



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA**

Civil Case 261 of 2002

ALICE WAMAITHA MWANGIPLAINTIFF

VERSUS

NATION MEDIA GROUP LTD.DEFENDANT

(CMCC 59 OF 2001)

J U D G M E N T

By a plaint dated 12th January 2001 filed before the C.M.'s Court Mombasa, Alice Wamaita Mwangi, the plaintiff, sued the Nation Media Group Ltd., the defendant herein, in which she claimed General and Exemplary damages for libel. It was alleged that the defendant had published in its 'Taifa Leo' publication of 20th November 2000 some defamatory matter against the plaintiff. On the 16th day of April 2002 the parties recorded a consent before Justice D.A. Onyancha withdrawing the suit from the Chief Magistrate's Court and transferring the same to the High Court for hearing and determination. Pursuant to leave granted on 21st March 2006, the plaint was amended thus introducing the English translation of the Kiswahili words printed on the Taifa Leo Publication of 20th November 2000.

At page 8 of the aforesaid publication the plaintiff allege that the defendant falsely and maliciously wrote an article which read as follows:

"Taxis owners are spreading venereal diseases in Nairobi Contrary to normal expectation, prostitution and some or their clients have now decided to hire taxis for the purpose of engaging in sex. SILAS OKORA reveals the story.

Prostitution has taken a scary turn due to the use of taxis in some streets of Nairobi city brothels for engaging in sex.

Disappointed by that kind of behaviours, a group of medical officers have asked the government to arrest such taxi owners as one way of curbing venereal diseases, especially HIV/AIDS amongst city dwellers.

..... All in all the taxi owners contribute in the spread of venereal diseases because of those some financial reasons: The use of the taxis has gone down to the extent where I do not see anything wrong with hiring my car for five minutes or so as long as I am paid my money ..."

The aforesaid words were published alongside the plaintiff's photograph. It is averred by the plaintiff that the aforesaid words as read together with the photograph in their natural and ordinary meaning were understood to mean that the plaintiff is of an immoral character and that she is living on the earnings of prostitution, hence she has since then been greatly injured in her character credit, reputation, her role as a parent and business woman and has been brought into hatred, ridicule and contempt before right thinking

members of society and has suffered considerable distress and embarrassment.

The defendant on its part filed a defence denying the plaintiff's claim. When the suit came up for hearing the plaintiff tendered the evidence of three witnesses. The defendant did not offer any evidence. Alice Wamaitha Mwangi (P.W.1) told this court that she is a taxi driver and owner operating within port area in Mombasa. She said she started to operate her taxi business in 1998 with motor vehicle registration number KVA 353 Make Datsun 120Y followed by KAD 587Z and currently KAM 086F. She said on the month of May 2000, she received some unusual attention from members of the public as she drove to and from her place of work. She was later given a copy of the Taifa Leo publication which had the offending words alongside her photograph. She produced it as an exhibit in evidence. She said she visited Mombasa Branch offices of the defendant to complain to the defendant's representative one Njuguna Mutonye. She said the defendant's representative became arrogant to her. Again in the month of November 2000 the same publication published her photograph in its Taifa Leo Edition of 20.11.2000 in an inner magazine dated 16.11.2000. She produced a copy of that issue as an exhibit in her evidence. She said her photograph was used in a page concerning reports to the effect that taxis are being used as lodging for prostitution hence contributing to the spread of HIV/AIDS. It is her belief that her photograph was associated with that story. She then instructed her advocates to demand for an apology and payment of damages. She said as a result of the story she stopped operating her taxi business for between 4 to 5 months. She claimed that the story affected her son whom she had to transfer from one school to another to avoid embarrassment visited on him. She stated that the publication affected her reputation and business and was even forced to relocate from Makupa where she was living to another area due to the publication.

P.W. 1's son Peter Mwangi Wamaitha a boy aged 9 years testified as P.W. 2. He told this court that he was shown her mother's photograph while he was in school. He said the watchman had the newspaper. The boy said he was subjected to so many questions as a result of her mother's photograph which appeared in a newspaper. He said shortly he was transferred to another school. Margaret Wambui Wainaina (P.W. 3) confirmed having read the story appearing alongside p.w.1's photograph in Taifa Leo Newspaper. P.W.3 said she was a very close friend to P.W.1 who operated a taxi business. She said the story was damaging in that it stated that taxi drivers turned their vehicles into commercial sex dens. She said the story and the photograph was widely discussed by many people who knew Alice Wamaitha (P.W.1)

At the end of the evidence, learned advocates appearing for both sides were invited to file written and to subsequently make oral submissions. From the evidence and the submissions I think the following issues arose for my determination. First is whether or not the story and the photograph appearing in Taifa Leo of 20.11.2000 was libelous to the plaintiff? Two, whether or not the plaintiff is entitled to damages and how much?

Let me start with the first issue. The defendant does not deny publishing the plaintiff's photograph alongside the offending story. No doubt the photograph has been identified as that of the plaintiff. The question which must be answered in this judgment is whether the story was libelous to plaintiff. I agree with the submissions of Mr. Gikandi for the plaintiff that the plaintiff's photograph is so prominent that anybody reading the said story and who knows the plaintiff cannot have any doubt that the defendant's story though it never named the plaintiff refers to in particular to the plaintiff and no body else. The story associated the plaintiff with sexually transmitted diseases such as HIV/AIDS. She was also associated with living on the proceeds of prostitution which is a criminal offence. This cannot afford the defendant the defence of fair comment. In any case the defendant never called for evidence to prove that the publication was a fair comment. I find the publication to be libelous to the plaintiff hence the defendant is liable. Having come to the conclusion that the defendant is liable for the tort of libel, it is now time to consider the second issue as to what is the amount of damage which the plaintiff should be awarded.

Mr. Gikandi, the learned advocate for the plaintiff has urged this court to award the plaintiff a sum of Kshs.20,000,000/- as damages. The learned advocate referred to Mombasa H.C.C.C. 102 of 2002 **Daniel Musinga =vs= Nation Newspapers Ltd.** in which the plaintiff who was by then an advocate of this court before being appointed a judge of this court, was awarded Kshs.10,000,000/-. This court was also urged

to make an award similar to the one given in Nairobi **H.C.C. NO. 1709 of 1986 J.P. Machira =vs= Nation Newspapers Ltd and Another** in which this court awarded the plaintiff who is an advocate of this court an award of Kshs.10,000,000/-.

Mr. Ndegwa, learned advocate for the defendant was of the view that the awards made in the cases cited by the plaintiffs advocate were not commensurate with the status of the plaintiff. He proposed an award of between Kshs.200,000/- to Kshs.500,000/-. I have considered the rival submissions over this issue. I agree with the submissions of Mr. Ndegwa that the authorities cited by the plaintiff cannot be used to guide this court on the amount of award to be made because the status of the plaintiffs in those cases are totally different. The plaintiff herein was and is not an advocate of this court. However the awards proposed by Mr. Ndegwa are too low. I have considered the authorities with near similar facts to this and I am of the opinion and so hold that an award of Kshs.2,500,000/- is a fair award.

In the end I enter judgment for the plaintiff and against the defendant in the sum of Kshs.2,500,000/- as damages for libel with costs to the plaintiff.

Dated and delivered at Mombasa this 7th day of September 2007.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Gikandi for plaintiff and Mr. Kibara h/b Ndegwa for Defendant.