REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE 331 OF 2009

ANDREW MUKITE MUSANGI …….....…….1ST PLAINTIFF

MARY ANN WAMBUI …….....…….2ND PLAINTIFF

VERSUS

STANDARD GROUP LTD…….....…... ……..DEFENDANT

J U D G M E N T

As the plaintiffs were planning their wedding and expecting their first child, an article was published in the Standard newspaper of Monday July 20th 2009 in the column designated as Entertainment/Gossip by Steven Muendo which ran like this;

"City Tycoon won't let daughter wed poor lover.

A popular city tycoon has locked horns with his daughter over her *fiancée* whose baby she is said to be expecting. The business magnate who owns multiple businesses in the city is said to have differed with his daughter, a manager in a leading Bank, for planning to marry a poor man. The rejected man dating the rich man's *"treasure"* happens to be a lawyer with a Nairobi firm. Reliable sources told MondayBlues that even after the lady indicated to her dad that the rejected *fiancée* was her life choice and that she was excepting his baby, Mr. Business Magnate would not listen to her pleas, as poor men are not his dream in-laws"

The plaintiffs were finally blessed with a baby girl on 8th October 2009, three months after the above article was published. Eighteen days after the birth of the child, the same columnist on the same Entertainment/Gossip page of the Standard newspaper of 26th October 2009 published this story:-

"GOSSIP OF THE WEEK

Tycoon's daughter and lawyer fiancée: a twist in the tale.

Recall a piece we published in this column early this year, on a tycoon who stopped wedding plans between his daughter and a prominent lawyer claiming the lawyer was not wealthy enough to marry his daughter? Well. The flamboyant businessman finally gave in after the lawyer's family pursued the tycoon.

A few weeks ago, a colorful ceremony was held for the two at the tycoon's residence and a wedding planned to take place in December. However, all seems to have taken a drastic turn and the tycoon's family is now on the receiving end. Apparently the lady, who is a top manager with a leading financial institution, had been expecting the *fiancée* child all along. But when she delivered a few weeks ago, the baby has suffered some deformities. It is said her lawyer *fiancée* who has since cooled about their relationship is blaming it on his lover's drunken behaviour. Sources told MondayBlues the relationship is now on the rocks

The distressed lady is said to be leaving the country for the United Kingdom, on holiday. But her f*iancée* has declined to fund the trip and their wedding plans are now on hold. From a tycoon stopping a lawyer from marrying his banker –daughter, to organize a weeding then a drastic turn of events that sounds like a great soap opera story line"

The plaintiffs read both articles but it is the last article that became the proverbial straw that broke the camel's back.

The first plaintiff, Andrew Mukite Musangi is an advocate, a managing partner in the law firm of Mukite Musangi & Company Advocates. His wife, Mary-Anne Wambui Kirubi Musangi, the 2nd plaintiff was, at the time of filing this action, a Marketing Director with Kenya Commercial Bank Limited. She is a daughter to a well-known businessman, Christopher John Kirubi, known to people as Chris Kirubi.

During the period in question, as I have observed earlier, the plaintiffs were engaged and expecting their first baby. Having finalized traditional pre-wedding ceremonies, the plaintiffs slated their wedding for 23rd December, 2009.

In view of the circumstances around their lives at this time, the plaintiffs, upon reading the two articles were left in no doubt that the prominent lawyer referred to in the article, was the 1st plaintiff while the daughter of a tycoon who is a manager with a leading (bank) financial institution was the 2nd plaintiff.

On 27th October 2009 through the firm of Singh Gitau Advocates, the 1st plaintiff addressed a letter to both the company that owns the newspaper, the Standard (Group) Limited and the author of the articles, Steven Muendo drawing their attention to the libelous nature of the publication to the plaintiffs and demanding that:

(i) They publish in the next issue of the Standard, on the front page a full, unequivocal and permanent withdrawal and apology to the plaintiffs, and family.

(ii) They indemnify the plaintiffs fully for the costs incurred in dealing with this issue, and thereafter enter into a discussion and compensation for the impairment of the plaintiffs' reputations and the stress caused by the publication.

