



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NUMBER 1342 OF 2003**

**HON JAKOYO MIDIWO ..... PLAINTIFF**

**V E R S U S**

**THE NATION MEDIA GROUP & ANR..... DEFENDANTS**

**JUDGEMENT**

Coram: Hon. Mwera J  
Tiego for the Plaintiff  
Kamau for Defendants  
Jane Court Clerk

The principal pleadings to be relied on as far as the record reveals are:

- 1) The Amended Plaintiff dated 16.01.04
- 2) The Amended Defence dated 02.02.04

The parties filed 8 agreed on 9.3.10.

It was pleaded in the plaintiff that the 1<sup>st</sup> defendant was the proprietor, printer and publisher of “Sunday” and “Daily Nation” editions of newspapers. The papers circulate in East Africa and indeed in the world by way of print or internet. The 2<sup>nd</sup> defendant was an employee of the 1<sup>st</sup> defendant as an editorial director. On 14.12.03 the defendants published in the Sunday Nation a front page story titled:

**“MINISTERS AND MP HELD IN SWOOP ON PROSTITUTES”**

**One Cabined Minister, an Assistant Minister and a Narc MP were caught by police in a notorious red light area with half naked girls in their cars. They first watched and video-taped before police moved in.**

**The politicians were seen shamelessly beckoning the girls to their cars then ushering them inside, before the police descended.**

**... They came from Rift Valley Province, the Coast and Nyanza and were all elected on a Narc ticket.**

**... This times an undercover police squad video-taped and photographed both the girls and**

**the men who wanted them.**

**The photos and the tapes will be preserved as evidence so that those caught do not try to claim they were framed, police said.**

**Prostitution is illegal in Kenya and some of the twilight girls who operate on Koinange Street are barely 12 years old.**

**First to be caught was the MP. He at first refused to identify himself when police reservists found him with a girl. They whipped out their pistols and ordered him to drive to Central Police Station where he finally identified himself as he was about to be thrown into a cell.**

**A senior police officer then intervened and had the MP freed...”**

The plaintiff claimed that the sensational manner in which the article was published complete with colour images of skimpily dressed prostitutes depicted sleaze, excited passion and became a matter of national interest with readers speculating as to the identities of the cabinet minister, assistant minister and the Narc MP. That a media house called **Royal Media Services** picked up the story and in its television newscast **positively named** the Narc MP said to have been found by the police. In what appeared not really relevant to this cause the plaintiff pleaded how the Royal media radio went into the story repeating it over time and even carrying it in Luo language. Such was not relevant here because Royal Media is not the defendant in this cause.

The pleading then went back to the publication by the defendants on 16.12.03 following a press conference the plaintiff addressed on 15.12.03 to deny the subject article. In paraphrase the plaintiff pleaded that in the publication of 16.12.03, the press conference of 15.12.03 had been called by two ministers and an MP to require the **Nation** to retract its story about the Koinange Street report/incident. That they had denied being involved in such, while the Commissioner of Police had confirmed that although there had been a swoop, no man or politician had been arrested – only women. The article of the **Nation** of 16.12.03 was pretty long, though, to the effect that the police had denied ever arresting politicians on Koinange Street with prostitutes or video-taping them. The plaintiff pleaded that the article in the **Sunday Nation** about him, had been false and malicious and yet the 1<sup>st</sup> defendant had maintained that it still stood by it:

**“22. Further to the foregoing the media houses acting on the false and malicious report published by the defendant carried out adverse, negative and false reports by naming the plaintiff as aforesaid.”**

That the statements were defamatory of the plaintiff even after the police disowned them; the further reference to the article was actuated by extreme malice and spite.

