



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 294 of 2004**

HON. MARTHA KARUA PLAINTIFF

VERSUS

THE STANDARD LTD FIRST DEFENDANT

KWENDO OPANGASECOND DEFENDANT

JUDGMENT

The Plaintiff filed this suit against both defendants claiming

- “(a) Damages on the footing of aggravated or exemplary damages**
- (b) General damages**
- (c) An apology in terms of text approved by the Plaintiff to be published in a manner as prominent as the offending article.**
- (d) A permanent injunction to restrain the defendants jointly and individually, by themselves, their servants and or agents from publishing or continuing to publish articles libelous to the Plaintiff**
- (e) Costs of the suit**
- (f) Interest on (a) and (b) above”**

The first Defendant is the publisher and printer of the “Sunday Standard,” a national newspaper with a very substantial circulation throughout the Republic of Kenya

elsewhere in the world and the said newspaper is also accessible on the Internet.

The second Defendant is an editor, writer, reporter and columnist of the First Defendant and is an adult male residing and working for gain in Nairobi.

The Plaintiff is and was at all material times an Advocate of the High Court of Kenya, a member of parliament representing Gichungu constituency and a Cabinet Minister in the Government of the Republic of Kenya.

She told the court in her evidence that at the time of the publication of the article complained of, she was the Minister for Water Resources, Management and Development and that currently she is the Minister for Justice and Constitutional Affairs.

She was admitted as an Advocate of the High Court of Kenya in the year 1982 and, as a member of Parliament for Gichugu Constituency, she has held that position since 1992 and for the three terms she has been in Parliament, she has been elected with an overwhelming majority on each occasion.

She has received numerous accolades and awards for her outstanding role as a Human Rights and Woman Rights Activist, the awards including among others an award in 1991 from Human Rights Watch Global which is based in the United States of America; International Commission of Jurist Kenya (ICJ); Jurist of the year award 1999; Recognized by FIDA Kenya in 1999 and an Award from the Law Society of Kenya in the 1990s for her diligence in the issues of Law.

The Plaintiff added that she has served as a Council Member of the Law Society of Kenya and FIDA Kenya. For 10 years she was the chairperson of the League of Women Voters a Political Lobby Group for Women. While serving as a Minister for Water Resources Management and Development, she received commendations on three different occasions from the Head of State.

The Plaintiff went on to say that on the 4th January, 2004 she read an article in the “**Sunday Standard**” titled “**Bedroom Spells Danger for Kibaki State House.**” The said article was on page 6 and was authored by the Second Defendant and it was closely related to the Headline of the paper which was titled “**...as First Lady Clashes with ministers.**” The headline story ran throughout pages 1,2,3,4, and 5, and culminated in the offending article on page 6, as can be seen in Plaintiff’s exhibit No.1

I must point out here that the Plaintiff’s exhibit No.1 referred to here has pages 1,5, and 6 only so that pages 2,3 and 4 have been kept away from the court, suggesting articles on the kept away pages are not considered offensive.

Back to the Plaintiff’s case, her case against both defendants is therefore based on her complaint that on or about 4th January, 2004 at page 6 of “**The Sunday Standard**” newspaper, the Defendants and each of them falsely and maliciously authored, printed and published or caused to be printed or published words the Plaintiff considers to be defamatory under the banner headline “*Bedroom Spells danger for Kibaki State House*” as follows:-

“Is it, for example, true that Mrs. Kibaki ordered Cabinet Ministers Martha Karua and Charity Ngilu out of State House, Mombasa, because she was incensed by the Vice-President’s reference to her as second Lady?”

Mrs. Kibaki is important because the marriage ring she wears was given to her by President Kibaki, but, unlike Ngilu and Karua, she is not an elected official of Government or State House.

If she is going to order ministers out of State House, she is going to alienate the President. It must be remembered here that President Kibaki appears to have made State House his office of choice.”

Those words, in paragraph 4 of the Plaintiff’s plaint are contained in Plaintiff’s exhibit No.1 being a copy of the relevant Sunday Standard newspaper; and in paragraph 5, as well as in her evidence before me, the Plaintiff stated that the offending phrases, though framed as a question, in their natural and ordinary meaning, meant and were understood to mean that the Plaintiff was at State House, Mombasa between 1st and 4th January, 2004 and was unceremoniously ejected from State House Mombasa by the First Lady, Mrs. Lucy Kibaki; as the Plaintiff was unwelcome and unwanted within the premises of State House, the Plaintiff having imposed her pressure upon the First Family who were at the material time holidaying in Mombasa. Further and in the alternative, the Plaintiff says that the said words bore and were understood to bear the meaning pleaded in paragraph 5 by way of innuendo.

The Plaintiff says the Defendants knew or ought to have known that the Plaintiff was not in Mombasa and specifically at the State House during the Christmas Holiday of 2003 and New Year of 2004. The question posed by the Second Defendant in the offensive articles did not therefore arise as the words were uncalled for, lacked any factual basis, were libelous and recklessly made and calculated to disparage the Plaintiff professionally, politically and socially and were meant to implant in the minds of the readers that

the Plaintiff has been ejected from State House Mombasa, which motive was based on malice.