The defendant, the Standard Limited in response to this letter assured the plaintiffs' counsel that the matter was being investigated and that they would revert to counsel. It appears no progress was made by the defendant in the investigations as no response was received prompting the plaintiffs' counsel to issue a demand notice to institute these proceedings. The plaintiffs brought two separate suits which were, by consent, consolidated, hence the reference to Andrew Mukite Musangi as the 1st plaintiff and Mary–Anne Wambui Kirubi Musangi as the 2nd plaintiff.

It is their contention in this suit that the articles in question were in reference to them; that the two articles were linked as the second article opens with the words:-

"Recall a piece we published in this column early this year……,"

that the words in the articles were defamatory as the plaintiffs' family members, friends, business associates and clients, who were privy to their circumstances made no mistake that the articles referred to them (the plaintiff(s)). According to the plaintiffs the alleged defamatory words meant and were understood to mean that:-

(a) The 2nd plaintiff's father regarded the 1st plaintiff and his family in a derisory and hostile manner.

(b)The relationship between the two families was sour and hostile.

(c) The plaintiffs' baby was born in poor health.

(d)The 2nd plaintiff contributed to the **"deformities**" of their baby due to her drunken behaviour and engagement in reckless substance abuse.

(e) The 2nd plaintiff is irresponsible, reckless and negligent therefore unfit to provide parental care.

(f) The 2nd plaintiff had been shunned by the 1st plaintiff as a result of the alleged substance abuse.

(g)The 1st plaintiff abandoned his duties as a father.

The plaintiffs maintain that the publications were false and injurious to their feelings and character. They claim general damages, exemplary and aggravated damages, a permanent injunction to restrain the defendant from further publishing libel material about the plaintiffs and/or their family members and costs of the suit as well as interest.

In their Amended Defence the defendant has denied that the articles were published falsely or maliciously and has asserted that they made no reference to the plaintiffs or to Mr. Chris Kirubi neither do the words contain description which would directly lead to the conclusion that they referred to the plaintiffs; that in any case the publications were fair comments in terms of **Section 15** of the **Defamation Act**, **Cap 36 (LOK)** and; that the plaints filed in these proceedings do not disclose any or any reasonable cause of action.

In his testimony during the trial the 1st plaintiff was categorical that as an advocate of many years standing, practicing law in Nakuru and Nairobi, he understood the articles to refer to him and the 2nd plaintiff in the circumstances of their professions and family life; that the publications were false and injurious to their feelings and damaging to their professions, reputation and character. Indeed, he went on, several friends, (including the Hon Mr. Justice Milton Makhandia of the High Court), relatives and professional colleagues were concerned and called them after reading the articles.

In support of their prayer for a permanent injunction the plaintiffs stated that they were apprehensive that the defendant would publish more defamatory articles about them and their family in view of the two successive articles in question.

The 2nd plaintiff also testified as to how she understood the contents of the two articles and their effects on her and her family. An associate partner of the 1st plaintiff in the law firm, Mr. Boniface Githinji Ndumia, advocate confirmed having read the articles and being confronted by colleagues in the legal fraternity seeking to know the accuracy of the articles. He was himself surprised and disturbed by the reports having known the 1st plaintiff as a responsible and reputable advocate.

Tejpal Singh Kunjan an Engineer and a close friend of the 1st plaintiff, who appears to have been his best man in the wedding from the endorsement on the certificate of marriage, concluded upon reading the articles that they referred to the plaintiffs and talked to the 1st plaintiff about them. He was more

concerned by the condition of the baby as he had not seen it. He later learnt that the articles were false. In his estimation he rates the 1st plaintiff, who is also his advocate ***" very ,very highly."***

The defendant did not call any witness. In their very detailed and well researched submissions both learned counsel made the following arguments in respect of their clients. Learned counsel for the plaintiffs stated that although the plaintiffs were not named in the articles the words were such that they could reasonably lead persons acquainted with them to conclude that they referred to them. The words, it was submitted, were defamatory as they were false and caused adverse effect on the plaintiffs' honour, dignity, reputation and feelings; that the words exposed the plaintiffs to hatred, ridicule and contempt in society.

