



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 1930 of 2000

KENNETH NYAGA MWIGE PLAINTIFF

Versus

AUSTIN KIGUTA 1ST DEFEDNNAT

BEDAN MBUGUA 2ND DEFENDANT

THE PEOPLE LIMITED3rdDEFEDNANT

JUDGMENT

The Plaintiff filed this suit against the Defendants claiming “(i) **Damages on the footing of aggravated or exemplary damages**” and “(ii) **General damages**” to be followed by costs of the suit and interest. The suit is based on the plaint dated 20th November, 2000 and the Defence dated 6th February, 2001 and is founded upon words printed and published on 2nd August, 2000 as follows:

“Arrest Warrant for KACA Official”

By Austin Kiguta

“A Nairobi Court yesterday issued a warrant of a rest for a Kenya Anti-Corruption Authority (KACA) Officer who failed to report in the Court to answer to a charge of assaulting a woman.

Addressing the Court after the file was called and Kenneth Nyaga Mwigie failed to show up, the prosecutor, Robert Maika Kyaa, applied to the Court to have the officer arrested and brought to court for his plea to be taken ...

A Kibera Senior Resident Magistrate Joanne Siganga immediately issued the arrest warrant and directed the order to Kilimani Police Station for execution.”

Those words were printed and published at page 5 of the 3rd Defendant’s daily national newspaper known as “**The People Daily**” which the Plaintiff says has a very substantial circulation throughout the Republic of Kenya and else where in the world. He adds that the Defendants printed and published the words complained of, not only falsely but also maliciously as in their ordinary meaning, those words meant and were understood to mean that the Plaintiff was a man of violent temperament and his

attendance in court could only be secured by a warrant of arrest; that the Plaintiff was of uncouth character and not fit to hold any public office or any office at all; that the Plaintiff is of such character and inclination as to be unfit to hold office as a Legal Officer in the Kenya Anti- Corruption Authority; that the Plaintiff is of Criminal character with no respect for the legal process whose attendance in court can only be secured by a warrant of arrest; that the Plaintiff is not a person fit to hold any office in society; that the Plaintiff is of such nature as not to have respect for law and order.

Further or alternatively the Plaintiff says that the words complained of bore and were understood to bear the meanings attributed to them above by way of innuendo because the Defendants knew that the Plaintiff was an Advocate of the High Court of Kenya and a Legal Officer at the Kenya Anti-Corruption Authority and the allegations in the offending article were untrue and were to cast aspersions as to the Plaintiff's suitability as an Advocate and as an officer with the Kenya anti-Corruption Authority.

The Plaintiff adds that the said words were calculated to disparage the Plaintiff both professionally and socially and for the maximum effect and publicity, the 2nd and 3rd Defendants caused the said offending story to be prominently published at the top right side of page 5 of the said Newspaper. In consequence the Plaintiff's reputation has been seriously damaged and has suffered distress and embarrassment.

The Plaintiff explained how he received information about the publication by the Defendants. He got hold of a copy of the newspaper and read it. It is from that newspaper report that he came to know about the criminal case against him in Kibera Court. He told this court that as a result of reading that publication, he went to Kibera Court to check whether in reality there was such a case in that court against him. But from what he told this Court later, it would appear that it is his lawyer who he asked to check for the case at Kibera and that lawyer, Mr. Radido, having done the checking, they both went to that court on 8.8.2000. The Plaintiff told this court that he first saw the charge sheet relevant in the Kibera court Criminal Case No. 6309/2000, while in this court before me being shown to him by Mr. Gathae, the Defendant's counsel. That is despite the fact that the Plaintiff's counsel obtained and has produced typed copy of relevant court proceedings from Kibera Court, copy of the charge sheet included.

In any case, the Plaintiff complains that following publication of the words complained of, he received numerous inquiries, verbally and by phones, from those who know him including friends and relatives, colleagues, the KACA Director and had to explain himself several times especially to those who knew who he was and were wondering how, as a Public Prosecutor who was regularly appearing in Court, the Plaintiff would assault somebody and could only go to court in that matter under a warrant of arrest.