It is the Plaintiff's case that the article was published in a prominent and sensational manner and that having regard to Defendants' past conduct, are likely to continue with publication of libelous articles unless restrained by the Court by an order of injunction.

She goes on to say that as a result of the said article, she has suffered loss and damage and has been greatly embarrassed and her credit, reputation and standing have been injured and brought to disrepute as a result of which she asks for the orders prayed for in the plaint.

The Plaintiff adds that when she read the article in question, she became shocked as she felt the defendants were deliberately generating a rumour. She was upset in her house in her constituency with her teenager children and other members of her family who knew she had not been at Mombasa and were therefore surprised by that article. She received several telephone calls from friends, other relatives and fellow members of Parliament asking why she had been thrown out of State House.

The following day she wrote a demand letter, P. exhibit 2, drawing the attention of the second Defendant to the article and pointing out to him that it amounted to libel and that she demanded an apology and admission of liability. She received no reply despite her, warning in the letter that if there were no reply, the Plaintiff would seek redress without further reference to the Defendants. In the second last paragraph, that letter states:

“This article in my view represents what has now become synonymous with the East African Standard that is; deliberate peddling of falsehoods against me with the sole intention of maligning me and injuring my standing credit and reputation in this regard I consider this an aggravation of the previous articles.”

The Plaintiff has explained during the hearing of this case that what she complained about in the contents of that quotation had resulted into her filing of four civil cases against the First Defendant jointly with other members of the First Defendant's staff. She has produced P. exhibit 3 and P. exhibit 4, copies of pleadings in HCCC No. 293 of 2004 and HCCC No.302 of 2004 respectively.

The Plaintiff does not agree with the Defendant's statement in their defence that the words complained of were fair and true statements of fact or true in substance or consist of expression of opinion. She says the two Defendants had her contact telephones and could have easily checked and confirmed that she had not been at Mombasa.

That was the evidence adduced by the Plaintiff and to conclude the hearing, counsel on each side agreed to exchange and file written submissions to be followed by brief oral submissions. That was done.

In her submissions, the Plaintiff's counsel follows the line taken in the Plaintiff's evidence and adds that any imputation is defamatory if it tends to lower or adversely affect a person in the estimation of others or adversely affect any aspect of his/her reputation. Any imputation, which may tend to injure a person's reputation in a business, employment, trade, profession, calling of office carried on or held by him is defamatory. Words are defamatory if they involve a reflection upon the personal character of the Plaintiff. It is submitted that the imputation in the article complained of was that the First Lady unceremoniously ejected the Plaintiff from State House Mombasa as she was unwanted and unwelcomed within the premises of State House and that she was scheming against the First Lady. The Plaintiff's counsel says that the article was explicit that the Plaintiff was a person not capable of holding a public office and/or practicing as an advocate as her behaviour was unbecoming; and that since the Plaintiff's evidence that she was not anywhere near Mombasa has not been controverted, it is manifest from the evidence that the words complained of in the offending article are untrue in every material respect and had been published maliciously.

Further, counsel submitted that under Common Law, defamatory imputation is presumed to be false and that the burden is upon the defendant to show that it is substantially true. The Defendant must also

prove that the defamatory imputation is true. It is not enough for him to prove that he believed that the imputation was true even though it was published as belief only.

It was also submitted that in the face of non-opposition, and absence of contrary evidence, the Plaintiff's evidence must be admitted in its entirety, that the Defendants published the offending article and it referred to the Plaintiff; that the publication was malicious as the Plaintiff was in Nairobi on the material day; that the offending article was published in a conspicuous and sensational manner; that there has been an aggravation of damage by failure to publish an apology; that the Defendants failed to call evidence to prove either limb of their averments in the defence that the words complained of consists of facts, were true in substance and infact and that so far as they consist of expressions of opinion, they are fair comment on a matter of public interest. The Defendant's defence must therefore fail.

It was also submitted that although section 7 of the Defamation Act provides for a defence of qualified privilege, that defence is vitiated by malice which the Defendants have not dispelled – because there is no evidence before the court that the Defendants made any inquiry to ascertain if the statement was correct and further when asked for an apology, no reply was forthcoming. Counsel concludes that this was clear indication that the statement was malicious and without foundation.

Counsel referred to “**The Code of Conduct and Practice of Journalism in Kenya 2nd Edition**” which she pointed out the Defendants failed to observe when writing the statement complained of.

I will now look at the Defendants' side. Although the Defendants filed a joint defence denying all the allegations made by the Plaintiff against each one of the Defendants, they elected not to be present – to give evidence during the hearing of this suit and no evidence was offered on their behalf. They were, however, represented by an advocate, Mr. Majanja from M/s Mohammed & Muigai Advocates, while the Plaintiff – came with her advocate, M/s Ndirangu of M/s S.W. Ndirangu & Company Advocates, during the hearing. Mr. Majanja cross-examined the Plaintiff who was the only witness in this suit. This court is entitled to look at that defence and consider their written submissions bearing in mind no evidence was adduced on the side of the defence.

