QS Mathenge (PW2). QS Mathenge responded to **Exhibit P1** more or less immediately after receiving his copy by **Exhibit P5**. He not only denied that the Plaintiff had uttered the words complained of to him, but expressed shock, in effect, that the Defendant would think that such words were uttered. QS Mathenge repeated his denial in his testimony in court and was not shaken in cross-examination.

14. QS Mathenge would of course have been the Defendant's best witness had he admitted that he uttered the words in **Exhibit P1** complained of. He has made no such admission and has turned out to be the Plaintiff's best witness. Though in a certain official meeting in which the Defendant and QS Mathenge were participants (see page 23 of **Exhibit D1**) QS Mathenge is recorded to have said that on an unspecified previous occasion, the Plaintiff had uttered some *nasty* words regarding the Defendant, this is not evidence that the Plaintiff uttered to QS Mathenge the words complained of in **Exhibit P1**. We do not know what those *nasty* words were. There was no further evidence regarding them.

15. The Defendant has alleged that QS Mathenge told him that the Plaintiff uttered the words complained of, which words the Defendant published in **Exhibit P1**. As already stated, QS Mathenge not only denied in **Exhibit P5** that he told the Defendant any such thing, but also repeated the denial in court under oath. I am not satisfied that the Defendant has come anywhere close to proving that the Plaintiff uttered the words complained of to QS Mathenge.

16. The long and short of this case is that the Defendant published of and concerning the Plaintiff words that were obviously defamatory of her. Those words were to the effect that she had threatened to kill him for interfering with her project. The threat was allegedly uttered in the presence of QS Mathenge. The Defendant reduced the alleged threat into writing and communicated the same in **Exhibit P1** not only to the Plaintiff herself but also to QS Mathenge and others.

17. An untrue allegation that someone has threatened to kill another person is by its very nature highly defamatory. On liability I must therefore find for the Plaintiff.

18. The circumstances disclosed by the evidence in this case amount to a misunderstanding between professional colleagues who had competing interests dictated by the various interests of the clients that they were representing in the building project they were involved in. Ordinarily therefore, damages would be fairly moderate. However, I must bear in mind the provisions of **section 16A** of the **Defamation Act, Cap 36**, particularly the *proviso* thereto. That section provides -

**"16A. Award of damages**

*In any action for libel, the court shall assess the amount of damages payable in such amount as it may deem just:*

*Provided that where the libel is in respect of an offence punishable by death the amount assessed shall not be less than one million shillings, and where the libel is in respect of an offence punishable by imprisonment for a term of not less than three years the amount assessed shall not be less than four hundred thousand shillings.”*

19. In the present case, the Defendant imputed to the Plaintiff the criminal offence of *threats to kill* which is a felony punishable by imprisonment for ten years in this country. See **section 223(1)** of the **Penal Code, Cap 63**. I must award at least the minimum damages provided by the statute, which damages in my view will more than adequately compensate the Plaintiff for the injury caused to her character and reputation. I will therefore award the Plaintiff all inclusive damages of KShs 400,000/00. This sum will carry interest at court rates from date of judgement until payment in full. The Plaintiff shall also have costs of the suit and interest thereon at court rates. There will be judgement accordingly.

**DATED, SIGNED AND PRONOUNCED IN COURT AT MURANG'A THIS 22<sup>nd</sup> DAY OF MAY 2015**

**H P G WAWERU**

**JUDGE**