Going into the particulars of malice and spite it was pleaded that the defendants knew or ought to have known that the first article would lead to speculation, adverse and negative publicity. The articles would injure those likely named to be wrongfully named in their personal and professional capacities in the eyes of right – thinking members of the society. That the defendant knew or ought to have known that the headline story of 14.12.03 could harm the plaintiff’s reputation yet they did not confirm with him where he was on the night in question. The story was false and even with the knowledge that the plaintiff was not the Narc MP, the defendants still did not care to clarify/change the impression created by the story. All was false, wrong, malicious and defamatory of the plaintiff.

It was further pleaded that the descriptions in the offending articles fitted the plaintiff well – an elected Narc first time MP from Nyanza Province. The defendants had not disassociated themselves from the reports carried by other media houses identifying the plaintiff. That the natural and ordinary meaning of the articles complained of was that the plaintiff was at the scene on the night in question soliciting for sex from prostitutes when police caught him on video and physically. Yet he was a married man. He was thus portrayed as a criminal, promoter of prostitution which was illegal, lacking in morals and thus not

fit to hold a public office of an M.P. And in the alternative that by *innuendo* a similar impression had been created of the plaintiff.

That from the gist of the content of the articles complained of, no doubts were left that they referred to the plaintiff. The defendants had in any event not denied what was published by other media houses. That meant that they were liable and so the court should so find and condemn them in damages, costs and interest. With the initial filing of the plaint, an application for a temporary injunction barring the defendants from publishing such articles was sought and granted. Now the plaintiff prayed that that should be made permanent.

In the amended defence, the defendants admitted publishing the subject article but denied that it was false or malicious. That it was a fair comment and a matter of public interest namely college/university girls engaging in prostitution with public and business figures. That the published pictures were genuine, taken on Koinange Street and so put forth with justification. The public was entitled to be informed of the sexual activities taking place in this age of HIV/AIDS and indeed the article in issue excited public debate. The reference to *Royal Media Services* was said to allude to parties and actions strange to or not linked with the defendants.

Further, the defendants denied ever having published any words defamatory of the plaintiff. He addressed the press conference as claimed in the plaint but the defendants did not link his name with/to the article complained of. Its words could not refer to or could not be understood to refer to the plaintiff in the way of his occupation. The Commissioner of Police made clarification about the article but he did not disown it as a whole. The article did refer to a class of people – MPs, but not the plaintiff specifically and to the exclusion of all other members independent of the said class. It could fit nine other MPs, three of them from Nyanza. The words were not malicious and/or defamatory of the plaintiff. The fact that the defendants published the denial by the plaintiff could not form a basis for cause of action as this. That the defendants were not responsible for the editorial policies of other media houses; what they published was neither malicious, reckless, false, irresponsible nor defamatory. The plaintiff had no cause of action against the defendants.

As said earlier a set of 8 agreed issues were filed and on 27.10.10, the trial opened with the plaintiff (PW1) in the witness box.

The plaintiff told the court that he was an MP for Gem since 2002 and was also a member of two committees of the Commonwealth – one against corruption and another of parliamentary whips.

On the morning/Sunday of 14.12.03 while at home his security detail drew his attention to the subject article here in the day's paper. The plaintiff went to church with his family, went to Gem then returned in the evening. Somebody then called the plaintiff and told him that *Citizen* was airing the story from the *Sunday Nation* juxtaposing his photograph, that of Mwakwere and Kiunjuri with those of prostitutes. He had been named as the MP from Nyanza with 2 ministers. The paper's edition was in the bundle marked Exh P1. The plaintiff read it. It said *inter alia* that of the 3 politicians referred to, 2 were first time MPs. One was a Narc MP from Nyanza. That the article said that undercover police took the photographs and video tapes now in the hands of the publisher – the 1<sup>st</sup> defendant. The girls were said to be from colleges/universities out to peddle flesh – i.e. committing the illegal act of prostitution. HIV/AIDS scourge was rampant. All that Sunday, people telephoned the plaintiff inquiring if he had been present on Koinange Street.

That evening *Citizen TV* and radio aired news referring to the subject article and naming the plaintiff. He sued *Citizen* in HCCC 1327 and 1328/03 and both suits had been determined.

