



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL SUIT NO. 319 OF 2005**

**KWACHA GROUP OF COMPANIES .....1<sup>ST</sup> PLAINTIFF**

**JIMI WANJIGI .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**TOM MSHINDI .....1<sup>ST</sup> DEFENDANT**

**DAVID MAKALI.....2<sup>ND</sup> DEFENDANT**

**THE STANDARD LIMITED .....3<sup>RD</sup> DEFENDANT**

**INTERIM JUDGEMENT ON THE CONSTITUTIONAL ISSUE**

This plaint was filed to seek general, aggravated and/or exemplary damages against the defendants for publishing impugned defamatory words in respect of the plaintiff.

The hearing of the suit commenced on 21<sup>st</sup> July, 2010 and the same ended on 12<sup>th</sup> November, 2010. However, during the submission, a very challenging issue was raised as to the jurisdiction of this court under Article 34 of the Constitution. The court was urged to interpret the said provision of the Constitution, evidently under Article 165 (3) (d) i.e. jurisdiction to hear any question respecting the interpretation of this Constitution.

Our Constitution has stolen a march over the Constitutions of many democratic states like U.S.A and India by providing for a specific freedom for media, which has been intoned by the provisions of Article 34.

I shall cite the relevant part thereof i.e Article 34(1) and (2)

***“(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) penalize any person for any opinion or view or the content of any broadcast, publication or dissemination.”**

Relying on the above provisions, Mr. Gitonga, the learned counsel for the defendants, contended that this court has no jurisdiction to hear this suit.

Mr. Gitonga premised this submissions on Article 34 (1) and (2) which by giving specific right of freedom of media barring any control of state over or interference with any person engaged in broadcasting, production or circulation of any publication or the dissemination of information by any medium and that the state is also restrained from penalizing any person for any opinion or view or the content of any broadcast, publication or dissemination.

Mr. Gitonga added that as per Article 34 (1) the only limitation or regulation of this freedom is what is expressed in Article 33 (2), namely:-

**“(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)” (Emphasis mine)**

It was emphasized further that by not including the rights specified in Article 33 (3) as a limitation to the freedom of Media, the people of Kenya have spoken in no uncertain terms that any publication in media cannot be now challenged before the court on the grounds that they are defamatory because what is published or broadcast is beyond the control of state and that Judiciary is included being an organ of the state. The state defined in Article 259; viz **“state’ when used as a noun means the collectivity of offices, organs and other entities comprising the government of the Republic under this Constitution.”**

As I have stated earlier, the freedom of media is a unique feature of our Constitution and I stress that all the courts of the world had taken in and protected the freedom of Press/Media under the umbrella of Freedom of Speech and Expression.

The Supreme Court of India in the case of ***Ramesh Thapar –vs- State of Madras (1959) SCR 12*** has held that freedom of speech and expression includes freedom of propagation of ideas and that this freedom is ensured by the freedom of circulation. The court also observed that the freedom of speech and expression are tie foundation of all democratic organizations and essential for the proper functioning of the process of democracy.

In the case of ***Express Newspaper & Others –vs- Union of India AIR 1958 SC 578***, the Supreme Court of India has summarized the principles relating to the freedom of specific expression in respect of media, namely, no measure can be enacted which would have effect of imposing a pre-censorship curtailing the circulation or restricting the choice of employment or unemployment in the editorial force and the court has further emphasized that such measure would certainly tend to infringe the freedom of speech and expression and such acts would therefore be liable to be struck down as unconstitutional. In short, the court indicated which kinds of restrictions could be declared as infringement of Freedom of Media.

In my view, our Constitution under the provisions of Article 34 has given life to the aforesaid principles and spirit of democratic values of a Nation expressed by those specific pronouncements and enactment of freedom of speech and expression of media. The courts in this country are grateful for being saved to

repeat the efforts of what the courts in other countries have gone through to spell out what is freedom of media.

While the Constitution has provided the unique provisions for freedom of the media, it has also provided general provisions to guide the courts to interpret the provisions of The Constitution and how to apply the provisions of the Bill of Rights.

I shall quote relevant provisions of Article 20.

***(1)The Bill of Rights applies to all law and binds all State Organs and all persons.***

***(2)Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.***

***(3)In applying a provision of the Bill of Rights, a court shall –***

***(a)Develop the law to the extent that it does give effect to a right or fundamental freedom; and***

***(b)Adopt the interpretation that most favours the enforcement of a right or fundamental freedom.***

***(4)In interpreting the Bill of Rights, a court, tribunal or other authority shall promote –***

***(a)The value that underlie an open and democratic society based on human dignity, equality, equity and freedom; and***

***(b)The spirit, purport and objects of the Bill of Rights. (emphasis mine)***

Article 259 (1) somehow lends weight to the above provisions and I shall quote the same –

***(1)This Constitution shall be interpreted in a manner that –***

***(a)Promotes its purposes, values and principles;***

***(b)Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;***

***(c) Permits the development of the law; and***

***(d)Contributes to good governance.***

Lastly, I shall note Article 25 which provides that certain rights cannot be limited and they are:-

***“Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited –***

***(a)Freedom from torture and cruel, inhuman or degrading treatment or punishment;***

***(b)Freedom from slavery or servitude;***

***(c) The right to a fair trial; and***

***(d)The right to an order of habeas corpus.***

I may just mention that freedom of media is not one of those unlimited rights.

