



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

MILIMANI LAW COURTS

Civil Suit 1099 of 2004

RICHARD OTIENO KWACH PLAINTIFF

VERSUS

THE STANDARD LIMITED 1ST DEFENDANT

DAVID MAKALI 2ND DEFENDANT

JUDGMENT

1. Introduction

The banner headline in the Sunday Standard issue of 19th October, 2003 read:

“Secrets of the Ringera Report”

The purpose of this front-page article was to expose the wrongdoings of allegedly corrupt members of the Judiciary.

Some 23 Judges had been suspended pending investigations on 15th October, 2003 – only four days prior to the publication of the article which is the subject of complaint before this Court. That article opened with the following four paragraphs:

“Like crime fiction based on the activities of the underworld, Justice Aaron Ringera’s report on corruption and the misconduct of judicial officers is a compelling mixture of dark humour and cruel betrayal by custodians of justice, we can now reveal.

Although none of the 23 judges suspended from their duties pending investigations by two tribunals has admitted being notified of their misdeed, few are likely to survive a full hearing if they contest allegations against them.

The corruption and unethical conduct enumerated in Ringera’s “dragon” range from the shocking to the preposterous. Some judges are accused of openly taking sides in cases before them. Others allegedly took it upon themselves to advise litigants to change advocates if they hoped to win.

In the more macabre cases, some judges openly solicited bribes, which they personally went to fetch from their victims in parking bays and lobbies of Five-Star hotels in the wee hours of the morning”.

The story then continued on pages 2 and 3 where the article narrated various allegations relating to 15 unnamed and allegedly corrupt Judges. Page 2 carries the picture of Retired Justice of Appeal A.B. Shah with a caption:

“Mr. Justice Amritlal B. Shah leaves the Nairobi Law Courts, after he was suspended”,

while page 3 carries the picture of the Plaintiff with the caption

“LOUD SILENCE: Appeal Judge R.O. Kwach”.

The Plaintiff, Richard Otieno Kwach, was, at the material time, a senior and long serving Judge of Appeal. The First Defendant was, and still is the publisher of the Sunday Standard, while the Second Defendant was, at the material time, its editor.

2. The Plaintiff’s Pleadings

In a Plaint dated and filed 15th October, 2004 the Plaintiff states, in relevant part, as follows:

“4. At page 2 of the Sunday Standard issue No. 1237 of 19th October, 2003 under the heading “This is how low the Judiciary had sunk” the Defendants and each of them falsely and maliciously printed and published or caused to be printed and published the following words defamatory of the Plaintiff:

“Judge 1

In the case of this Judge the Ringera Committee received a complaint that the judge allegedly advised the respondents in a civil suit to change their advocates because the judge did not wish to deal with the firm that he was representing. The judge then asked for Kshs.3m to dismiss the application. The money was paid in two installments. The first installment at the basement parking of the Hilton Hotel in November 2000 at 12.15 a.m. The final installment of Kshs.1 million was collected by the judge personally from the Hilton Hotel reception on November 30, 2000 at 7.30 p.m. The judge proceeded to dismiss the application against the respondents as promised, which amounted to direct corruption. The judge also faces two other complaints, which amount to misconduct or misbehaviour. One complaint was made against the judge in a civil appeal outside Nairobi in which the judge allegedly called the Advocate in Chambers and urged him to drop the appeal. The judge remarked in open court, that the advocate’s clients were “killing my people” and were not paying damages. In the other complaint, the judge is said to have humiliated an advocate in open court, which constituted judicial misbehaviour.”

5. Along with the words set out in the last preceding paragraph, the defendants also published the Plaintiff’s photograph under the caption “LOUD SILENCE: Appeal Judge R.O. Kwach.”

6. In their natural and ordinary meaning the said words meant and were understood to mean –

(a) The plaintiff is a corrupt person who was not fit to be a judge.

(b) The plaintiff corruptly used his position as a judge to solicit bribes from litigants to line his pockets.

(c) The plaintiff was corrupt and dishonest and abused his office by selling justice.

(d) The plaintiff denied parties their constitutional right to representation by counsel in court.

(e) The plaintiff solicited bribes from litigants whose cases came before him.

(f) The plaintiff’s temperament and behaviour rendered him unsuitable to hold the office of a judge.