On 15.12.03 the plaintiff went to Nairobi and addressed a press conference denying that he was the one the media were referring to in connection with the Koinange Street story. He had been in Gem the material night. He had attended meetings there which the 1<sup>st</sup> defendant had published about. Then the 1<sup>st</sup> defendant carried the content of the press conference the plaintiff held (Eh P1 – 36, 37) that he had been in Gem on the material night. The Police Commissioner said on 15.12.03 that the swoop story was not

true and no MP had been arrested along Koinange Street. But still the 1<sup>st</sup> defendant maintained that it stood by its story in the **Sunday Nation** (Exh P1 – 38) The article had not named the culprits but all that could be gleaned from the photographs on the front page to the **Nation** paper of 16.12.03, (at the press conference) but that he himself was not named in the original article:

**“But I sued the 1<sup>st</sup> defendant because their paper Daily Nation of 16.12.03 carried the story saying that I had denied, yet that paper insisted that it stood by their story.”**

It was the plaintiff’s position that reading the **Nation** stories from 14<sup>th</sup> to 16<sup>th</sup> of December 2003, the impression being created was that indeed there had been the swoop in which 3 MPs were netted.

The plaintiff who was married with a family had not been exonerated from the allegations carried in the article. It was a defamatory and made-up story. He wanted the court to award him damages and order the defendants to publish a suitable apology.

In cross examination the plaintiff said that he was a first- timer MP but not the only one, among other about 20 Narc MPs in Parliament. No MP was mentioned by name in the article of 14.12.03. And when the plaintiff’s security detail drew his attention to the article, he thought that it was not referring to him.

No calls came in to the plaintiff about this article on 14.12.03 until Hon. Kajwang called him at 2 pm to wonder whether the article was about him. At 7 pm Hon. Raila also called. Then at 7.30 pm his name was in the news.

On 15.12.03 the plaintiff called a press conference to deny the report of the previous day. The 1<sup>st</sup> defendant attended. The plaintiff could not say where the rest of the 12 Narc MPs were on the material night. Only that there was a police swoop which netted only women. Though not named in the article, yet article appeared on 16.12.03 – under the head “sex scandal.” The article said that they had denied it. The plaintiff’s constituents believed that he was the culprit. But when he demonstrated that the 1<sup>st</sup> defendant had been malicious, the plaintiff was re-elected (in 2007). He had no evidence to produce from the media about the functions he took part in on 5.12.03. Had “**Citizen**” not named him, the plaintiff would have thought that the story belonged to the tabloids.

To the plaintiff, when the defendants affirmed that they were standing by the story of 14.12.03 it meant that his denial was not genuine.

Wilbrod Ouma Opondo (PW2), an office furniture dealer in Nairobi was selling buns in Kayole Estate when on 14.12.03 he read in a newspaper that MPs and a minister had been caught at night in a swoop in the “red light” district together Koinange Street along with girls skimpily dressed. That the article stated that one politician came from the Coast, another from the Rift Valley and the last from Nyanza. That the girls were college/university students. The plaintiff’s name was not stated. Only a Narc MP. Then in the evening PW2 heard on “Citizen” radio names of these politicians – Mwakwere, Kiunjuri and Jakoyo Midiwo - the plaintiff. The court heard that the newspaper had claimed that those men netted had been video-taped, beckoning the girls to go to their cars. The witness thought the reports meant those involved were participating in immorality and prostitution and therefore unsuitable. The witness spoke of hearing more stories from Citizen’s **Ramogi FM**. Then Mwakwere called a press conference and he with Kiunjuri and the plaintiff denied the report. The Commissioner of Police denied that politicians had been netted in the subject swoop. On 16.12.11 the 1<sup>st</sup> defendant reported in its newspaper that the 3 politicians had denied being involved. But that edition stated that it stood by its report (of 14.12.03). Although the newspaper of 14.12.03 did not name the plaintiff, PW2 thought that it referred to him. PW2 who hailed from Siaya County knew the plaintiff as the MP for Gem, in the same country. Reading the article left the witness with the view that the plaintiff was immoral and so unfit to lead people.

