



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 542 OF 2007**

**KOIGI WA**

**WAMWERE.....PLAINTIFF**

**V E R S U S**

**1. THE STANDARD LIMITED**

**2. BENSON**

**RIUNGU.....DEFENDANTS**

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

The Plaintiff's suit is in defamation. General as well as punitive/ exemplary damages are sought. The Plaintiff also seeks an order for publication by the Defendant of an unqualified apology, plus costs and interest.

The words pleaded by the Plaintiff to be defamatory of him are to be found in paragraph 16 of the plaint. Those words were published in the *Crazy Monday* magazine of 23<sup>rd</sup> April, 2007 published by the 1<sup>st</sup> Defendant. The words were written by the 2<sup>nd</sup> Defendant.

At paragraph 18 of the plaint the Plaintiff has pleaded that the words complained of, in their natural and ordinary meaning, and also by innuendo and inference, were defamatory of him. Particulars of innuendo and inference are given.

The Plaintiff has also pleaded that the publication was actuated by malice and recklessness. Particulars thereof are given in paragraph 19 of the plaint.

The Plaintiff has further pleaded that the qualified apology subsequently published by the Defendant in the *Crazy Monday* magazine of 30<sup>th</sup> April, 2007, was insincere and amounted to a mockery of him.

The Defendants entered appearance and filed a statement of defence dated 25<sup>th</sup> July, 2007.

Publication of the words complained of was admitted. But the Defendants denied that the said publication was motivated by malice, or that it was intended to raise any implication that the Plaintiff had affiliation to an outlawed sect known as **Mungiki**.

The Defendants further denied that the words complained of were, in their ordinary and natural meaning, meant, or could be construed to have meant or imply, or that the same were capable of being understood to mean or to imply, any of the meanings defamatory of the Plaintiff pleaded in paragraph 18 of the plaint. The malice pleaded in paragraph 19 of the plaint was also denied.

The Defendants also denied that the apology published by them was insincere or a mockery to the Plaintiff.

The Defendants have pleaded in the alternative and without prejudice that the words complained of were fair comment made in good faith and without malice upon a matter of public interest, in so far as the same concerned the public actions and political pronouncements of the Plaintiff who was a Member of Parliament of Kenya. Particulars were given in paragraph 14 of the defence.

At paragraph 15 the Defendant pleaded, again without prejudice and in further alternative, that in so far as the words complained of consist of allegations of fact, they were true in substance; and further that in so far as the words consisted of opinion, they were fair comment made in good faith and without malice upon matters of public interest. Particulars under the then **Order VI, rule VIA 6(2)** of the **Civil Procedure Rules** were given.

The Defendants therefore seek dismissal of the Plaintiff's claim.

In a reply dated 8<sup>th</sup> August, 2007 to the statement of defence, the Plaintiff joined issue with the Defendants upon their defence.

At the start of the hearing of the case, the Plaintiff's bundle of documents as per his list of documents dated 13<sup>th</sup> September, 2007 was by consent admitted in evidence and marked as **Exhibit P1**. The Defendants had no documents to produce.

The Plaintiff testified and called one witness. The Defendants did not lead or call any evidence. Written submissions were filed on behalf of the parties.

I have considered the testimony of the Plaintiff. I have also considered the written submissions, including the cases cited.

**Mungiki** is a notorious and well-known gang of criminals in Kenya. It operates mainly in Nairobi, Central Kenya and some parts of the Rift Valley Province. It's well known trade- marks are dread-locks, sniffing tobacco and macabre murders, sometimes involving beheadings and mutilation of bodies. Members of the gang are said to earn their living mainly by extortion, particularly from the public transport sector.