Otherwise in their written statement of defence, Defendants jointly stated that they admitted publishing the article complained of but denied that the same was done either falsely and/or maliciously. They denied that those words were capable of bearing the meanings or any of the meanings ascribed to them in paragraph 5 of the plaint or even by way of innuendo as alleged in paragraph 6 of the plaint.

According to paragraph 5 of the plaint, the offending phrases, though framed as a question, in their natural and ordinary meaning they meant and were understood to mean; and I repeat them here because they are important

“(a) The Plaintiff was at State House, Mombasa between 1st and 4th January.2004.

(b) The Plaintiff was unceremoniously ejected from State House Mombasa by the First lady Mrs. Lucy Kibaki

(c) The Plaintiff was unwelcomed and unwanted within the premises of State House.

(d) The Plaintiff had imposed her pressure upon the First Family who were at the material time holidaying in Mombasa.”

In paragraph 6 of the plaint it says that further or alternatively to paragraph 5, the said words bore and were understood to bear the meaning pleaded in paragraph 5 by way of innuendo because, firstly the Defendants knew or ought to have known that the Plaintiff was not in Mombasa and specifically at the State House during the Christmas Holiday of 2003 and New Year season of 2004; secondly, the Plaintiff having not been in Mombasa during the material time, the questions posed by the second Defendant in the offensive article did not arise; and thirdly, the Plaintiff had as a matter of fact not left Nairobi during the period stated in the article.

That is the conclusion of paragraph 6 of the plaint, but Defendants in their defence wanted strict proof by the Plaintiff, of what she was saying, including proof that the Plaintiff's reputation has been seriously damaged and that she has suffered distress and embarrassment as alleged in paragraph 8 of the plaint; as they deny that the Plaintiff has suffered any injury known to law as a result of the article complained of or as alleged in paragraph 10 of the plaint or at all and aver that the plaintiff is not entitled to either general, exemplary and/or aggravated damages.

The Defendant averred that in so far as the words complained of consist of statements of fact, they are true in substance and in fact and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest. They give particulars as required by order VI rule 6A of the Civil Procedure Rules stating that it is true "***The First Lady was incensed by the Vice President's reference to her as second Lady***"; it is true that "***The First Lady unlike the Plaintiff, is not an elected official of Government or State House***"; it is fair comment to speculate on what the effect of the First Lady asking the Plaintiff to leave State House Mombasa would have on the President's presidency; it is fair comment to say that "***if (The First Lady) is going to order Ministers out of State House; she is going to alienate the President.***" The Defendants said that in so far as was necessary, they were going to rely upon the provisions of section 14 and 15 of the Defamation Act Cap 36 Laws of Kenya.

The Defendants said that since their activities are motivated by a sense of public duty and a desire to serve the Nation and they are never motivated by material gain in deciding upon their publication the article was published in the same manner as any other story and not in a prominent and sensational manner as alleged by the Plaintiff.

The Plaintiff, as a Cabinet minister and member of Parliament, the Defendants add, her actions are a matter of public Interest, Public concern and scrutiny. Kenyans as taxpayers have a right to know the whereabouts and activities engaged in by the Plaintiff in the discharge of her public duty. The Defendants are media operators, are exercising their constitutional rights in disseminating information with respect thereof to the Public. As such an injunction against them cannot issue as claimed or at all without derogating on their freedom of speech as enshrined in section 79 of the Constitution of Kenya.

The Defendants point out, and there is no evidence from the Plaintiff disproving this, that the Plaintiff has not made any attempt whatsoever to exercise her right of reply under section 7A of the Defamation Act to entitle the Plaintiff to be awarded, at the discretion of the court, an additional amount of damages together with the damages for defamation, if there were further evidence that the Defendants had failed or refused to publish the correction or the said reply or failed to give it the prominence required by section 7A.

In view of that failure by the plaintiff I may divert to look at subsection (7) of Section 7A which 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 the 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 regard to all circumstances of the case."

Compliance with section 7A aforesaid, should not be confused with what the Plaintiff says she did as stated in paragraph 12 of the plaint - making demand for apology and amends and giving notice of intention to sue. There is evidence confirmed by Plaintiff exhibit No.2, that the Plaintiff demanded an apology and admission of liability. There is no evidence she also demanded "**amends**" as stated in paragraph 12 of the plaint. Evidence has been adduced further by the Plaintiff that the Defendants ignored the demand for apology and admission of liability. Hence the filing of this suit.