On quantum, counsel submitted that, in view of the nature of the publication- boldly headed and highlighted in red, the gravity of the libel, the degree of dissemination and the fact that the libelous material was repeated, and guided by decided cases, an award of Ksh,14,000,000/= was appropriate in respect of the 1st plaintiff made up of Kshs.7 million general damages, Ksh5 million aggravated damages and Kshs.2 million for punitive retributory damages. In respect of the 2nd plaintiff, Kshs.18,000,000/= was suggested, representing general damages (Kshs.9 million) aggravated and punitive damages Kshs.7 million and 2 million, respectively. Counsel relied on the decisions in **Chirau Ali Mwakwere** V**. Royal Media Services Ltd Nairobi,** HCCC No.57 of 2004, **Ochilo Ayacko** V. **The Standard Limited & Another**, HCCC No.78 of 2008. **Cassidy**V. **Daily Mirror Newspapers Limited,** (1929) All ER 17. **John P Machira** V**. Wangethi Mwangi and Nation Newspaper Ltd.,** HCCC No 1709 of 1996 and **John** V**. MGN Limited** (1966) 2 All ER 35.

For his part learned counsel for the defendant submitted that there was no evidence that the articles referred to the plaintiffs, without their names or physical description; that the words in the articles were not defamatory; that the plaintiffs have failed to comply with **Order 2 rule 7(1)** of the **Civil Procedure Rules, 2011** regarding the particulars of the facts and matters to support the allegation of defamation; that an ordinary reader of the articles would not have concluded that it referred to the plaintiffs.

On quantum, relying on the cases of **Kenya Tea Development Agency Ltd** V. **Benson Ondimu Mases t/a B O Masese & Company Advocates**, C.A No. 95 of 2006, **Jones**V **Pollard,** (1997) EMLR 233 **Chirau Ali Mwakwere** (Supra), **J .P Machira** (Supra) and **Mwangi Kiunjuri** V**. Wangethi Mwangi & 2 others** (2008) eKLR learned counsel submitted that the proposal of Ksh.14 million and Kshs.18 million for the plaintiffs have no basis in law, and urged the court to reject them. Regarding the prayer for a permanent injunction it was submitted that it is speculative as there is no basis for the plaintiffs' apprehension. Counsel further argued that the plaintiffs ought to have availed themselves the right of reply in terms of **Section 7A** of the **Defamation Act;** that the damages, if any to the plaintiffs was substantially reduced by the absence of malice on the part of the defendant, the limited circulation in terms of the knowledge of those referred to in the publication, the fact that the articles were in the inner page, the fact that the articles were ran for a single day each and in the absence of evidence that the defendant had a direct financial gain from the from the publications.

From the publications, pleadings, evidence presented at the trial and submissions, the issues falling for determination can broadly be stated thus:-

(i) Whether the two articles in question were in reference to the plaintiffs.

(ii) Whether the words used in the articles were defamatory of the plaintiffs or whether they amounted to fair comment.

(iii) Whether the material was published, i.e. communicated to at least one person other than the plaintiffs.

(iv) Whether the plaintiffs are entitled to damages and the other prayers in the amended plaint.

In considering these issues the court must balance the provisions of **Articles 33, 34** and **35** of the

Constitution, dealing with freedoms of expression and media and individual's right to access to information on the one hand and **Article 31** in respect of the right to privacy on the other hand. Talking of the right to access to information, and the freedom of expression Lord Denning MR said in **Fraser** V**. Evans & others**(1969) **All ER 8** that:

"There are some things which are of such public concern that newspapers, the press and indeed everyone is entitled to make known the truth and to make their comments in it. This is an integral part of the right of the speech and expression. It must not be whittled away"

Lord Coleridge, CJ in **Bernard & Another** V**. Perriman,** (1891-4) All ER 965 had, several years earlier, observed that:

" The right of the speech is one in which it is for the public interest that individuals should possess, and indeed, that they should exercise without impediment, so long as no wrongful act is done; and unless an alleged libel is untrue, there is no wrong committed"

(Emphasis supplied)

But talking about a person's right to protection of reputation and character William Shakespeare said:

"**Iago:**

Good name in a man and woman, dear my Lord,

Is the immediate jewel of their souls.

Who steals my purse steals trash; 'tis something, nothing;

'Twas mine, 'tis his, and has been slave to thousands;

But he that filches from me my good name

Robs me of that which not enriches him.