In cross-examination the court heard that the names of the 3 politicians referred to were carried on **Ramogi FM**, belonging to Royal Media Group which also owns a TV network. The 1<sup>st</sup> defendant also owned radio and TV stations but PW2 did not listen to these ones. Only **Royal Media Services** named the

plaintiff. After the article he was reelected as MP. That closed the plaintiff's case and the defence opened.

Joseph Odindo (DW1), the group managing editor with the 1<sup>st</sup> defendant, oversees the work of managing editors of editions known as **Daily Nation**, the **Sunday Nation** and **Taifa Leo**. The article in question appeared in the Sunday edition of 14.12.03, speaking about MPs and a minister arrested on Koinange Street. Prior to that the 1<sup>st</sup> defendant had published several articles on AIDS and this one was to give prominence to that subject as a national disaster. The focus of that article was not the politicians but the subject of AIDS. Word reached the 1<sup>st</sup> defendant that police were going to carry out a swoop on Koinange Street and when that was done girls were arrested and weapons recovered. The reporter sent by DW1 on this matter, returned with information that politicians, businessmen, college girls were involved. That reporter on crime, had been with the 1<sup>st</sup> defendant for 36 years. He was directed to place the report. The story of 14.12.03 did not refer to specific politicians or businessmen. Only classes to emphasise that they had power and influence and were preying on students even with – AIDS in the air. The MP said to have been arrested did not mean the plaintiff. He did not contact the 1<sup>st</sup> defendant but he called and addressed a press conference denying that he was the MP. This surprised DW1 since the plaintiff had not been named or pointed to. There were about 150 Narc MPs and it could not necessarily be the plaintiff. When the 3 politicians called a press conference, the 1<sup>st</sup> defendant gave their story from page coverage. And the defendants still stood by their story of 14.12.03 of politicians, businessmen and students.

And even at that time none called the defendants for any clarification. The defendants did not share their report of 14.12.03 with any other media houses – their competitors. Served with a letter to admit liability (Exh P1 – 40), the same was denied and this suit followed. The defendants did not agree to the draft apology forwarded to them either. (Exh P1 – 45). They had not given descriptions to fit the plaintiff. And if the plaintiff went to **Royal Media** for anything, that was not the defendants' source.

In cross-examination DW1 went over how stories are gathered, scrutinised and ultimately reported. One Mr. Muiruri, no longer with the 1<sup>st</sup> defendant, came up with the story on the ground, took photographs and video-tapes. The 1<sup>st</sup> defendant had the identities of the politicians involved but it did not share these with other media houses. DW1 was aware that **Citizen** reported the names. The trial closed and submissions were filed.

Recapping the contents of the pleadings and the evidence from both sides and then focusing on the subject article the court was urged to note the fact that the defendants published an article to the effect that ministers and an MP had been held in a swoop along with prostitutes. And even after the plaintiff and the 2 others denied involvement at a press conference, the 1<sup>st</sup> defendant still maintained that it stood by its story of 14.12.03. That article did not identify the plaintiff by name but another media house did. However his impression remained that the article of 14.12.03 had been aimed at leaving no doubt that the MP referred to was the plaintiff. The description fitted him as a first time Narc MP from Nyanza and his picture appeared in later publications. The words had not only been defamatory but also embarrassing. That the plaintiff's evidence remained unshaken and it was supported by Wilbrod Ouma Obondo (PW2) even as the defendants, through DW1 denied all that. Several relevant cases were cited to show

the subject MP in swoop, was the plaintiff. The cases included **David Syme & Co & Anr Vs Caravan** [1918] CLR 234 and **Z. K. Shah Vs The united Africa Press** [1961] EA 93. It should be recognized that the cited cases were many and quotations from them, copious.