I have carefully read the words complained of. It is unfortunately necessary to reproduce in this judgment the full article as published in order to appreciate its meaning and import:-

### **“KOIGI REDISCOVERS HIS CULTURAL ROOTS**

**Sometimes when Koigi Wamwere talks, one wishes that those who once burned his effigy had instead found better use for their energies by gluing his tongue firmly in his mouth instead.**

**That would save the nation the occasional drivel spewed out by the Information assistant minister. He seems to have taken his job rather literally judging by his apparent conviction that his docket entails assailing public ears with his weird opinion on a hotchpotch of issues.**

**The Subukia MP was at it again last week. This time, he had the absence of mind to amount one of the most eloquent defences of Mungiki by a government officer. He was further quoted advising Winnie Wangui to look for a morally handsome man like Koigi instead of wasting love on a discredited thug like Artur Margaryan.**

**But it is with the Mungiki thing that Koigi crossed the line by mile. For a sanctimonious political ideologue, it is shamelessly hypocritical for the Mp to mask known loyalties to a killer gang with socialist postulations intended to mitigate its dastardly crimes.**

**Koigi actually had the temerity to accuse Police Commissioner Hussein Ali of harassing “innocent” young men under the guise of cracking down on the illegal sect. The MP claims the majority of suspects linked to the murderous militia in police custody are only guilty of being poor, jobless Kikuyus. Some are being crucified merely for sporting dreadlocks. Others’ only crime is being relatives to genuine Mungiki members.**

**So he wants the Police Act sufficiently amended to clearly define “Mungiki”. The causes of incubating otherwise good men in the sect must also be officially addressed. Unless and until that is done, the Commissioner and Security Minister John Michuki must be firmly instructed to keep their hands and their jails off the cultish, murderous militia or risk full-blown “social strife”.**

**The arrest of “innocent” Mungiki suspects is particularly annoying to Koigi considering the potential consequences. Like Maina Njenga, there is a real threat one can get ‘saved’. Should you be sufficiently ‘touched’, you can even become a pastor like Ndura Waruinge.**

**Apparently, that would be scandalous to Koigi. The MP scarcely conceals his disdain for mainstream faiths. In fact, he has previously, by word and deed, manifested closer ties to Mungiki than to any other religion.**

**He used to wear lengthy dreadlocks he claimed were his symbolic yardstick of President Moi’s and Kanu’s years of repression. Then he was caught on camera relishing his tobacco with undisguised Mungiki adherents in the spirit of true comradeship.**

**Koigi of course cited curiosity and cultural loyalties for his links with an atavistic sect that promotes female circumcision and chauvinistic Kikuyu Puritanism that can be summarised as subjugation of women and bigotry towards other tribes and their ways of life.**

**His counsel to Wangui on her love life might be sound. But discretion is advised in the case of Koigi's brief for his Mungiki buddies. It is an electoral year after all."**

Beside the article was a large photograph of the Plaintiff. The significance of this photograph is that the Plaintiff was photographed when he used to wear dreadlocks. His testimony at the hearing, which was uncontroverted and which I accept, was that the photograph was taken in 1992 or 1993; that he cut off his dread-locks some time in 1993; that since that time he had not worn dread-locks; and that the picture had nothing at all to do with his known hair-style at the time the article was published.

To begin with, the article by its wording and tenor is highly abusive of the Plaintiff. Secondly, the article accuses him, then a Member of Parliament and an assistant minister in the government, of being a Mungiki sympathiser. The article says in part that he had-

**"...the absence of mind to mount one of the most eloquent defences of Mungiki by a government officer....."**

The article further accused the Plaintiff of being hypocritical as far as Mungiki was concerned. It said-

**"....For a sanctimonious political ideologue, it is shamelessly hypocritical for the MP to mask known loyalties to a killer gang with socialist postulations intended to mitigate its dastardly crimes."**

The article then goes on to accuse the Plaintiff of being protective of Mungiki. It says-

**"The arrest of "innocent" Mungiki suspects is particularly annoying to Koigi considering the potential consequences....."**

The article comes close to accusing the plaintiff of being a member of Mungiki. Sample this-

**"...The MP scarcely conceals his disdain for mainstream faiths. In fact, he has previously, by word and deed, manifested closer ties to Mungiki than to any other religion.**

**He used to wear lengthy dread-locks he claimed were his symbolic yardstick of President Moi's and Kanu's years of repression. Then he was caught on camera relishing his tobacco with undisguised Mungiki adherents in the spirit of true comradeship....."**

The Defendants have pleaded fair comment made in good faith and without malice upon a matter of public interest.