7. Further or alternatively the words bore and were understood to bear the meaning pleading in paragraph 6 by way of innuendo.

Particulars Under Order VI rule 8

The defendants knew that the issue of corruption was a very emotive matter which had generated heated exchanges in the Constitutional Review exercise among the Delegates, the legal profession and the public.

8. The said words were calculated to disparage the plaintiff both professionally and socially.

9. In consequence the plaintiff's reputation has been seriously

Damages (sic) and he has suffered distress and embarrassment”.

3. The Defendants' Pleadings

The Defendants, in a Statement of Defence dated and filed 2nd December, 2004, stated, inter alia, as follows:

“3. The Defendants admit that they published the words set forth under paragraph 4 and 5 of the Plaintiff, but deny that they did so falsely or maliciously, either as alleged in the Plaintiff or at all.

4. The 1st Defendants (sic) deny the contents of paragraph 6 (a) to (f), 7 & 8 of the Plaintiff and further denies that the words complained of bore or were understood to bear the exaggerated meanings set in paragraphs 6 (a) to (f) of the Plaintiff. The Defendants state the words complained of were not directed at the Plaintiff and deny that they were understood to have been directed at the Plaintiff. The Defendants deny that contents of paragraphs 6(a) to (f), 7 & 8 of the Plaintiff in their entirety.

5. The Defendants deny that the words complained of were of and concerning the Plaintiff that they referred to were understood to refer to the Plaintiff. The Plaintiff's name forms part of the article in question and the words complained of in the plaintiff are not directed at the Plaintiff.

6. Without prejudice to the foregoing the Defendants will aver that the words complained of were published as fair information on a matter of public interest, bona fide and without malice, in the honest belief that the words were true. The occasion is therefore privileged.

7. The Defendants deny that the Plaintiff's reputation has been seriously damaged or that he has suffered distress and embarrassment as a result of the article and puts him to strict proof thereof”.

4. Issues

The parties have agreed on the following issues of dispute:

1. Did the Defendants falsely and/or maliciously print and publish or cause to be printed and published the words set fourth in paragraph 4 of the plaintiff?

2. Were the words set fourth in paragraph 4 and 5 of the plaintiff directed and/or understood to have been directed by way of innuendo or otherwise refer to the person of the Plaintiff?

3. Were the words complained of published as fair information on a matter of public interest, bona fide and without malice in a belief that the said words were true and thus privileged, or were the words calculated to disparage the Plaintiff both professionally and socially?

4. *Was the Plaintiff's reputation seriously damaged and did the Plaintiff suffer distress and embarrassment as a result of the article?*

5. *Is the Plaintiff entitled to aggravated or exemplary damages and general damages?*

6. *Is the Plaintiff entitled to costs of the suit?*

7. *Evidence & Findings*

The Plaintiff presented three witnesses. The Defendants presented none. Accordingly, the only evidence before this Court is that of the Plaintiff, and it is uncontroverted.

In his testimony before this Court, the Plaintiff, aged 62, and married with five children, outlined his early life and education at Alliance High leading to admission at the University of Dar-es-Salaam to study law; his admission as an Advocate of the High Court of Kenya

69; appointment of Assistant Counsel to the then East African Community; practice of law first with the law firm of Harrison, Hamilton & Mathews, and later with Ndungu, Njoroge & Kwach until 1988 when he was appointed a Judge of Appeal, a position he occupied until his suspension on 15th October, 2003. Narrating his rich and eminent professional history, the Plaintiff singled out for mention his participation at the International Visitors Program at the invitation of the United States Department of State in 1988 and the various fact-finding Committees and Commissions that he headed or served on including the Committee to investigate Corruption in the Judiciary; the Rules Committee; the International Civil Aviation Organization; and the Commission of Inquiry into the death of the late Foreign Minister Ouko, appointed by The President of the Republic of Kenya.

The Plaintiff further testified that amongst his peers are several Judges in both the Court of Appeal and in the High Court of Kenya. Amongst them are the Chief Justices of Kenya and Uganda, and a former Prime Minister in Tanzania and presently serving as a Judge in the East Africa Court of Justice.