What Mr. Donald B. Kipkorir told the court confirms this part of the Plaintiff's evidence. He gave evidence for the Plaintiff as a friend he had known and held with esteem for many years. He disclosed that around the time of that case as KACA was being wound up and the Plaintiff applied to join his law firm, he, the witness, had to put what he had heard about that case in consideration and his law firm ended up not taking the Plaintiff.

To that Mr. Chacha Odera added in his written submissions that the imputation in this case was about the Plaintiff in the way of his office as public prosecutor and profession as an Advocate. He submits that the article was explicit that the Plaintiff was corrupt and conducted himself in a manner not befitting a person holding the position of a Public Prosecutor. If true, that would doubtless amount to dishonest and dishonourable conduct for which the plaintiff would at least, be liable for prosecution before the Advocate's Disciplinary Committee, but with the probability of criminal charges being preferred against him. The learned counsel adds that it is noteworthy that, pursuant to the "**Anti Corruption and Economic Crimes Act**," it is an offence punishable with a jail term for a person to engage in corrupt practice. There can be nothing more demeaning and unbecoming of an Advocate of this court in disregarding a Court process thereby necessitating the issuance of a warrant of arrest to secure his attendance.

Counsel adds that the slur is that much more nefarious because it was being promulgated at a time when the entire country was in the grip of fighting graft. The clamour for fighting graft occupied much of media space and KACA was the statutory body mandated to lead the fight and the learned counsel asks

this court to take judicial notice of that fact calling it a fact of public notoriety. He emphasizes that given the emotive nature of the fight against graft, any suggestions that an Advocate working for KACA had no respect for law and the court, was likely to expose the individual concerned to the ire of all.

Mr. Chacha Odera had earlier on pointed out that issue was raised whether the court issued witness summons to accused person. He submitted that whether the Magistrate was right or wrong in issuing witness summons to the Plaintiff is not the issue. The issue is that the Defendants maliciously published that warrant of arrest were issued against the plaintiff for his failure to attend court. He notes that this fact was even accepted by the First Defendant when he appeared in Court on 8th August, 2000 and apologised to the court for his misreporting. The Defendants subsequently carried a correction but without an apology to the Plaintiff in their newspaper edition of the 11th August 2000. Malice on their part can be inferred by their admission to the court that their report was wrong and their apology to court for the inaccurate reporting and on the same breath refusing to apologise to the Plaintiff and pleading a defence as pleaded in their statement of defence filed in this suit. Malice is further inferred by the Defendants carrying a correction in their newspaper edition of 11th August, 2000, although without an apology to the Plaintiff. The learned counsel poses a question: **“How can the Defendants plead in their defence that what was reported in their offending article was true and yet apologise to Kibera Court for their article and publish a correction in their edition of 11th August, 2000?”**. He submits that since at the trial the Defendants called no evidence to dispel that which was given by the Plaintiff and his witness in their viva voce testimony, the Plaintiff’s evidence and that of his witness stands uncontroverted and the issue that the court must determine is whether the evidence adduced is sufficient to support the Plaintiff’s claim.

On their part, the Defendants who filed their defence but did not come during the hearing to adduce evidence, admitted in that filed defence that they published the words complained of and further admitted that the words refer to the Plaintiff but they refuse to admit that those words defamed the Plaintiff because they claim that those words were accurate account of the court record and copy of the charge sheet filed in the Court on 1st August, 2000.

The Defendants add that the words complained of were written by the 2nd Defendant under a sense of duty as a daily newspaper of a matter towards the Plaintiff and in the honest belief that the statements were true and the matter published was of public concern and the publication of a matter filed in a criminal court in Kibera involving an official of the Kenya Anti-Corruption Authority who was being charged with an offence of assault causing actual bodily harm, was for the public benefit. The Defendants therefore had an interest in the subject matter and publication of the said words and/or the Defendants were under a social and/or moral duty to publish the said words. Thus, it is the Defendant’s case that the words complained of were published on an occasion of qualified privilege.