And makes me poor indeed"

Othello Act 3, scene 3, 155-161

For Christians the Holy Book in **Proverbs 22:1** teaches:

" A good name is more desirable than great riches; to be esteemed is better than silver or gold."

It is common knowledge that on two separate occasions the articles complained of were published by the defendant in its newspaper, the Standard. It is also not in dispute that circulation of the newspaper is wide. According to the 1st plaintiff no less thirty (30) people who read the articles called him include Hon. Mr. Justice Milton Makhandia, a High Court Judge. The 2nd plaintiff was alerted about the articles by a friend, Chemutai Kipkorir. Two persons who read the articles testified and expressed their disgust in the contents. Thus the act of publication has been proved.

Were the words used such that they could reasonably be understood to refer to the plaintiffs? No doubt the articles did not name the plaintiffs or any other person. There were no photographs or their physical descriptions, and the plaintiffs are relying on extrinsic circumstances. They have in their pleadings and evidence before me given particulars of the facts on which they rely to show the words were understood to refer to them as follows:-

(i) The 1st plaintiff is a lawyer and was engaged to the 2nd plaintiff.

(ii) The 2nd plaintiff is the daughter to Mr. Christopher (Chris) John Kirubi, a successful businessman with interest in the media (Capital FM Radio), Tiger Haco, real estate and sits in several boards of companies. He fits the description "*tycoon*" "*magnate*" who owns multiple businesses in the city" and "*flamboyant*."

(iii) The 2nd plaintiff, at the time of the publication in question was a Marketing Director in Kenya Commercial Bank. She explained that although she was a director her responsibility included managing all the affairs in marketing and communications department in the bank (across East Africa), hence was a manager.

(iv) When the first article was published the plaintiffs were expecting their first baby.

(v) The 1st plaintiff was practicing law both in Nakuru and Nairobi as a Managing Partner in Mukite Musangi & Company Advocates, having practiced for fourteen (14) years in 2009 when this suit was filed, and therefore prominent by known standards in the profession.

(vi) In June 2009, a few weeks before the 1st article the plaintiffs and their parents, family members and friends held a pre-wedding traditional ceremony known in Kikuyu as *Ngurario* at the home of the 2nd plaintiff's father.

(vii) The plaintiffs' wedding was planned for 23rd December 2009.

Lord Denning, MR in **Morgan V Odhams Press Ltd** (190) 2All ER 544 explained that for the plaintiff to be said to have been identified in a defamatory article there must be some key pointer in the article itself indicating that it refers to the plaintiff and that if the reader draws his adverse conclusion from other facts, and not from the words complained of, then it is no libel:

He said;

"In my opinion, therefore, in order to be actionable at the suit of a plaintiff, there must be something in the words themselves which points to him. There must be some words, some initials , some esterisks, some reference or other to him, such that the pleader can insert in these days, as he always did in the old days, the key words in bracket '*(meaning thereby the plaintiff)*'"

Looking at the words in the two articles any reasonable reader with the particular knowledge and circumstances of the plaintiffs would reasonably understand the words to refer to the plaintiff. It was not a fantastic coincidence that there would be two groups of four people (the plaintiffs, their baby and Mr. Chris Kirubi) in this country with such striking similarity.

I come to the conclusion in this regard, that the articles were in reference to the plaintiffs. The plaintiffs have stated categorically that, contrary to the articles,

(i) there was no objection to their marriage by the 2nd plaintiff's father and their wedding proceeded as planned;

(ii) the plaintiffs' baby was normal - without any deformities;

(iii) the 2nd plaintiff is (was) not a drunk;

(iv) the 2nd plaintiff had no plans to leave for the United Kingdom as a result of marital differences.

The words used in their ordinary meaning portrayed the plaintiffs as irresponsible people, the 2nd plaintiff

as a drunkard and unfit to be a mother, as explained in the pleadings and in evidence.

The words, I find, were defamatory and could not amount to a fair comment. A defence of fair comment is available to a defendant who is satisfied that the facts which are relied upon in support of the plea are true and he had reasonable evidence to support them or reasonable grounds for supposing that sufficient evidence to prove them will be available at the trial, at which he intends to support the defence. See **Gatley on Libel and slander, 9th Edition (27:12) page 692.**

No evidence was produced to suggest that the facts relied on by the defendant were true. There were, similarly, no reasonable grounds to support those facts.

