



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

**Civil Suit 306 of 2004**

NASHON OLUOCH.....PLAINTIFF

VERSUS

KENYA TIMES MEDIA TRUST LTD.....1<sup>ST</sup> DEFENDANT

JAMES KUTAI.....2<sup>ND</sup> DEFENDANT

**JUDGMENT**

The plaintiff is a businessman and Director of a company which was known as “*Lule Auto Spares Ltd.*” By a plaint filed on 10<sup>th</sup> November 2004 he averred that on the 4<sup>th</sup> day of March 2004 the defendants falsely and maliciously caused to be printed and published an article on page 17 of a newspaper known as “*KENYA TIMES*”, owned by the first defendant concerning the plaintiff which had the heading “*Businessman weeps after losing bid to retain Kshs.8m earth movers*”. The article complained about read in part as follows:-

***“A Nakuru businessman wept uncontrollably after he lost his bid to retain ownership of earth moving equipment valued at over Kshs.8m. Senior Resident Magistrate, Stella Muketi ordered Nashon Oluoch Lule and his company, Lule Auto Spares, to surrender two caterpillars to the dealers within 30 days after he was found to have breached lease contract..... She further directed that the equipment be returned in working condition and that the defendant meets the costs of the suit”.***

The plaintiff averred that the said article and in particular the above quoted words were defamatory to him and were published out of malice, malevolence and/or spite towards his reputation. He gave particulars of malice as follows:-

- (i) That the defendants by themselves and their servants and/or agents neglected to ascertain whether the plaintiff had breached the contract that was the subject of the suit, Nakuru CMCC NO. 270/2004.
- (ii) That the defendants by their publication did publish malicious falsehood by stating that he wept uncontrollably after the ruling of the court in Nakuru CMCC NO. 270/2004.
- (iii) That the defendants by themselves and their servants and/or agents neglected to ascertain whether the plaintiff was seeking to retain ownership of the suit property.
- (iv) That the defendants by themselves and their servants and/or agents neglected to ascertain whether the plaintiff was condemned to pay costs of the entire suit.

The plaintiff further stated that the said words in their natural and ordinary meaning meant and were intended to mean that he was a cheat, coward and unscrupulous loser who could not honour business agreements and who on that account required to be shunned and avoided at all times due to his behaviour.

He went on to say that as a result of the publication of the said words he was injured in his credit and reputation and had been exposed to public ridicule, contempt and odium and was disparaged and brought into disrepute and or otherwise lowered in the estimation of right thinking members of the society as a whole and especially in the business world. He said that he had suffered damage as a result of the publication and claimed general and aggravated damages.

The defendants filed a joint statement of defence and admitted publication of the article referred to in the plaint but denied that the same was falsely and maliciously published as alleged in the plaint. They contended that the words complained of in their natural and ordinary meaning consisted of statements of facts and that they were true in substance and in fact and consisted of a fair comment on a matter of public interest.

The defendants further denied that the words complained of in their natural and ordinary meaning bore or were understood to bear or were capable of bearing or being understood to bear the meanings as alleged by the plaintiff and further denied that the same were defamatory in any way. The defendants also denied all the particulars of malice as stated in the plaint and stated that the article complained of was truthful and was not published for mere sensationalism. They further stated that the article complained of dealt with matters of public interest and the defendants had legitimate moral and social duty to publish the same. They further denied that there was any malice, malevolence and or spite in publishing the article complained of and that the publication of the article injured the plaintiff's credit and reputation in any way. The defendants denied that the plaintiff had suffered any loss as a result of publication of the said article.

When this matter came up for hearing on 28<sup>th</sup> September 2005 the defendants' advocates, Kandie Kimutai and Company did not attend court and Mr. Ogola Advocate held their brief and applied for an adjournment on the grounds that the said advocates had not obtained vital documents from their client and were therefore unable to proceed with the hearing. The application was opposed by the plaintiff's counsel and the court declined to grant the adjournment as sought. Thereafter Mr. Ogola did not take any part in the proceedings.