On the whole therefore and taking into account all the evidence before me as well as written submissions from the Plaintiff’s Advocates represented by Mr. Chacha Odera and no written submissions from the Defendant’s Advocates represented by Mr. Gathae, who had promised to bring but failed to bring the said submissions, the position in this matter as I see it is briefly as follows:

Defamation is any imputation which tends to lower or adversely affects a person in the estimation of others, or adversely affects any aspect of his reputation. Any imputation which may tend to injure a person’s reputation in a business, employment, trade, profession, calling or office carried on or held by him is defamation (Cately on Libel and Slander, 9th Edition p.51 para. 2.26).

To be actionable, words must impute to the Plaintiff some quality, which would be detrimental, or the absence of some quality, which is essential, to the successful carrying on of his office, profession or trade. The words are defamatory if they involve a reflection upon the personal character of the Plaintiff.

It is defamatory to impute to a person in any office any corrupt, dishonest or fraudulent conduct or other misconduct or impute that has been guilty of any dishonest or disreputable conduct or any other misconduct.

A statement is defamatory of the person of whom it is published if it tends to lower him in the estimation of right thinking members of society generally or if it exposes him to public hatred, contempt or ridicule or if it causes him to be shunned or avoided.

I risk repetition defining defamation, but perhaps I should add that it all depends upon the circumstances of each case. In the circumstances of this case therefore, was the Plaintiff defamed?

The Plaintiff may or may not have been aware of the Criminal Case then being preferred against him by Kilimani Police Station in Nairobi, but it is a fact that on 1st August, 2000 a Police Prosecutor known as Inspector Kyaa appeared before Miss Siganga, then Senior Resident Magistrate in the Senior Principal Magistrate's Court at Kibera, having filed in that court a Criminal Case No. 6309 of 2000 against the Plaintiff now in this suit. The Plaintiff was therefore by then the accused person in that criminal case.

From the investigation which had convinced the Police to file that Criminal Case, they must have been fully aware that the person they were taking to court to prosecute was an important Public Officer in the Country being a Legal Officer and Public Prosecutor in KACA and also an Advocate of the High Court of Kenya. In as much as some people may like to embarrass others or show off, the Police having taken the criminal case to court in the absence of the Accused (and there is no evidence that he had been told or bonded to attend court that day) the normal procedure would have been for the police to go and bond the Accused to attend court for plea or for the prosecutor to apply before the learned Magistrate for the Accused person to be summoned (and not to be arrested) to attend the court for plea and this was more so bearing in mind the status of the Accused. Such a situation does not call for the issuance of warrant of arrest which is issued only where the accused has refused to attend court or can otherwise attend court only under warrant of arrest and there was no evidence of such a situation in that criminal case against the Plaintiff. Further, witness summons is not relevant because an accused person is not a witness and witnesses are not normally required on a plea day and when a witness goes to court, he goes to give evidence and not to take plea. A witness summons is therefore clearly different from summons to an accused person to appear in court for plea and both the learned Senior Resident Magistrate and the court prosecutor must have been well aware of that position.

With that in mind therefore, I look at what has been brought before me in this suit from Kibera Court as proceedings in Criminal Case No. 6309/2000 with a lot of anxiety. Before me is a typed copy of the proceedings produced as Plaintiff's exhibit. There is also a handwritten photo copy of same proceedings, brought by the Defendants.

Comparing the two, while the typed copy shows the court prosecutor as having applied on 1st August, 2000 for

“Witness summons to issue for accused to appear in court for plea,”

the handwritten photocopy, though not as easy to read as the typed copy, is showing the same Court prosecutor as having applied for a warrant of arrest to issue for the Accused to go to that Court for plea. While the typed copy says the magistrate made the order:

“Witness summons to issue to accused to appear in court on 8.8.2000 for plea,”

the hand written photocopy shows that the Magistrate's order was to the effect that warrant of arrest, (written simply “W/A”) to issue to accused to appear in court on 8.8.2000 for plea.

On 2nd August, 2000 apparently after the Plaintiff had read the words complained of in newspapers, the situation changed. On that day, 2nd August, 2000 the same Court Prosecutor appeared before the same Magistrate and the Plaintiff was present with his Advocate Mr. Nderitu. The Court Prosecutor told the Magistrate that he did not have the Police case file. The Magistrate recorded, according to the typed copy, as follows:

“The Court issued a witness summons for accused to appear in Court on 8.8.2000 for plea. There is no police file in court.