I shall quote some of the constitutional provisions which emphasis the spirit, purport and objects of the Bill of Rights. Article 28:-

***“Every person has inherent dignity and the right to have that dignity respected and protected.” (emphasis mine)***

Article 38 governs the provisions for access to information and I shall quote Article 38 (2) which stipulates:-

***“Every person has the right to the correction or deletion of untrue or misleading information that affects the person.”(emphasis mine)***

Mr. Gitonga’s submissions, which follow, shall be considered in the background of the above observations.

It was submitted that the incorporation of Article 34 has history of Constitutional making process. In the Report of Constitution of Kenya Review Commission dated 18<sup>th</sup> September, 2002, it was recommended that the new Constitution should give general protection to the media, including protection from government interference. The provision of 2002 draft was almost adopted in the provisions made in 2004 draft. Mr. Gitonga emphasized that the wordings of those two drafts are similar to Article 34 of the Constitution which is retained despite the amendment proposed by 2005 draft which included the limitation to the rights like.

***(a)The limitations or restrictions provided for by the Constitution;***

***(b)The respect of the rights and reputations of others; and***

***(c) The maintenance of the integrity, authority and independence of the Court’s judicial proceedings and the administration of justice.***

Mr. Gitonga thus submitted that the omission of the aforesaid limitations in Article 34 means that the people of Kenya rejected the same and did not want any state control on freedom of media. Thus the Judiciary which is included in definition of state has no right to involve itself in matters concerning the media.

He added that the publication which is impugned by the plaintiff as a defamatory publication cannot be looked into by the court and further contended that even if the court comes to the conclusion that it is defamatory to the plaintiff, it cannot in any event, give judgment on damages because that exercise shall be in contravention of Article 34 (2) (b) which prohibits state to penalize the media for any opinion or view or the contents of any broadcast, publication or dissemination.

Mr. Issa, the learned counsel for the plaintiff opened two pronged opposition to the contentions raised by Mr. Gitonga.

It is submitted that the issue of jurisdiction was not pleaded in the Defence and no effort to amend the Defence is undertaken. Thus as per Order 2 Rule 4 of Civil Procedure Rules (previously Order VI Rule 4 (1) and (2) of Civil Procedure Rules) which stipulates inter alia that in any pleading subsequent to the plaint a party shall plead specifically any matter which alleges that any claim or defence of opposite party is not maintainable or which if pleaded might take other party by surprise.

The decision of Court of Appeal in the case between ***Stephen Onyango Achola & Another and Edward Sule House & Another (Civil Appeal No. 209/01 UR)*** was relied upon.

I may bear in my mind that in the said case, the issue raised was that of limitation, and which was not pleaded but was raised as a preliminary objection.

The court observed and I quote:

***“The second respondent having failed to specifically plead the issue of limitation in its defence it was***

***not entitled to reply on that issue and base its preliminary objection on it; nor will the second respondent be entitled to reply on that defence during the trial of the suit unless it amends its defence. It is trite law that cases must be decided on the issues pleaded and we need not cite any authority for that proposition. It is equally not to be forgotten that a party who is entitled to reply on the defence of limitation is perfectly entitled to waive such defence and thus let the suit proceed to trial on its merit.”***

The second side of the opposition to the issue of jurisdiction is based on the interpretation of the Constitution. It was averred that the Constitution undisputedly gives the High Court Power to determine issues of interpretation as per Article 165 (3) (d) of the Constitution.

It is quite clear also that the Constitution has given the High Court an unlimited original jurisdiction in Criminal and Civil matters. It was thus stressed that the cause involving defamation is a civil matter and that as per provisions of Article 165 (3) (a) of the Constitution. This court has jurisdiction to hear this matter.

I shall state here that it is trite that the Court is enjoined to determine the issue of jurisdiction raised before it as a preliminary point. I do agree that this issue was indicated and was raised at the fague end of the trial, but the issue under the Constitutional provisions, whenever raised, needs to be considered and determined. It has been now raised and submitted upon and I shall have to deal with it.

The limitations on the jurisdiction of the High Court are spelt out in Article 165 (5) and Mr. Issa contended that the suit is properly before the court.

In response to the issue that the freedom of media is absolute, it was submitted that Article 24 of the Constitution is the answer to that issue that no fundamental freedom is absolute and that limitation should be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

I shall cite the factors enumerated in the said Article which should be considered before a right is limited, namely –

***(a)The nature of the right or fundamental freedom;***

***(b)The importance of the purpose of limitation;***

***(c) The nature and extent of the limitation;***

***(d)The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and***

***(e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.(emphasis mine)***

I may pause and observe here that the limitations which are mentioned in the said Article can be assimilated with regulations or restrictions. I would also agree that here, the court has to interpret several provisions of the Constitution while giving the effect or purport to another provision of the same Constitution and any freedom cannot be interpreted in isolation with other freedoms enshrined in the Constitution. I must admit that it is difficult to get a direct precedent on this issue because of unique incorporation of Freedom of Media in our Constitution and that the court has to understand the spirit, value and purport of several fundamental rights enshrined in our Constitution. The value of the Constitution without doubt, is to preserve the human ***dignity, equality, equity and freedom.***

None of the rights are superior to other except those stipulated in Article 25. I am also fortified in my observations by Article 27 (2) which stipulates that ***“Equality includes the full and equal enjoyment of all rights and fundamental freedoms”*** as well as Article 24 (1) (d) cited hereinabove.