In my opinion, I think this was a right case where a reply was relevant and reasonable and the Plaintiff ought to have exercised her right of reply under section 7A within fourteen days from the date of publication of the statement complained of. The section makes it mandatory that the right of reply "**shall**

not be exercisable after a period of six months from the publication of the relevant damaging material;” and that seems to suggest that leave of the court may be sought if the right of reply is intended to be exercised after the expiration of 14 days and before the expiration of six months.

Back to the defence of the Defendants, I said earlier that no evidence was adduced by the Defendants during the hearing to buttress their filed written defence. However the Defendant’s Advocates filed written submissions stating as follows:

The Defendants contend that the Plaintiff is not entitled to the reliefs sought. In order to determine whether the words complained of, in their natural and ordinary sense tend to lower the reputation of the Plaintiff in the eyes of right thinking members of society, the court must look at the whole article to appreciate its full import and tenor as that is what a right thinking member of society would do.

The article was, in essence not so much about the Plaintiff as it was about exploring the extent to which the personal lives of prominent people in Public Offices affects the discharge of their public functions. The article was making a case for the proposition that what happens on President Kibaki’s domestic front can affect the way Kenya is governed and the reference to the Plaintiff was made only in passing, and it was one of the many examples cited by the publisher.

In particular, the articles sought to interrogate the role of the First Lady in a democratic state. In order to articulate the issue with greater clarity, the author poses the question whether it was true, for example, that the First Lady ordered Cabinet Ministers Martha Karua and Charity Ngilu out of State House, Mombasa, because she was incensed by the Vice President reference to her as Second Lady. The author went on to say **“Mrs. Kibaki (meaning the First Lady) is important because the marriage ring she wears was given her by President Kibaki, but unlike Ngilu and Karua, she is not an elected official of Government or State House.”**

The Defendant’s Counsel goes on to point out that understood in the context of the article as a whole, it is clear that the author is inviting the public to make available contribution to the important debate on the scope and obstacles of democracy in government, which is one of this Country’s constitutional principles, a debate which should be welcome in any civilized society.

It is further pointed out in the submissions that when viewed in the proper context, it is clear that the author of the article did not seek to defame the Plaintiff. On the contrary, it is apparent that the author’s view is that a Cabinet Minister, who has the legitimate, democratic mandate to access State House, should not be denied such access merely because the person so restraining her/him is the President’s wife.

The second Defendant does not say that the Plaintiff was actually ejected unceremoniously from State House, nor does he say that the Plaintiff had an argument with First lady. The article only poses the rhetorical question in order to steer a wider and more fundamental debate. The author simply uses the scenario to advance the argument. The truth or otherwise of the details of whether the incident actually transpired as reported is neither here nor there. It is immaterial. The submissions continue:

“The Defendants do not assert that the words are true, but it is submitted that whether they are false or not is NOT an important matter for Your Lordship’s consideration, as far as the issue evaluating the defamatory content of the words is concerned.”

I will rest there submissions filed by the Defendant’s counsel. I must say that each counsel has said more in respective submissions and I have the feeling my Judgment may not be easily understood if I were to include everything said on each side. I am however very grateful to both learned counsel for their canvassing and evaluation of the facts and evidence before the court, exposition of the relevant law and supply of useful material. In concluding this Judgment, I will be looking at all those things.

To start with, I note what counsel for the Plaintiff said in paragraph 4 at page 2 of her written submissions that

on the 4th January, 2004 the Plaintiff read an article in the Sunday Standard titled “*Bedroom Spells danger for Kibaki State House.*” The said article was on page 6 and was authored by the 2nd Defendant and it was closely related to the Headline of the paper, which was titled “*The First Lady had clashes with the Minister*” The headline story ran throughout pages 1,2,3,4,5, and culminated in the offending article on page 6 (Plaintiff’s Exhibit 1.)

That is what counsel for the Plaintiff said and related to that, the Defendants’ counsel in his written submissions also paragraph numbered 4 on page 2 says that in order to determine whether the words complained of, in their natural and ordinary sense tend to lower the reputation of the Plaintiff in the eyes of right thinking member of society, the court must look at the whole article to appreciate its full import and tenor because that is what a right thinking member of society would do.

Putting together what both learned counsel are saying, it follows that there wasn’t only a single article. There were other related articles which could be seen by eyes of right thinking members of society as those eyes run through pages 1,2,3,4,5, and 6 of the “**Sunday Standard**” dated 4th January, 2004. While counsel for the Defendants seems to have no regard for the other related articles and therefore confines himself to the article authored by the second Defendant from which the passage containing the words complained of were taken by the Plaintiff, counsel for the Plaintiff as well as the Plaintiff herself, recognize the presence of the other related articles but for the purpose of their case, have chosen to use a passage in one of the related articles; a passage and not the whole article, authored by the second Defendant. It is therefore the Plaintiff’s case that the court looks at the passage complained of only in order to decide that there was defamation. On the other hand, it is the Defendant’s case that the court looks at the whole article written by the second Defendant to decide whether there was defamation. I may then ask: how about the related articles which the eyes of the ordinary, reasonable, fair minded, or in short, right thinking member of society, have also seen? The articles are related and the right thinking member of society having read all of them because they are related and his eyes could not rest until after reading all the articles, would definitely come out with knowledge or opinion better than the knowledge or opinion conceived by a member of society who confined himself to the passage complained of only or confined himself to the article authored by the second Defendant only. Admittedly, however, the one who has read the whole of the article authored by the second Defendant is better informed than the one who has read the passage or words complained of only.