Order:

Mention 8.8.2000 when The Accused’s plea will be taken.”

The contents of the hand written photo copy in which the words “**witness summons.**” is simply written as “W/S”, are the same as in the typed copy quoted above.

It appears to me that this is where and when the problem started and that was on 2nd August, 2000. A full Senior Resident Magistrate writing in Court proceedings that her court had issued a witness summons for the Accused to appear in court for plea. This was recorded in the presence of the prosecutor and the Accused who was with his Advocate, Mr. Nderitu. The Accused and his Advocate were there because, after reading what the Defendants had published in the article complained of by the Plaintiff in this suit, the Accused and his Advocate went to complain about, or check, what happened.

In the evidence before me concerning his visit to Kibera court on 2nd August, 2000, the Plaintiff kept on talking about the Police case file. It was not with the Court Prosecutor and the Plaintiff could not therefore see the charge sheet against him on that day. About the court case file, the Plaintiff gave the impression he did not care to see it. Yet it must have had the charge sheet because no criminal case is filed in court and the Accused summoned or arrested for plea without the relevant charge sheet being in the court case file. In this matter, the Plaintiff saw the charge sheet for the first time when he was before me being cross examined by the Defendant’s counsel. The Plaintiff said that himself in his evidence during cross-examination, and it is difficult to understand that when the typed copy of the court proceedings he had produced included the charge sheet.

That was so even though the Plaintiff was in the same court for the second time on 8th August, 2000 with his two Advocates, Mr. Radido and Mr. Nderitu. That was the day for plea to be taken before the same Magistrate with the same Court Prosecutor. The record of Court proceedings for that day shows no difference between contents in the typed copy and contents in the handwritten photo copy. Mr. Radido was the first person to address the court stating as follows among other things:-

“Before Accused’s plea is taken I wish to point out that Newspaper reports appearing in the Kenya Times of August 2, 2000; The People Newspaper of August 2, 2000 and the Daily Nation of August 2, 2000. We perused court file and confirmed that no warrant of arrest had been issued in respect of the accused herein. What has been issued was a witness summons for him to appear in court to day for plea. All the three newspapers had reported that the court has issued a warrant of arrest when no warrant of arrest had been issued at all. On that date that the matter was in court on 1.8.2000, the accused was handling a KACA Case No.1167/2000 together with myself before Mrs. Wanjala, S.R.M. at Court 7, _ _ _ Accused had not been served to appear in this court on that said date _ _ _ I am instructed that no police officer went to KACA offices to bond accused and were frustrated by Senior KACA Officers. The Accused feels defamed and humbly submitting that the court do order The People Newspaper, The Daily Nation and the Kenya Times Newspapers to make appropriate and prominent apologies for this report which were not factually correct. That is all.”

To that the Court prosecutor responded stating:

“I agree with Mr. Radido. I actually applied for summons to issue for accused and not a warrant.”

Thereafter Mr. Austine Kibute from “**The people Newspaper**” Mr. Nicholas Ngolyo from “**The Daily Nation**” and Mr. John Korir from “**The Kenya Times**” addressed the court in that order. It appears Mr. Austine Kibute was Austin Kiguta the 1st Defendant according to the Plaintiff and Augustine Kiguta the 1st Defendant, according to the filed defence in this matter.

In any case, it is apparent from what the three reporters said that they were not in the court before Senior Resident Magistrate Siganga on 1st August, 2000 and therefore they obtained what they reported from the court case file while in the court Registry and had also perused the police case file.

Austine Kibute told the Court that what he wrote was straight from the court case file and he saw a slip of a warrant of arrest in the police file. He added:

“.... I carefully perused everything before reporting the matter and I was satisfied that what was indicated was warrant of arrest. I came to court soon after the order was made by court. I was not present when the court order was made. I went to the Registry and I perused the court file. I thought I saw warrant of arrest written in the Court file and there was a warrant of arrest issued on the Police file. I am ready to file written apologies in the Newspaper as I have now realized that I did file a wrong report. I realise I did not correctly read the contents of the court file I did not confirm the file contents with any court officials.”