The plaintiff testified and said that apart from running the company Lule Auto Spares Ltd. which was now known as "**Lule Auto World and Construction Company Ltd**", he was also running a pub known as "**Lule's Club**". He produced a copy of the ruling that was delivered by Mrs. Stella Muketi, SRM in Nakuru **CMCC 270/2004**. He said that the article as published in the "**KENYA TIMES**" newspaper did not portray the truth of what had happened in court. He denied having wept in court immediately after delivery of the said ruling.

He further stated that the story as published in the said newspaper showed that he had breached a contract that he had with Rift Valley Agricultural Contractors which was not true. He produced Page. 17 of the said newspaper as P.Exh.3. The plaintiff said that he was greatly injured in his reputation by the publication of the said article and added that after the publication he was telephoned by his family members, friends and business associates to ask him whether what they had read in the paper was true. He added that his family members were greatly injured in their feelings and embarrassed when they read that he had wept uncontrollably in court and he was personally affected by the embarrassment which his family members suffered.

He said that before he went into business he was a lecturer at Egerton University and he was widely known. He added that he had been a reknown footballer in the country having played for a leading football club known as "**Gor Mahia**" between 1978 to 1982. He also played for the national football team, "**Harambee Stars**" and in 1979 was voted the youngest best footballer at the age of 19 years.

The plaintiff further stated that his business was adversely affected by the publication of the said article because his company was getting contracts from its clients based on how well equipped it was and the company clients had been made to feel that the capacity of his company to undertake serious projects had been reduced. He produced an extract of the company's audited accounts showing its turnover for the 2004 as Kshs.12,652,335/- against an estimated turnover of Kshs.24 million which compared well to the turnover for the year 2003 at Kshs.24,075,396/-.

The plaintiff further stated that the months of July, August, September, October, November and December 2004 were the ones that were most affected and he produced a statement of accounts (P.Exh.4) in proof thereof.

The plaintiff called as a witness Joseph Ondingo Agola, a Chartered Secretary and a Certified Public Secretary who had prepared the annual returns and accounts for Lule Auto World and Construction Company Ltd. for the years 2003 and 2004. The witness said that he had been doing that work for the said company since 1994. He referred to the annual report and accounts for the said company for the year ending 31<sup>st</sup> December 2004 and said that the company's profit for that particular year was lower by nearly Kshs.5 million as compared to that of 2003. He supported the plaintiff's contention that the company's performance was greatly affected by the article which the plaintiff referred to.

The defendants did not testify and neither did the advocates for both parties draw a list of issues for determination. Having perused the pleadings that were filed by the parties herein, I believe the following are the issues for determination in this matter:-

1. Whether the defendants falsely and maliciously caused to be printed and published in the first defendant's news paper the "**KENYA TIMES**" of 4<sup>th</sup> March 2004 of and concerning the plaintiff the words as set out in paragraph six of the plaint.
2. Whether the said words in their natural and ordinary meaning bore or were understood or were capable of bearing the meanings ascribed to them in paragraph 8 of the plaint.
3. Whether the plaintiff was in any way injured in his credit and reputation by the alleged defamatory words.
4. Whether the alleged defamatory words were true in substance and consisted of a fair comment on a matter of public interest.
5. Whether the plaintiff is entitled to any damages as a result of the alleged defamation and if so, the quantum thereof.

I now wish to deal with the first issue. I have carefully perused the ruling that was delivered by Mrs. S. Muketi, SRM in **CMCC No. 270/2004** aforesaid. I have also considered the plaintiff's evidence regarding his reaction to the said ruling. The plaintiff's evidence was not challenged at all and therefore when he said that he did not weep at all following the delivery of the said ruling, I have no reason not to believe him. The first defendant through the second defendant reported that the plaintiff "**wept uncontrollably after he lost his bid to retain ownership of earth moving equipment**". This in my view clearly meant that following delivery of the said ruling the plaintiff was so affected, even emotionally, that he could not hold his composure and he wailed in a manner which was totally unacceptable for a businessman like him. If that was not true, and I believe it was not, then it is obvious that the plaintiff was considerably aggrieved by the contents of the said article.