The Plaintiff testified that Wednesday 15th October, 2003 was a sad day for him. He was at the gym at Norfolk Hotel in Nairobi. It was 7 pm. He was on the tread mill. The room was full of people. The Kenya Television Network, which is part of the First Defendant's company, began to air the 7 pm news. His was the first photograph to be flashed on Television, alongside the news that several Judges had been suspended. **"The room went dead. I just left people looked sadwhen I arrived home, the scene there was as if someone had died. I was shocked. My friends and relatives were there. They asked 'what happened'? I had no answer,"** said the Plaintiff.

Then, four days later, on Sunday, 19th October, 2003, the Sunday Standard, a publication of the First Defendant, published a front-page story under a bold headline: **"Secrets of the Ringera Report."** The article continued on pages 2 and 3 under the heading: **"This is how low the Judiciary had sunk."** Details of allegations against 15 Judges were outlined, under sub-headings: "Judge 1", "Judge 2" etc., without actually naming any Judges. However, page 2 carried a picture of Mr. Justice (Rtd) A.B. Shah, while page 3 carried the picture of the Plaintiff with the caption: **"LOUD SILENCE: Appeal Judge R.O. Kwach."**

The Plaintiff gave evidence that having read the case studies of the 15 Judges (by numbers), he was able to identify, by a simple process of elimination, that the Case Study no. 1 was a malicious reference to him. And together with his picture on page 3, and the "sensational" caption, it was intended to show that he was one of the corrupt Judges.

Soon after this publication, the Plaintiff testified that he was "bombarded" with phone calls from friends and relatives expressing shock. These included Professor Shem Migot Adholla, who was in Malawi at the time, and Mr. James Orengo, Advocate. The Plaintiff swore that these allegations are completely false, and that he had never received any bribes in his entire career. He said that as a result of this publication, everyone shunned him; that as a Judge his name and integrity was his capital, stock-in-trade,

and goodwill; that it had been irreparably wounded, and that he would always be “the Judge who was removed for corruption.”

The second witness before this Court was Professor Shem Edwin Migot Adholla who has a PhD in Sociology from the University of California, LA, and who is now a private Consultant. He is a long-standing friend and peer of the Plaintiff, and testified that when he saw the Plaintiff’s picture in the middle of the offending story, he concluded immediately that the Plaintiff was among the 15 Judges whose case-studies had been outlined in the article. He soon realized that the case-study under “Judge No. 1” was a reference to his friend, the Plaintiff, and that the esteem in which he had held his friend got seriously affected, and he felt betrayed. This is what he said:

“Upon immediate reading of the paper I knew that one of the descriptions referred to Judge Kwach because his photo was on page 3 and the caption said “loud silence” for a man who I knew to be loud. My esteem of him was affected. May be I did not know him. May be I was naïve. I felt betrayed. I did not expect this kind of behaviour. Do I want to be associated with him?”

The third witness, Mr. James Aggrey Orengo, Advocate, who described the Plaintiff as a learned Judge and an “inspiration” to him from his childhood days, testified that the inclusion of the Plaintiff’s picture with the offending story led him to the conclusion that the Plaintiff was one of the 15 Judges referred to in the Sunday Standard. When he read and analysed the story, and by a simple process of elimination, he concluded that the case-study under “Judge No. 1” referred to the Plaintiff. According to him, several of his colleagues had come to a similar conclusion. He said he believed the story, “the Standard being the oldest newspaper”. As a result of what he read, his respect for the Plaintiff vanished, and he felt let down. To him, the words “Loud Silence” in the caption meant that the Plaintiff had been approached to make a comment, but had said nothing. “For a man of many words that the Plaintiff is, this meant that his silence was telling,” concluded the witness.

6. Findings, Law, and Conclusion

Let me now turn my attention to the six issues identified for determination, and provide my Judgment on each one of them individually.

I find the facts to be as per the summary of evidence given by the three witnesses and outlined hereinbefore. As the defence chose not to call any witnesses, the Plaintiff’s evidence is uncontroverted. The following is my determination, and the reasons for my Judgment on each issue:

The first issue is whether the Defendants falsely and/or maliciously printed and published or cause to be printed and published the words set fourth in paragraph 4 of the Plaintiff?