Freedom of expression which applies to ***“every person”*** is provided by Article 33 of the Constitution and that right has been given a restriction or regulation by Article 33 (3) and I shall quote the same:-

**“(3) In the exercise of the right to freedom of expression every person shall respect the rights and reputation of others”**

The purport of the above provision is culled out from the provisions of Article 24 (1) (d) specified herein before.

The **“person”** is defined in Article 260 of the Constitution as:-

**“‘Person’ includes a company, association, or other body of persons whether incorporated or unincorporated.”**

The media as an identified group is thus included in the expression **“person”**.

Moreover, it has to be noted that any regulation or limitation as is prescribed by Article 23 (3) **cannot be construed as abridgement of the freedom.**

The Supreme Court of India in the case of **Bennet Coleman & Co. & Others (1972) RD – SC 266** has observed , namely –

**“It does not follow from this that freedom of expression is not subject to regulations which may not amount to abridgment. It is a total misconception to say that speech cannot be regulated or that every regulation of speech would be abridgement of the freedom of speech. No freedom however, absolute, can be free from regulation.”** (Emphasis mine)

It was further emphasized by the court and I quote:-

**“There might be an abridgement of speech, but not an abridgement of freedom of speech. The pith and substance test although not strictly appropriate might serve as a useful purpose in the process of deciding whether the provision in question which work some interference with the freedom of speech are essentially, regulatory in character.”** (emphasis mine).

I have observed earlier, that the other jurisdiction of the world has interpreted and included freedom of media under the all encompassing freedom of speech and expression and the above observations are thus appropriate to be considered in respect of Freedom of Media. I may note that the cases referred by me in any event involved regulations to the media.

Considering or taking the pith and substance test, would any court consider the provisions of Article 33 (3) (above specified) of **the Constitution** as the abridgment of the freedom of speech, even if those provisions were enacted by an Act of Parliament? I would unhesitantly say. It cannot be!

Considering the value and spirit of the Constitution and all the relevant provisions thereof cited hereinbefore, as well as taking into account the spirit of human dignity, equality and equity, it comes out clearly that the rights granted by the Constitution should be enjoyed as well as governed equally amongst all persons.

If the court has to accept the interpretation propounded by Mr. Gitonga, it shall be encouraging traversy of justice, rule of law and equality as well as equity in protections of laws and Constitution.

Looking at the submissions practically, it shall resound in death knell of principle of protection of human dignity and reputation. Any person intending to defame another only has to go to the media and ask them to publish the defamatory article and then the media to take shelter under Article 34.

Here, I shall like to quote a passage from **Coleman’s** case (supra) where the court emphasized by observing, namely:-

**“It has been said that justice is the effort of man to mitigate inequality of man. The whole drive of the directive principles of the Constitution is towards this goal and it is in consonance with the new concept of equality.”**

Our Constitution has in no uncertain terms, adopted the principle of equality and it has not stopped there. It includes human dignity and equity.

I shall like to adopt a passage from the South African case of *Del Plessis and Others –vs- De Clerk and another* (1997) LRC 1, 637 at 672.

***“Any law of defamation is a restriction on freedom of speech in the interest of other rights worthy of protection. More particularly, in cases of defamation, Courts have tried to strike a balance between the protection of reputation and the right of freedom of expression.”***

I can do nothing more than reiterate the same. The human dignity does cover the right of reputation and protection of human dignity is the duty endowed to the court by the Constitution.

The removal of some portion from the Draft Constitution stipulating Court’s powers as regards freedom of media cannot be construed as taking away court’s power to do justice and in any event, the Constitution has amply granted the courts the powers to exercise its primary duty which is to preserve and guard justice, equity and equality.

I may not say more than what I have observed hereinbefore and reject the point raised by Mr. Gitonga that the court has no jurisdiction to hear and determine the defamation cases filed against the members of media as per the provisions of Article 34 of the Constitution.

I am at this stage reminded of often quoted observation of ***Albert Einstein***; namely –

***“Out of clutter, find simplicity.***

***From discord, find harmony.***

***In the middle of difficulty find opportunity.”***

This Judgment is my polite effort to read and declare consistency among the Constitutional provisions.

I shall after this give the final judgment on the issues in the suit, on 11<sup>th</sup> May, 2011 as earlier notified.

**Dated, signed and delivered** at Nairobi this 13<sup>th</sup> day of **April, 2011**

**K H RAWAL**  
**JUDGE**  
**13.04.2011**