In the case of **Charleston and Another v. News Group Newspaper Ltd and Another (1995) 2 All E R 313**, it was unanimously held by the House of Lords that

“A prominent headline or a headline and photograph could not found a claim in libel in isolation from the related text of an accompanying article which was not defamatory when considered as a whole, because it was contrary (i) to the law of libel for a plaintiff to sever, and rely on, an isolated defamatory passage in an article if other parts of the article negated the effect of the libel and (ii) to the principle that if no legal innuendo was alleged the single natural and ordinary meaning to be ascribed to the words of an allegedly defamatory publication was the meaning which the words taken as a whole conveyed to the mind of the ordinary, reasonable, fair-minded reader. Accordingly, a plaintiff could not rely on a defamatory meaning conveyed only to the limited category of readers who only read headlines.”

It was said that there is a long and unbroken line of authority the effect of which is accurately summarized in **Duncan and Neill on Defamation (2nd edition, 1983) p 13, para 411** as follows:

“In order to determine the natural and ordinary meaning of the words of which the plaintiff complains it is necessary to take into account the context in which the words were used and the mode of publication. Thus a plaintiff cannot select an isolated passage in an article and complain of that alone if other parts of the article throw a different light on that passage.”

That was a quotation in the judgment of **Lord Bridge of Harwich** who wrote the leading judgment in **Charleston And Another v. News Groups Newspapers Limited And Another** (ibid). He went on to say that the locus classicus is a passage from the judgment of **Alderson 13 in Chalmers v Payne (1835)**

2 Cr. M&M 156 at 159, 150ER 67 at 68 where it is said:

“But the question here is, whether the matter be slanderous or not, which is a question for the jury who are to take the whole together, and say whether the result of the whole is calculated to injure the Plaintiff’s character. In one part of this publication, something disreputable to the Plaintiff is stated, but that is removed by the conclusion; the bone and antidote must be taken together.”

His Lordship went on to say:

“It is often a debatable question which the jury must resolve whether the antidote is effective to neutralize the bone and in determining this question the jury may certainly consider the mode of publication and the relative prominence given to different parts of it. I can well envisage also that questions might arise in some circumstances as to whether different items of published material relating to the same subject matter were sufficiently closely connected as to be regarded as a single publication.”

In my view such questions as are envisaged in the last part of the above quotation have arisen in this case before me and that is why I earlier on posed the question:

How about the related articles which the eyes of the ordinary, reasonable and fair-minded member of society have also seen?

Those articles or news items relate to the same subject matter and in my view are sufficiently closely connected as to be regarded as a single publication to be considered as a whole in order to determine whether words in the passage complained of are defamatory.

From what has been brought before me, there is no evidence that the Plaintiff was at the State House Mombasa or even at Mombasa on the dates in question. There is therefore no evidence the Plaintiff was ejected from the State House Mombasa by the First Lady and no evidence that the Plaintiff ever had disagreement with the First Lady or anyone else at the State House Mombasa during the material time. The words in the passage complained of may therefore have been false in so far as they infer that the Plaintiff was at State House Mombasa but does that falsehood necessarily mean defamation? Were the words complained of defamatory?

I have indicated my view that quoting the passage complained of and assigning meanings to it or interpreting it outside the context of rest of the article written by the second Defendant may mislead into wrong conclusions. That is more so when the banner headline is superimposed over the passage complained of; and as I have also indicated the same misleading result may occur if the article written by the second Defendant is assigned meanings or interpreted in isolation from the other articles or news items on pages 1,2,3, 4 and 5 closely connected with the second Defendant’s article on page 6. They were all about President Kibaki and his presidency.

The lead banner headline in the “***Sunday Standard***” on that day 4th January,2004 was:

“Questions Over Kibaki’s health”

That was authored by the “***Sunday Standard Team***” who had something to say about the President’s health. That formed the lead news item or article in that day’s “***Sunday Standard***” and also about President Kibaki whose photograph was printed just below the banner headline on the left hand side of the first page as the news item was started on the right hand side of the page also below the same banner headline so that the news item was started on the left hand side of the President’s photograph.

Below the President’s photograph there was an article authored by Mr. Dennis Onyango under a banner headline smaller than the lead banner headline and giving the impression that it is under the umbrella of the lead banner headline. Mr. Onyango’s banner headline said:

“---as First Lady Clashes with Ministers”

and I must remark here that in the lead banner headline news item on page 5 in the first paragraph under a very small heading using the word “Failed”, on the left side of the late Vice President Michael Wamalwa’s photograph, the **“Sunday Standard Team”** advised readers to see a separate story for what happened when the President failed to preside over a scheduled function in Mombasa there being allegations he was barred by the First Lady from leaving State House for the event. The separate story advised must have been the one authored by Mr. Dennis Onyango seen from the front page of the said **“Sunday Standard”** and I now move to Mr. Dennis Onyango’s said article.