The Plaintiff, in his written submissions, has argued that placing his picture in the middle of the offending article, with a sensational caption “Loud Silence: Appeal Judge R.O. Kwach”, with the Case Study on “Judge No. 1.” constituted a malicious reference to him. The Defence, in their written submissions, argue that none of the accused Judges have been referred to by name in the offending articles. The names of only two Judges (Judges Shah and Kwach) appear, as part of the captions under their pictures. According to Ms. Dar, Counsel for the Defendants,

“inclusion of the photographs of the Plaintiff and Justice A.B. Shah within the article was as a result of the suspension of the two following the making of the Ringera Report. The fact of the Plaintiff’s suspension as a judge is borne out by his admission in cross-examination that he was one of the judges suspended pursuant to the Ringera Report.”

So, then, if the purpose of including the pictures of the two Judges was simply to tell the readers that the said Judges were “suspended” and no more, **the caption could have said exactly that, and no more. Why the caption: “Loud Silence”?**

Ms. Dar further argues that the Plaintiff’s claim is not founded on the fact that his photograph was printed

within the article:

*“A reading of the **Plaint** reveals that the **Plaintiff’s claim** is not founded on the fact that his photograph was printed within the article: the **Plaintiff does not allege** that the mere fact that his photograph was printed within the article was defamatory; rather he alleges that he was the subject of the words complained of and the printing of his photograph along with the words complained of was defamatory.”*

In my view, Ms. Dar’s argument is untenable, and intended only to split hair. Paragraph 5 of the **Plaint** clearly suggests that the publication of the **Plaintiff’s picture and caption alongside the words set out in the case-study relating to Judge 1**, constituted defamation. It is the whole article, and its context, alongside any pictures that must be seen collectively and in their totality to decipher possible mischief. (See Gatley on **Libel & Slander**, 9 Ed. (1988) states at page 97 (3.28)).

Having evaluated the arguments by both sides, the first question can be answered in two parts.

Firstly, that the **Plaintiff** has provided no evidence to suggest that the information contained in the offending article was and is false. The material was sourced from the Report prepared by a Committee headed by Justice Ringera (the Ringera Report) and I am convinced that the conveyance of the finding of the report was a matter of public interest and was done so in the honest belief that the facts of the report were true.

Secondly, on the issue of malice; while the report may well have been in the interest of the public, **the way in which it was conveyed was arguably reckless. The inclusion of the Plaintiff’s picture together with a caption that I find was, to say the least, “sensational”, alongside the various allegations, would no doubt instill a belief in the reasonable man reading the paper that the allegations referred to the Plaintiff.** The logic in this case, that pictures within an article are in fact connected to that article is simple. It seems that the Defence in this case cannot claim to be bereft of this simple logic, and as such, the inclusion of the **Plaintiff’s picture** within the article and the fact that he, the **Plaintiff** would be connected to the substance of the article ought to have been within their contemplation at the time. On these facts, if one can infer an intention to connect the **Plaintiff** with the stated allegations; and that the defence did so with the knowledge that this connection would result in harm; that there is no doubt that such an action would be malicious. In this case, given the facts, logic, and experience of the defence as a newspaper that convey information to the public that is trusted; their failure to exercise due caution in the publication of their article appears tantamount to malice.

On the **second issue of dispute**, as to whether the words in paragraph 4, and 5 referred to were directed at the **Plaintiff; I am of the opinion they did for two primary reasons.**

Firstly, while the defence has argued extensively that no reasonable person would have been able to identify ‘Judge 1’ of the case-study as the **Plaintiff, I am of the opinion that it is irrelevant as to which one of the fifteen judges in the article was in fact a reference to the Plaintiff. The article was published in a way that any of the judges could have been a reference to the Plaintiff, including ‘Judge 1’. The inclusion of the Plaintiff’s picture with an ambiguous caption “loud silence” gave no alternate explanation as to its purpose in the article.** It would, therefore, be a matter of commonsense that one of the judges in the article was in fact a reference to the **Plaintiff.**