What Mr. Nicholas Ngolyo said was substantially similar to what Mr. Austine Kibute said. The same with Mr. John Korir. Each said he went to the court Registry and read the Court Case file and saw what he took to be warrant of arrest and did not know it was witness summons. Each apologized and undertook to make a written apology in his newspaper.

In her ruling on that day the learned Senior Resident Magistrate stated that the three Journalists reported that her court had issued a warrant of arrest against the Accused. She said she had only issued summons but each of the three journalists had gone to the court Registry perused the court file and without confirming with any court official the contents of the court file, each proceeded to file the report on what he thought he had seen in the court file. Each ought to have exercised responsible journalism by confirming the said court orders and perusing the summons actually signed and issued by the court.

The Magistrate added that since each journalist had accepted and admitted his mistake and had apologized for his mistake, she accepted their apologies. Also accepted was their undertaking to print appropriate apologies in their respective newspapers the following day.

After the Magistrate had read that ruling, the court prosecutor applied to withdraw the Criminal Case against the Accused under section 87(a) of the Criminal Procedure Code stating that he had been instructed by the OCPD to do so. The Magistrate accepted the application and the case was withdrawn before the plea of the Accused was taken.

The Plaintiff's case is that following what happened in court that day concerning the journalists, the Defendants failed to publish an apology because what they did as shown in MFI 3 was a correction of a mistake and not apology. It stated that they had erroneously reported that a warrant of arrest had been issued but they later learned that what had been issued was a summons. The Defendants, according to the Plaintiff, failed to apologize and accept liability and therefore this suit was filed.

I should add that looking at the charge sheet filed in the Criminal Case at Kibera, there is no doubt that the prosecution intended to have a warrant of arrest issued against the Accused even though the alleged offence was a simple assault under section 251 of the Penal Code. In the relevant column having the words **“without or with warrant”**, the letters **“w/out”** which had been written were cancelled and replaced by the letters **“W/A”**. Further in the column with the words **“Bond or Bail and Amount”**, It is specifically written **“APPLY FOR W/ARREST”** It is the court prosecutor who was being so instructed by Kilimani Police Station to apply in Court for warrant of arrest. The court prosecutor having been so specifically instructed through the charge sheet which was prepared on 31st July, 2000, seems, as the record shows, to have gone to the court on 1st August, 2000 and applied for the warrant of arrest in accordance with those instructions and that is what the hand written photo copy of the court proceedings for that day shows as I stated earlier. Indeed following the proceedings on 1st August, 2000, Form **“CRIMINAL 96”** was prepared and its photo copy is part of the hand written photo copy proceedings of the Court shown by the Defence in MFI 2 with a line crossing through it suggesting it was subsequently cancelled. That document is clearly distinct from witness summons or summons to accused for plea

which does not seem to have found its way into the court case file in Criminal case No. 6309/2000 at Kibera even as at 8th August, 2000, yet it is claimed the court order made on 1st August, 2000 was the relevant court order. The journalists told the court on 8th August, 2000 that they had seen a warrant of arrest in the file and I can see a photo copy MF I 2 aforesaid.

On 1st August 2000, therefore! what was in that court case file following court proceedings on that day was the charge sheet, record of the court proceedings on that day and a filled up warrant of arrest I have been talking about above. Normally a copy will remain in the court case file as the original goes for execution. That warrant of arrest form could not have found its way into that case file if it were not intended to issue a warrant of arrest in that case, for if indeed witness summons were intended, it is the form for witness summons which ought to have been found in that case file.

If the journalists found that charge sheet, those court proceedings and the warrant of arrest form Criminal 96 in that court case file as they all are saying, then that appears to be the correct position and the truth. They went and reported it in their respective newspapers which came out on 2nd August 2000 and after those newspapers had been read in the morning 2nd August 2000, changes seem to have started taking place to the extent of affecting the relevant subsequent court proceedings where people would talk of having issued witness summons to an accused person to appear in court for plea so that in the end the relevant court proceedings omit the word **“witness”** for the prosecutor and Magistrate to proceed to use the word **“summons”** only as is evidenced in the Prosecutor’s address on 8th August, 2000 and the Magistrate’s subsequent ruling thereafter that day after the journalists had addressed the court and Mr. Radido, like the three journalists in court on that day, had talked of “witness summons” as the document the court had said had ordered to be issued. In her aforementioned ruling on 8th August, 2000 the learned Magistrate stated among other things as follows:

“The court issued ‘summons’ to the accused to appear in court for plea to-day.”