The article started with the ceremony at the State House mombasa on the last evening of the year 2003 to welcome the new year 2004 when Vice-President Moody Awori’s innocent tongue slipped and referred to the First Lady as the second Lady, and the article points out that though the Vice-President good-naturedly apologized instantly, the slip of his tongue spoilt the New Year’s Eve party.

Mr. Onyango went to say that the New Year’s Eve came **“after days of altercations and harassment reportedly meted out to top State House Staff by the First Lady who is said to have been furious most of December over the role of the President’s second wife Mary Wambui, and the way presidential aids and Ministers close to him have been running his itinerary and his Presidency”**.

The article continued:

“On December 30th, Lucy had another bitter altercation with Health Minister Charity Ngilu when she went to escort him to an event he was to preside over.

She had gone to confirm the President’s itinerary when the First Lady put her foot down and dared them to take the President to any function. It was real drama; a source said.

Consequently, the President failed to turn up at the Coast Provincial General Hospital to mark one year in office last Tuesday. All arrangements had been made; including security detail being dispatched. Dignitaries had taken their seats at the high table. The red carpet had been rolled out, upto the first floor of the Pediatric Ward where the President was to present gifts. Then the Coast Provincial Commissioner, Mr. Cyrus Maina, drove in to deliver the news that the President would not attend.

Sources said the incident with the Ministers was the climax of weeks of rage on the First Lady’s part after Mary Wambui acquired quasi-official public status following the exclusive publication of her interview in the Sunday Standard three weeks ago.

Several State House aids have earned the First Lady’s wrath for allegedly defending or siding with or acting for her co-wife.

Thoroughly disgusted, one Minister is said to have left the seaside town ahead of schedule.”

The article goes on to say more about the First Lady in relation to Ministers, Mrs. Mary Wambui also referred to as Mary Kibaki, the President’s aids and associates, the then State House Comptroller Mr. Matere Keriri and the President’s personal assistant Mr. Alfred Getonga including:

“Sources say she is partly responsible for paralyzing State House in the raging battle for turfs between various factions.

Sources say Lucy has tried to assert her authority in State House and has disagreed with the

President's close associates not only on personal but also on significant political issues like the divide in the coalition."

As it can be seen, the news item by the "***Sunday Standard Team***" and the article by Mr. Dennis Onyango did not concern themselves only with what happened at State House Mombasa during the material time. They also concerned themselves with what happened at the State House Nairobi and elsewhere concerning the President and his presidency as affected by the conduct of the First Lady apart from the President's own health problems.

Mr. Dennis Onyango's article ended on page 5 under a further small heading:-

"Lucy clashes with Ministers"

and the article talked about those clashes without mentioning the Plaintiff in particular. The only Minister mentioned by name was Health Minister, Hon. Charity Ngilu as already seen earlier.

The Second Defendant's article on page 6 came in as a comment on Mr. Dennis Onyango's article, and could have been also on the other related articles seen, like the one on the President's health by the "***Sunday Standard Team***," and the articles not seen like the ones kept away from this court in this suit.

From the material before me, it is not clear how the Second Defendant included the Plaintiff's name in the question the Second Defendant posed in the words complained of. He was not before this court to give the court his evidence on that issue. He may have got the name from the articles on material not brought in court in this suit.

But as I have said, the article was a comment. It was brought under an attractive small banner headline, namely,

"Bedroom Spells danger for Kibaki State House"

Read that banner headline together with the words complained of only. Your opinion is likely to be coloured and you may come out with a different opinion from the opinion of the person who will read that banner headline together with the whole article under that headline, and better still, together with Mr. Dennis Onyango's article, the Sunday Standard Team's news item, and perhaps, also together with the kept away articles. In so far as it is of material assistance in this case, the following is what the Second Defendant said:

"President Kibaki's State House is taking a battering straight from its own bedroom.

It goes without saying that when State House suffers, the President's image, too, comes under close scrutiny and, needless to say, this distracts the President's attention from governance.

It is why the President must deal urgently with a turf war that has erupted between his wife and the Comptroller of State House, Mr. Matere Keriri.

Mrs. Lucy Kibaki wants Keriri out of State House and that not only invites attention to the First Lady and the Comptroller, but also to President Kibaki's administration and family life.

Strictly speaking, the President's position here is tricky. Keriri is accused by Mrs. Kibaki of being too close - for her comfort of course - to the President's second wife, Wambui."

The article goes on to say something more about Mr. Keriri and the President and Wambui including:

"About Wambui, the President, like most men in public life, would much rather their relationship remained away from the headlines, both print and electronic.