Secondly, the purpose of the article when construed as a whole, and read in its entirety, was to discredit corrupt Judges. **The logical connection that anyone of those judges could have been a reference to the Plaintiff owing to the inclusion of his picture, and compounded by the overall purpose of the article, when read in its entirety, augment the Plaintiff’s submission that the words complained of did in fact refer to, and were directed at him.** It seems evident that the **Plaintiff** would be both socially and professionally embarrassed by such references and that they would have the effect of directly injuring his reputation both personally as well as in his profession. **Gatley on Libel and Slander** (supra) states that “words are defamatory if they involve a reflection upon the personal character or official ...reputation of the **Plaintiff.**” In this instance the very purpose of the article was to impute such references and it is clear that those references have been directed at the **Plaintiff. I believe that this**

answers the third issue in dispute. I would add only, that it is unfortunate that the defence did not care to elaborate further as to why the information was privileged aside from its source and their belief in the truth of the matters published. **It must be said, that even if the matters were true and the source credible, the fact that any of the allegations could have been attributed to the Plaintiff means that inevitably there would be false matters directed and attributed to him.**

The **fourth issue** is whether the Plaintiff's reputation was seriously damaged and whether he suffered embarrassment and distress as a result of the article. In response to this, I find that there is some merit in the defence that much of the embarrassment was as a result of the broadcasts that are not the subject matter of this Plaint. However, it seems evident to a reasonable person that a man accused of corrupt practices amounting to criminal behaviour within his profession by a major publication, in this case the defence, would be socially and professionally embarrassed and suffer distress. **I believe that his reputation would be, and was in this case, damaged given the fact that his friends testified that not only did they hold him in lower esteem following the publication, but actually avoided him.**

The **final issue** is whether the Plaintiff is entitled to aggravated or exemplary damages and general damages. In my opinion, when assessing damages the Court must look at the whole conduct of the Plaintiff and the Defendant from the time of the publication until the time of judgment. As I had the occasion to state in *Kipyator Nicholas Kiprono Biwott vs. Clays Ltd* (HCCC. No. 1067 of 1999) the Court will look at the conduct of the parties before action, after action, and in Court during trial. Malicious and insulting conduct on the part of the Defendant will aggravate the damages to be awarded. These "aggravated damages" are meant to compensate the Plaintiff for additional injury going beyond what would have flowed from the words alone, caused by the presence of aggravating factors. **In this case while the act of the Defendants was reckless it would be unjust to say that they committed an act which was manifestly malicious.** Furthermore, the Plaintiff did not exercise his right to an apology under Section 7A (1) of the Defamation Act which would have mitigated his losses had the Defendants acceded to his demands and published one. Also, following *Martha Karua v Standard Limited & Another* 2006 eKLR had the Defendants failed to produce such an apology, the case for aggravated and exemplary damages would be clear. Still, the recklessness on the part of the Defendants was at a level that I have already stated as being tantamount to malice albeit a less grave form of malice than had it been a clear unequivocal and intentionally directed attack at the Plaintiff before, during, and after action.

In *Sutcliffe vs Preseedram Limited* (1990) 1ALL ER 269 the principles on exemplary damages are made lucid. I am inclined to agree with Sir Thomas Bingham who stated that "Exemplary damages can only be awarded when the Defendant knew that he was committing a tort, or was reckless as to whether his action was tortious or not, and decided to publish because the prospects of material advantage outweighed the prospects of material loss." I can see no economic advantage gained by the Defendants in publishing this article, there was no additional revenue to be gained from the publishing of the article, nor would they gain any other material advantage. The law on damages is clear that exemplary damages are only to be awarded when compensatory damages would be sufficient. In my view that is not the case here.

With regard to the assessment of damages, I have taken into account all the cases cited to me, and I note that I am bound by the Court of Appeal decision in *Johnson Evan Gicheru v. Andrew Morton & Ano* (Civil Appeal 314 of 2000 – Nbi) which was handed down 14th October, 2005, and which set the maximum limit of damages in that case to Shs. 6 Million in respect of the Plaintiff who, not unlike the Plaintiff before me, was Judge of Appeal at the relevant time. Applying the principles set out in that case, and because here the Plaintiff before me did not invoke his rights under Section 7A (i) of the Defamation Act, I am of the view that a composite award, including an element for aggravation, of Shs.5,500,000 (five million five hundred thousand) would represent a fair and reasonable award.

Accordingly, and for all the reasons outlined above, I enter Judgment for the Plaintiff in the sum of Shs.5,500,000 together with costs and interest as prayed in the Plaint.

Dated and delivered at Nairobi this 16th day of October, 2007.

ALNASHIR VISRAM

JUDGE