That was after the court prosecutor had said:

“I actually applied for “summons” to issue for accused and not a warrant.”

How could three different journalists have seen the same information, perhaps at different times, or separately, if no warrant of arrest was to issue? How could all the three have failed to see that it was **“summons”** or even **“witness summons”** to issue and NOT warrant of arrest to issue? Could the court prosecutor, an Inspector of Police, have ignored instructions given to him by his superiors such as the instructions in the charge sheet column under the words “Bond or Bail and Amount”, and decided on his own in that disciplined force, to apply for **“witness summons”** or apply for **“summons”** when instructions in that column clearly required him to **“APPLY FOR W/ARREST”**? Perhaps further or oral instructions to that effect had also been added. That charge sheet had been prepared and signed at Kilimani Police Station, the very police station which subsequently, instructed the same court prosecutor in that disciplined force, to withdraw the Criminal Case against the Accused and the same Court Prosecutor, without any question, complied and withdrew the case from the court stating in part:

“I have instructions from the OCPD Kilimani to have the case withdrawn I pray for the case be withdrawn _ _ _”

With all that in mind, perhaps it is not remembered that when Mr. Radido addressed the court that day 8th August, 2000, what he said included the following:

“Accused had earlier on made a report about the assault concerning the complainant’s husband and that husband had been charged in Makadara court, which case is due for hearing on 6.9.2000. It is my instruction that the complainant’s husband is being used to harass and intimidate the accused herein.”

I said earlier in this Judgment that where an accused person who has not refused to go to court is required

to go to court for a plea, especially when the charge is not serious, the normal procedure is for the prosecution to police bond him or to apply for summons so that the court issues the summons for that accused person to go to court for plea. I added that that is more so where the status of the accused person, like in this case a responsible Public Officer in a respectable Office, is taken into account. But I also said that some people may use such opportunity to embarrass the accused or to show off, and now adding what Mr. Radido told the court as just quoted above, that opportunity could also be used by those people **“to harass and intimidate”** the accused.

In that Criminal Case therefore was it not an opportunity for such people, after they had succeeded in getting a charge preferred, to insist that the person to be charged must be arrested? To my mind, that was the time when the question of arrest arose in the Criminal Case and the relevant charge sheet was prepared with the intention to arrest the accused and that is why it contains the instruction to the Court Prosecutor to **“APPLY FOR W/ARREST”** and acting on that instruction, the court prosecutor on 1st August, 2000 applied before Senior Resident Magistrate Kibera for a warrant of arrest against the Accused in that case and that Accused is now the Plaintiff before me. That application was granted by the Magistrate.

That being so, it is apparent that what the three journalists reported about the issuance of the warrant of arrest in the criminal case was correct and truth. Apparently it was a fair and accurate account of the court record including the charge sheet filed in court on 31st July, 2000 and published by the journalists on an occasion of absolute privilege in terms of section 6 of The Defamation Act which states that **“a fair and accurate report of any newspaper of proceedings heard before any court exercising judicial authority within Kenya shall be absolutely privileged;”** the Defendants publishing the matter, which was of public concern, under a sense of duty, social and/or moral, to the Public for the public benefit in this matter where the question of the issuance of the warrant of arrest goes beyond what happened in the court from the 1st to the 8th August, 2000 as same may be traced backward up to the complainant and the complaint in the Criminal Case while still at Kilimani Police Station. I therefore come to the conclusion that the words complained of were published in the honest belief that they were true and that the defence herein filed by the Defendants is proper and justified, notwithstanding what the 1st Defendant told the court on 8th August, 2000 to the effect that he had realized his report was wrong and that he apologized his report was wrong and that he apologized for his inaccurate reporting. He apologized in court but failed to publish the apology when he instead published a correction and subsequently the defendants filed that defence dated 6th February, 2001.

Let us not shrink from the truth, to change it or falsify it in order to blame others unfairly, and journalists should not be blamed when they ought not to, because doing so amounts to wrongfully and unconstitutionally curtailing freedom of expression.