There is that awkward thing about the public becoming interested to know how the President treats Wambui and her children and whether they are also to be treated as First Family.

And then there is Lucy. Why is Mrs. Kibaki important in this our country? Because she is married to President Kibaki, which is why she is referred to as the First Lady and theirs as the First Family.

The First Family is important because it not only has the President in its number, but it is supposed to act as a role model for the rest of the country.”

The article goes on talking about the First Family and the Presidency adding:

“The way the First Family carries itself is a matter of national importance and the way, therefore, Mrs. Kibaki treats the President becomes a matter of national concern.”

The author chips in humorous remarks concerning a jab by his wife on his own bald head as compared with a jab by the First Lady on the President’s head and continues:-

“It is to the First Lady, the country reckons that the President should turn after a hard day at his desk and in the political arena for peace and quiet to prepare him for the following day’s work.

Some would say that this puts the First Lady in a very important position in as far as influencing his reactions to what has gone on and what is to go on is concerned.

To put it bluntly, what happens on President Kibaki’s domestic front can affect the way Kenyans are governed. I am not persuaded that the President can completely shut out an encounter such as the one I have alluded to above and concentrate exclusively on matters of State.

Nobody would believe President Kibaki if he were to claim that his working mind is so compartmentalized his ‘domestics with Lucy’ do not affect his work.

Similarly, the President would be fooling himself if he reckoned this would not be of profound interest to his political opponents.”

Then follows the passage with the words the Plaintiff is complaining about in this suit. They start with a question:

“Is it, for example, true that Mrs. Kibaki ordered Cabinet Ministers Martha Karua and Charity Ngilu out of State House, Mombasa, because she was incensed by the Vice-President’s reference to her as Second Lady?

Mrs. Kibaki is important because the marriage ring she wears was given her by President Kibaki, but, unlike Ngilu and Karua, she is not an elected Official of Government or State House.

If she is going to order Ministers out of State House, she is going to alienate the President. It must be remembered here that President Kibaki appears to have made State House his office of choice.”

The passage with the words complained of by the Plaintiff ends there, but the Second Defendant's article continues:-

“He has not set foot at Harambee House since he was elected last year, preferring instead to deal with matters of State from State House.

So, how will the President deal with Keriri and Wambui on the one hand, and Keriri and Lucy on the other? I do not have Solomonic wisdom to prescribe, but I am certain he would much rather it were settled quietly.

And this I know. The President would much rather this column was about the controversy about his pronouncement that Narc affiliate parties are obsolete.”

That is the end of the Second Defendant's article. I have said the article was a comment on the contents of the other related articles and may now add that the comment appears to be more particularly on what Mr. Dennis Onyango wrote in his aforementioned article. As a comment, the Second Defendant's article was provoking debate from readers of the **“Sunday Standard”** especially what he said following the question he posed at the beginning of the passage complained of by the Plaintiff.

That comment, in my view, did not suggest in any way that any Cabinet Minister had been, or had attempted to be, in a bedroom at State House either Mombasa or Nairobi or anywhere else.

According to the article, those of or in the bedroom at State House were the First Family. They were the ones spelling danger

“for Kibaki State House”

and the article endeavoured to explain why that was so. In that endeavour, the article advanced a case in favour of Ministers pointing out they are democratically elected members of Parliament, appointed by the President, to be Cabinet Ministers and therefore entitled to walk in and out of State House, whether at Nairobi or Mombasa or anywhere else where the President may be, in the performance of their ministerial duties as the President was using State House as his office of choice and was not therefore going to his Harambee House office where Ministers could have been going to see him instead of going to State House to see him. Since that was the position, the article argued - that First Lady was not entitled, for any reason, to obstruct the Ministers from performing their official duties with the President at State House. As the Defendant's Counsel rightly put it,

“- - - the author's view is that a Cabinet Minister, who has the legitimate, democratic mandate to access State House, should not be denied such access merely because the person so restraining her (or him) is the President's wife.”

In that article, the author did not advance a case in favour of Ministers only. He also advanced a case in favour of other officials of the State such as Mr. Matere Keriri, then the Comptroller of State House.

Looked at that way, I am not persuaded to agree that the Plaintiff has proved that the single natural and ordinary meaning to be ascribed to the passage complained of by her, when looked at as a whole in their context, convey to the mind of the ordinary, reasonable, fair-minded reader that they are defamatory of the Plaintiff. I do hold that the Plaintiff has not succeeded in proving that the words complained of, in their natural and ordinary sense tend to lower the reputation of the Plaintiff in the eyes of right thinking members of society.

The words complained of started with a question which the author commented upon. That question remains a question to date and despite the evidence which has been given by the Plaintiff that she was not at the State House Mombasa or in the city of Mombasa at that time, there is no reasonable basis from which this court can say now that by that question the Second Defendant was saying that the Plaintiff was definitely at the State House Mombasa or was at Mombasa and that the plaintiff was definitely

unceremoniously ejected from State House Mombasa because the Plaintiff was definitely unwelcomed and unwanted there, having imposed her pressure upon the First Lady. That is what the Plaintiff claims to be as seen from paragraph 5 of the Plaintiff. I am saying it is not so.