It may be true that the public actions and "political pronouncements" of a Member of Parliament may be matters of public interest, especially to those beholden to politicians (and there are many people of that ilk in this country). But fair comment cannot include what amounts to an accusation that a politician is a sympathiser of a banned murderous gang. As already pointed out, the article falls just short of accusing the Plaintiff of being a member of the gang.

The Defendants did not bother to tender evidence to prove the particulars pleaded of the Plaintiff's "actions" and "political pronouncements" upon which they made "fair comment" in the article.

The Defendants also pleaded justification and gave particulars of the “facts” upon which that justification was based. They did not bother to bring evidence to prove those facts.

As already pointed out, alongside the article was a picture of the Plaintiff when he used to wear dreadlocks. There cannot be any doubt that the picture was used in order to add weight to the unsubstantiated claims of the Plaintiff’s sympathies and links to **Mungiki**.

Any ordinary and reasonable member of the public reading the article in issue would have no hesitation at all in concluding that the article was accusing the Plaintiff of being a sympathiser and protector of Mungiki. In fact, such an ordinary and reasonable member of the public would be forgiven for concluding that the article was accusing the Plaintiff of being a member of **Mungiki**.

I have no hesitation at all in holding that the words complained of were highly defamatory of the Plaintiff, both in their natural and ordinary meanings, and also by innuendo. On liability, the Plaintiff has proved his case on a balance of probabilities.

I will now consider what damages to award.

As is well known, damages in defamation are **at large**. In other words, they are at the discretion of the judge.

Whereas in slander the claimant must prove actual harm or damage to his reputation, libel is actionable *per se*. In other words the claimant does not have to prove actual damage or harm to his reputation to be entitled to damages. Such harm or damage is presumed by the law.

The Plaintiff has sought both general damages as well as punitive/ exemplary damages.

In defamation general or damages compensatory are awarded to compensate the claimant for the injury to his reputation and the hurt to his feelings. It will be expected that such damages will vindicate him to the public as well as console him for the wrong done to him.

In assessing compensatory damages, the court will take into account the distress, hurt and humiliation which the defamatory publication has caused the plaintiff. The court will consider the gravity of the libel. The more closely it touches the Plaintiff’s personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious the libel is likely to be. See the case of **Johns –vs- MGN Limited [1996] All E.R 34**. It was further stated in this case as follows:-

**“The extent of publication is also very relevant; a libel published to millions has a greater potential to cause damage than a libel published to a handful of people. A successful plaintiff may properly look to an award of damages to vindicate his reputation; but the significance of this is much greater in a case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libellous publication took place. It is well established that compensatory damages may and should compensate for additional injury caused to the Plaintiff’s feelings by the defendant’s conduct of the action, as when he persists in an unfounded assertion that the publication was true, or refuses to apologise, or cross-examines the plaintiff in a wounding or**

**insulting way.”**

The court will also consider the conduct of the defendant after the defamation, and even the conduct of the plaintiff; whether or not there has been a satisfactory apology or attempt at correction of the wrong impression created; whether there has been malicious and/or insulting conduct; and whether the plaintiff was accorded an opportunity to give his side of the story in order to correct the wrong impression created. **Section 16** of the Defamation Act, which provides for mitigation of damages, would also be considered.

The Defendants in the present case plead that they published an apology. The Plaintiff has pleaded that this apology was not sincere and was actually a mockery of him.

The apology was carried in the **Crazy Monday** magazine of 30<sup>th</sup> April, 2001. The apology article, by quoting certain parts of the Plaintiff's letter of demand, published in part his side of the story. So, it can be said that the Plaintiff was given a chance to give his side of the story.