From the foregoing therefore, I find no falsehood or malice in the article complained of read as a whole. I do not find the many defamatory meanings the Plaintiff is reading from that article such as corruption, dishonesty or dishonourable conduct, lack of respect for the law unless that is attributed to those who applied for the warrant of arrest, unfitness to hold a responsible office or any office in society, unfit to be an advocate or to work as an officer of the Kenya Anti-Corruption Authority. If anything, I do find that some of the negative meanings the Plaintiff is reading from the words complained of, if truly there, may only be attributed to the fact that the Plaintiff was charged in that criminal case and therefore those responsible can only be those who charged him in court and not the defendants who only reported what they honestly believed to be true and indeed it is true that the Plaintiff was charged in that criminal case.

To conclude this Judgment by answering the question I posed earlier therefore, in the circumstances of this case, I do not find that the Plaintiff was defamed by the Defendants as alleged. I will therefore dismiss this suit because the Plaintiff has failed to prove libel or defamation even on the balance of probabilities.

But in case it is held that I should not have dismissed the Plaintiff's suit, the result would have been as follows bearing in mind the circumstances of this suit and the relevant case authorities cited by the

learned Plaintiff counsel.

Libel is actionable per se and I would therefore have awarded the Plaintiff general damages in the sum of **Kshs.1,500,000/=**.

Concerning Aggravated or Exemplary damages, the Plaintiff is asking for these because of the Defendant's failure to apologize an apology which was tied to an admission of liability. The Plaintiff expected that to be done following the Kibera Court order which required the 1st Defendant to publish an apology but did not say anything about liability which may have been in a letter subsequently written by the Plaintiff to the Defendants reminding them of the need for the apology.

I should not, however, forget that no evidence was adduced before me about the Plaintiff's compliance with section 7A of the Defamation Act. The Plaintiff was entitled to exercise his right of reply under section 7A (1). Had he exercised his right of reply under that section and produced evidence to show that the Defendants had failed to publish the reply or had not published it as required by the law, his case for aggravated or exemplary damages would have been clear. There is no acceptable evidence for malice. No acceptable evidence of matter tending to increase the amount of general damages.

What is happening now is that the Plaintiff having failed to comply with section 7A is relying on the failure to apologize to get what he cannot get under section 7A. The case authority of Johnson Evan Gicheru –vs- Andrew Hustan Michael O. Mara Book Ltd C.A. No. 314 of 2000 where the Court of Appeal held that failure to publish an apology amounts to an aggravation and therefore the need to award aggravated damages is being relied upon. That case was based on libel published before section 7A of the Defamation Act was drafted and passed by Parliament in 1992 to take care of the situation where letters of apology were required and therefore to-day people should be talking about their right of reply through which they may demand apology and see failure to apologize instead of talking about letters demanding apology from publishers or journalist.

In fact under sub-section (7) of section 7A, if a Plaintiff did not exercise the right of reply, the court shall be at liberty to reduce the amount of damages, which the court would have otherwise awarded, by such sum as the court considers appropriate having regard to all circumstances of the case. That subsection states as follows:

“In any civil proceedings for libel instituted by a person or body of persons entitled to a right of reply who or which has failed to exercise such right in accordance with this section, the court shall, in the event of it having found in favour of the Plaintiff, be at liberty to reduce the amount of damages which it would have otherwise awarded by such sum as the court considers appropriate having regards to all circumstances of the case.”

Compliance with section 7A should not be confused with the making of demand for apology and amends and giving notice of intention to sue through a letter by the Plaintiff or his advocate.

In this suit therefore, I would not have awarded the aggravated or exemplary damages although I would not also have reduced the amount of damages **Kshs.1,500,000/=** mentioned earlier. I would, however, have added the Plaintiff costs of this suit plus interest.

Now having said the above regarding what I would have awarded, I go back to where I said I was going to dismiss this suit. I need add nothing. Accordingly, the Plaintiff's suit is hereby dismissed in its entirety with costs to the Defendants.

Dated and delivered at Nairobi this 18th day of April, 2008

J.M. KHAMONI

JUDGE

Present:

Mr. Chacha Odera for the Plaintiff

Muturi Court Clerk