The submission concluded that the court should find that the defendants meant to defame the plaintiff in their article of 14.12.03 and so should carry liability. The article had been false and malicious. There was no justification to publish it and no other defence is available to the defendants.

Coming to quantum, several cases were cited with awards ranging between sh. 1m and sh. 10m. Here the court was urged to award sh. 10m for general damages and a total of 4 m for aggravated and exemplary damages. A further sh. 500,000/= in lieu of tendering apology.

The defendants' side similarly went over the pleadings and evidence and set out what the plaintiff ought to prove to succeed i.e. that:

- i) the article was written of and concerning him;
- ii) it was perceived by members of the public to concern the plaintiff;
- iii) the publication was actuated with malice – express or implied;
- iv) as a result the plaintiff was ridiculed and shunned;
- v) previously his reputation was impeccable but it has now been lowered in the eyes of society following the article
- vi) there was no viable defences open to the defendants e.g. serving public interests; and
- vii) accordingly the plaintiff is entitled to an award of damages.

Although cognizant of the high premium placed on the need to protect the reputation of individuals the defendants went over issues like qualified privilege, public interest, the status of the article, freedom of speech, the plaintiff's reputation, apology, fair comment and the nature of reliefs sought (damages). The end was that the plaintiff suffered no loss because the article in question was not published concerning him. It was said that sh. 14.5m proposed by the plaintiff was unreasonable and manifestly excessive. If awarded that could only enrich the plaintiff. After going over the criteria for awarding damages with emphasis on exemplary and/or aggravated damages etc., and without even putting forth a proposal, the defendants concluded that the plaintiff had failed to make out a case worth any award of damages.

Beginning with the identity of the plaintiff in the article, the court was told and both sides were agreed that the plaintiff's name did not feature. That he did not lay before court the rest of the description in the article or such other extrinsic evidence to the meaning/identity intended by the defendants. Neither could the natural and ordinary meaning gleaned from the article lead an ordinary person to hold the view that it was the plaintiff who was intended - a first time Narc MP from Nyanza. The cases of **Hutton & Co. Vs Jones** [1908 – 1910] AU E.R. 42 and **Bonnick Vs Morris** [2003] 1 AC 300 were cited.

In determining this case it is not in issue whether the article complained of was published or not. It was and that was admitted. But if it was defamatory and of the plaintiff the court will begin with the issue of **identity**. Both sides are agreed that the name of the plaintiff did not feature in the article of 14.12.03. So his cause has been based on the claim that the description of the first time Narc M.P. from Nyanza, said to have been arrested in the police swoop along Koinange Street involving twilight college/university girls, with politicians and businessmen, in these bad days of AIDS, fitted the plaintiff. That will determine the success or failure of the claim herein.

The case of **David Syme** (Supra), whose facts are not of much concern here did refer to the position the plaintiff has taken regarding identity, as per Isaacs J in that case, that the plaintiff was not specifically named:

**“... The test of whether words that do not specifically name the plaintiff refer to him or not is this: Are they such as reasonably in the circumstances would lead persons acquainted with the plaintiff to believe that he was the person referred to? That does not assume that those persons who read the words know all the circumstances or all the relevant facts. But although the plaintiff is not named in words, he may, nevertheless, be described so as to be recognized; and whether that description takes the form of a word picture of an individual or the form of a reference to a class of persons of which he is or is believed to be a member, or any other form, if in the circumstances the description is such that a person hearing or reading the alleged libel would reasonably believe that the plaintiff was referred to, that is sufficient reference to him. But that is a fact, and it is a fact the burden of proving which to the satisfaction of the jury is upon the plaintiff.”**

In this case has the plaintiff proved to the satisfaction of this court that persons who read the article of 14.12.03 believed that it referred to him even as his name did not feature? How does the plaintiff plead or assess evidence regarding this? It was submitted:

**“The plaintiff further pleaded at paragraph 27A of the Amended Pleat that the said words published on 16.12.03 bore and were understood to bear the meanings pleaded at paragraph 27 by way of innuendo that indeed the plaintiff was indeed the member of parliament referred to in the articles of 14.12.03 and particularly that:-**

**a) a Cabinet Minister, an Assistant Minister and a Narc MP had indeed been arrested**

**b) the reportage in the Sunday Nation of 14.12.2003 was factual with regard to the events prior to the arrests, during arrests and after the arrests**

**c) those who had read the articles of 14.12.03 and equally read the articles of 16.12.03 and observed the way the words were ..... and fashioned as well as how the pictures appeared were left in no doubt that the plaintiff was actually the said MP**

**d) those who watched the news on Citizen TV as well as listened to the news on Citizen Radio and Ramogi FM and who had read the articles of 14.12.03 and 16.12.03 were left in no doubt that the plaintiff was actually the said MP**

**e) the fact that the defendants published that it stood by the stories published in the Sunday Nation of 14.12.03 in its article of the Daily Nation of 16.12.03 after their attention had been drawn to the news on Citizen TV and Radio and Ramogi FM , and they did not deny any link already created, left no doubt that the plaintiff was actually the said MP mentioned in their articles.”**

The offending article, if it can be so described in the whole of these proceedings is the one of 14.12.03. From what was placed before this court, that article essentially was that a cabinet minister, an assistant minister, and a Narc MP had been caught by the police with half naked girls in their cars along Koinange Street. Those 3 caught were from Rift valley, the Coast and Nyanza and were all elected on a Narc ticket. It is clear from this article that no names featured. How can the article point to the plaintiff, although he was a Narch MP from Nyanza? It was given in evidence that at that time there were over 150 Narc MPs and about 20 of them from Nyanza. Can it be said that the plaintiff or those reading this article could see the plaintiff as the MP? Hardly. In fact he himself in the beginning termed the story as a “tabloid” one. Then who could see him in it? Hon. Kajwang and Hon Raila who the plaintiff said telephoned him to inquire whether he was the MP? He did not call them as witnesses and in any case they were not certain that the plaintiff was the MP in the article. They had telephoned him merely to *inquire*. And what of Wilbroad Ouma (PW2)? At the time of reading the article he was *selling* buns (mandazi) at Kayole in Nairobi. The plaintiff was not named. He could only suspect. But when he heard news from *Royal Media Services*, then he concluded that the MP was the plaintiff. Such cannot be the evidence to sustain the test that the description in the article fitted the plaintiff. Those who telephoned the plaintiff or PW2 had their own reasons to suspect that the MP stated was the plaintiff. Such could not come from the article of 14.12.03.

The article of 16.12.03 carried the plaintiff’s denial he expressed at the press conference he with others called. The article clearly stated that the 3 politicians denied being involved in the subject swoop. It was all well that their photographs were carried in that paper. They had called the press conference. Did they not want also to be photographed? And in any event why did they call the conference to deny contents of an article which did not carry their names or photographs? If the 1<sup>st</sup> defendant repeated what it had said on 14.12.03, and which was the subject of the denials, could that mean that it was naming the 3 politicians? This court cannot think so. The article did not but the 1<sup>st</sup> defendant asserted that it still stood

by its report of 14.12.03 which did not name the plaintiff with the two others. Then was the plaintiff justified or proving his identity by alluding to what other media house services who carried his name said? Not so. Those were doing their own thing and DW1 told the court that it was their policy not to share with competitors such things. So if the defendant's attention was drawn to those other news outlets they were not bound or to be found liable for what those others were doing. Indeed the court was told that the plaintiff sued those others for defamation and was handsomely given awards.

As for this one, the plaintiff had not proved his claim. If he had a sum in the region of sh 2.5m could have been considered as an award.

In sum this suit fails with costs. Judgement accordingly.

Delivered on 5.12.2011.

**J. W. MWERA**  
**JUDGE**