As to whether there was in fact an apology, the answer is no. The so called apology was simply a mockery of the Plaintiff. Listen to this-

**“Crazy Monday.....stands by last week's edition as a fair comment based on the Subukia MP's public utterances and conduct. We insist that Koigi has been caught on camera sniffing tobacco in the company of individuals whose compartment is not dissimilar to of the average Mungiki adherent.”**

The so-called apology is the following words-

**“..... We wish to offer the MP our unconditional apologies for drawing inevitable conclusions from his pronouncements and associations.....”**

This was a snide throw-back at the Plaintiff. It is not an apology at all. It is in fact a cynical insult. There was no attempt at all to correct the wrong impression created by the original offending article.

This ties up with the issue of malice. The cynical, mocking so called apology is a further indication of the Defendant's malice towards the Plaintiff. I have already mentioned the tenor of the original article. The language was impolite and abusive to the Plaintiff. The article appears calculated to harm the Plaintiff as much as possible, especially in the then upcoming general elections. There were several references to those general elections in the article.

I find without hesitation that publication of the words complained of was motivated by malice towards the Plaintiff.

I have considered the Plaintiff's place in society. He is a well known politician. He has been a Member of Parliament for several terms and also at some point an assistant minister in government. There is no doubt that he is well known internationally and locally. He has been from time to time a vocal panellist in radio and television talk shows.

He has a well deserved place as an outspoken campaigner for democracy and justice in Kenya.

The Plaintiff is also a renowned author of books and articles. He has received various awards and honours

in recognition of his work in human rights issues. In brief, the Plaintiff is no doubt a man of good standing, reputation and character.

The words complained of accused him of defending a banned criminal organisation. The words were such that he was almost being accused of being a member of Mungiki.

As already pointed out, **Mungiki** is a murderous criminal gang that is no doubt a threat to security in this country. The libel committed by the Defendants against the Plaintiff is indeed a grave one.

I mentioned that the Plaintiff called one witness. He was **Michael Maina Kamami**. Apparently he was called to testify as to what harm the defamation did to the Plaintiff's bid for re-election as Member of Parliament for Subukia Constituency. For one thing, he did not believe that the article comprising the defamation was referring to the Koigi Wamwere that he knew. It appears that the article did not change his view of the Plaintiff's character and reputation.

The witness was a registered voter in Subukia Constituency. He participated in the 2002 general elections at which the Plaintiff was elected Member of Parliament for that Constituency. He also voted in the 2007 general election at which the Plaintiff failed in his bid to retain his seat as Member of Parliament for Subukia. The witness did not state in his testimony that he was influenced in any negative way by the defamatory article as far as the Plaintiff's bid for re-election was concerned. He declined to disclose whether or not he voted for the Plaintiff.

I am not satisfied that the words complained of led or contributed to the Plaintiff's defeat in his bid for re-election as the Member of Parliament for Subukia. However, this does not take away anything from the very grave nature of the defamation committed against him by the Defendants.

I must point out that courts must guard against unduly high awards in defamation cases as such awards would no doubt negatively impact upon the freedom of speech and press. Freedoms of speech and press are vital ingredients to a vibrant democracy like ours. It is also not the business of the courts to unduly enrich litigants in defamation cases. This would have the effect of encouraging more and more defamation litigation.

Doing the best I can, I will award the Plaintiff compensatory damages of KShs. 3 million. I will also award punitive or exemplary damages of KShs. 500,000/=. That makes a global award of KShs. 3.5 million. There will be judgment for the Plaintiff for that sum which will attract interest at court rates from the date of judgment until payment in full.

There is also the order for apology sought by the Plaintiff. As already noted, the "apology" published by the Defendants was in fact not an apology but a cynical insult. I therefore find that the order for apology sought is merited. I hereby grant such order as sought in the plaint.

The Plaintiff shall also have costs of this suit together with interest thereon at court rate from the date of filing suit. There will be orders accordingly.

There has been delay in the preparation and delivery of this judgment. The same was occasioned by my poor state of health these last few years, exacerbated as it was by my transfer to Machakos, a very, very busy single-judge station, in early 2010. The delay is regretted.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 8<sup>th</sup> DAY OF APRIL, 2011.**

**H.P.G. WAWERU**

**JUDGE.**