But even if this court were to accept that the Second Defendant said what the Plaintiff attributes to him in paragraph 5 of the Plaintiff, the position would not change because according to the articles I have referred to in this judgment, there were Ministers actually ejected by the First Lady from State House, either Mombasa or Nairobi, and those Ministers were not being so ejected in a gentle, friendly way and ejections were not being made because the First Lady felt that the Ministers were nice and friendly people to her. She was definitely nasty to them and the Plaintiff would perhaps have been an exception had she been one of the actual ejectees. But that would not have meant that the Defendants would have defamed the Plaintiff bearing in mind what I have been saying about the relevant articles including the passage complained of from the Second Defendant's article. It was that kind of behaviour by the First Lady towards Ministers that prompted Defendants in this suit report the matter, taking upon themselves the task of defending Ministers and therefore coming up with a good case in favour of those Ministers and against the First Lady. There would be no defamation in that on the part of the Defendants.

Looking at what is contained in the Plaintiff's submission at page 3 under the heading Burden of Proof, it is true the Defendants published the words complained of which refer to the Plaintiff. It may be true the words were published in a conspicuous place if page 6 inside a newspaper is conspicuous; and it is true the words were published in a sensational manner bearing in mind the banner headline. It is true the Defendants published no apology which was tied to the requirement for admission of liability. But from what I have been saying about the words complained of, what was the apology and admission of liability for? What was malicious about the publication which aimed at vindicating Ministers case, including the Plaintiff's, against the First Lady? In doing so the Defendants may have said the Plaintiff was at Mombasa when the Plaintiff was not at Mombasa. That may have been a mistake or even a falsehood on their part. But where is malice and particularly libel in the circumstances of this case? I see neither. I do not find, in the words complained of a meaning that the Plaintiff is unworthy of being an advocate or unworthy being a Minister or unworthy of holding a public office.

Having said what I have already said about paragraph 5 of the Plaintiff, the averment about an innuendo as stated in paragraph 6 of the Plaintiff does not stand, that averment having been based upon paragraph 5 of the Plaintiff.

In conclusion, failure by the Plaintiff to prove libel or defamation means that none of the prayers in paragraph 14 of the Plaintiff can be granted. That is to say, no aggravated or exemplary damages; no general damages; no apology; no permanent injunction and no costs and interests. That is because I will dismiss the Plaintiff's case in total.

But in case it is held that I should not have dismissed the Plaintiff's case, I would have granted the Plaintiff the following, bearing in mind the circumstances of this case and the relevant case authorities cited on both sides:

General damages Kshs.1,500,000/=. On Aggravated or Exemplary damage, the Plaintiff is asking for this because of the Defendant's failure to apologize an apology which was tied to an admission of liability. The Plaintiff wanted that done through letter and there is evidence to that effect. As seen earlier there is no evidence that the Plaintiff attempted to exercise her right of reply under section 7 A(1) of the Defamation Act. Had she exercised her 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, her case for aggravated or exemplary damage would have been clear. There is no acceptable evidence for malice. No 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 she cannot get under section 7A. She is relying on 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. 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 today 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 of apology. I would not therefore have awarded the aggravated or exemplary damages.

With regard to prayer C, demanding an apology, from what I have just been saying in the previous paragraph and in view of the fact that I would have awarded general damages, I would not have granted prayer (c).

Prayer (d) seeks a permanent injunction to restrain the Defendants jointly and individually, by themselves, their servants and or agents from publishing or continuing to publish articles libelous to the Plaintiff. With all due respect, I think that prayer is bringing into this suit extraneous matters – as this is a case in which there has been no evidence proving the imminent danger of republication of the passage complained of so as to entitle the Plaintiff to the injunction being prayed for.

Moreover, the Defendants are a print media and the case this court is handling is a defamatory case. Where an injunction has to be asked for therefore, parties have to address the issue fully on the relevant law appreciating the fact that the question of an injunction in defamation cases is treated in a special way. Here an injunction is not treated in the way it is treated in other civil cases because defamation cases have special law relating to the granting of injunction which law must be applied in addition to the law applied in other Civil cases because generally and basically, actions or cases of defamation bring out a conflict between private interest and public interest, and this is more so in countries like Kenya where we have the Country's Constitution which has provisions to protect fundamental rights and freedoms of the individual including the protection of freedom of expression. I see no need to go deep into the matter here but will only state that from what is before me, I would not have granted the injunction prayed for in (d).

I would have awarded the Plaintiff costs of the suit and interest.

Having said the above, I go back to where I said I was going to dismiss this case in total. I need add nothing. Accordingly the Plaintiff's case is hereby dismissed in its entirety with costs to the Defendants.

Dated at Nairobi this 24th day of April 2007.

J. M. KHAMONI

JUDGE