On quantum I have noted that the 1st plaintiff seeks Kshs14 million while the 2nd plaintiff, Kshs.18 million. I specifically sought to know from learned counsel for the plaintiffs if he had any decided cases that would guide the court in making such unprecedented awards. Of course, he had none, as I know not of any decision in Kenya or elsewhere where such an award has been given in a libel suit. Although there was a time in the history of the Judiciary (Kenya) - from the late 1090's to early 2000 when awards in defamation cases were mind-boggling. For instances:

a) Kshs.10 million was awarded to the plaintiff in **Joshua Kulei V. Kalamka Limited**, HCCC No.375 /1997

b) **Nicholas Biwott** V**. Clays Limited**, HCCC No.41068/1999 Ksh.30million

c) **Charles Kariuki t/a Charles Kariuki & Co Advocates** HCCC No. 5 of 2000- Kshs.20 million

d) **Daniel Musinga t/a Musinga & Co. Advocates,** HCCC No.102 of 2000 –Kshs.10 million

e) **Obure V. Tom Alwako & others** HCCCNo.956 of 2003- Kshs.17 million.

In an accident claim in **David Kiprugut & another** V**. Peter Okebe Pango** Civil Appeal No. 68 of 2004, the Court of Appeal laid down a principle which ought to equally apply in libel case, thus:-

" As we have already stated, in the assessment of damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards on similar cases"

In **Standard Ltd. V. GN Kagia t/a Kagia & Co Advocates.** Civil appeal No.115 of 2003 the Court also explained that.-

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

The large awards was criticized by Court of Appeal in **Gicheru V. Morton & Another** (2005) 2 KLR 332 where the Court observed that they (the awards) did not have any juridical basis, were manifestly excessive, could not be taken as persuasive or as guidelines of the awards to be followed by trial courts; that they departed from fundamental principles of awarding damages in libel cases. Those principles may be summarized as follows:

(i) The court has wide latitude in awarding damages in an action for libel.

(ii) In assessing damages in an action for libel the court is entitled to look at the whole conduct of the defendant from the time the libel was published down to the time of the judgment.

(iii) An award in case of defamation is not compensation for the plaintiff's damaged reputation but is a vindication to the public and a consolation to him for a wrong done to him .

(iv) Where the defendant could have, with due diligence verified the facts leading to the libellous story or where he was simply reckless or negligent, such recklessness or negligence must be taken into account.

(v) The level of damages awarded should be such as to act as deterrence and to instill a sense of responsibility on the part of the defendant.

(vi) The gravity of the libel and

(viii) The extent of publication are also factors to be considered.

Applying these principles to the facts in this matter, the conduct of the defendant was inexcusable and completely callous, particularly with regard to falsehoods on physical condition of a two-week old baby.

The consistency of the publication, the falsehood and the nature of the statements, no doubt, point to malice. Two letters addressed to the defendant under **Section 7A** of the **Defamation Ac**t (right of reply) were ignored. The defendant acted recklessly and negligently by failing to verifying the fact in the articles before publishing them. As a result of the articles I am satisfied, taking into consideration the positions of the plaintiffs in the society, their social standing was lowered in the eyes of their peers and professional colleagues.

Guided by the decisions in the **G N Kagia & Company Advocates, Gicheru, J.P. Machira** and **George Shane Okoth t/a Okoth & Co Advocates** (supra) and taking into account that the defendant has failed or refused to publish a correction in terms of **Section 7A (6)** of the **Defamation Act,** I enter judgment against the defendant and award damages to the plaintiffs as follows:

(i) Mr. Andrew Mukite Musangi (the 1st plaintiff) general damages in the sum of Ksh3,000,000/=.

(ii) MaryAnne Wambui Kirubi Musangi (the 2nd plaintiff) Ksh3,000,000.

(iii) Exemplary damages in the sum of Kshs.500,000/= for each of the plaintiffs.

I also award costs of the suit interest on the above sums. There will also be an injunction to permanently restrain the defendant or its servants or agents from publishing any more defamatory material regarding the plaintiffs.

Dated, Signed and Delivered at Nakuru this 25th day of May, 2012

W OUKO
JUDGE