The article in question fully identified the plaintiff by his full names and even the name of his company and therefore there was no doubt that it is the plaintiff who was being referred to. Whether the words complained of were published maliciously or not, is not important because defamation is a tort of strict liability and malice becomes relevant only if the defendant contends that the words were published on an occasion of qualified privilege or were a fair comment which is not the case in this matter. The report also indicated that the defendant had been ordered to meet the costs of the suit. That was not correct

because the court ordered that the costs of the application be in the cause. I find that the defendants published untrue words regarding the plaintiff without considering the import of the said report to the credit and reputation of the plaintiff.

In answering the second issue, I have already held that the words complained of were defamatory to the plaintiff. In paragraph 8 of the plaint, the plaintiff stated that the said words meant or were intended to mean that he was a cheat, coward and unscrupulous loser who could not honour business agreements and therefore one who was to be shunned and avoided at all times due to his behaviour.

I do not entirely agree with the plaintiff that the said article meant or was understood to mean as stated hereinabove. It is true that the court held that the defendant, which was Lule Auto Spares Ltd. had not fully complied with the terms of a lease contract which it had entered into with Rift Valley Agricultural Contractors, the owner of the machines which were in dispute. The plaintiff was not the defendant and the issue of non payment for the lease of the machines was not canvassed at all during the hearing of the said application. What in my view was offensive and utterly untrue was the allegation that the plaintiff herein wept uncontrollably after he lost his bid to retain ownership of the earth moving equipment. It was not the plaintiff who lost the application, it was a company where he was a Director.

It is not in dispute that the plaintiff was injured in his credit and reputation by the aforesaid defamatory words. However, it must be borne in mind that Lule Auto Spares Ltd. or Lule Auto World and Construction Company Ltd. is not a party to this suit and therefore it is not clear whether the company itself suffered any loss as a result of the defamatory words aforesaid. The alleged decline in the company's profitability which the plaintiff and his witness testified about cannot be claimed by the plaintiff but can only be rightly claimed by the company. The plaintiff is a Director in the said company and it is an elementary company law principle that a company is a separate legal entity from its shareholders and/or directors. If Lule Auto World and Construction Company Ltd was a co-plaintiff in this suit, I believe it would have had a stronger case than that of the plaintiff given the nature of evidence that was adduced herein.

Turning to issue number four, while it is true that Lule Auto Spares Ltd. was ordered to return the earth moving equipment to Rift Valley Agricultural Constructors Ltd., there is no evidence that the plaintiff herein wept uncontrollably following delivery of the said ruling. It is also not true that either the plaintiff or the said company was ordered to meet the costs of the suit. It was for the defendants to adduce evidence to show that the alleged defamatory words were true in substance and consisted of a fair comment on a matter of public interest. In my view, the dispute that was in court was not a matter of public interest and even if it were, the defendants had a legal obligation to make a true and factual report and not otherwise.

With regard to the last issue, award of general damages in a defamation case acts as a consolation to the plaintiff for the distress which he suffered from the publication of a defamatory statement and goes towards repairing the harm done to his reputation. Counsel for the plaintiff urged this court to award a sum of Kshs.3,500,000/- as compensatory damages and Kshs.2,500,000/- as aggravated damages. She sought to rely on several decisions of the High Court among them **HCCC 294 of 1997 ABRAHAM KIPSANG KIPTANUI VS FRANCIS MWANIKI AND 4 OTHERS** (unreported) where the court awarded the plaintiff therein Kshs.3,500,000/- as general damages and Kshs.1,500,000/- as aggravated damages. Counsel also cited this court's decision in HCCC 208/02 **FATHER SAMUEL WAWERU VS SAMUEL MBURU AND THE STANDARD LTD.** (unreported) wherein the court awarded the plaintiff Kshs.2,500,000/- as compensatory damages and Kshs.250,000/- as punitive damages.

I have already stated that a distinction must be drawn between the plaintiff and Lule Auto World and Construction Company Ltd. The annual report and accounts which were produced by the plaintiff was in respect of the said company. The plaintiff's loss if any, cannot be quantified. While I agree that he was injured in his credit by the false report that he had wept uncontrollably in court after his company lost the said application, I do not think that the plaintiff is entitled to such high damages as claimed. Apart from the fact that he was embarrassed by the said defamatory publication, there is no evidence that he personally suffered any financial loss as a result of the same. I am alive to the fact that the plaintiff and

his wife being the sole directors of Lule Auto World and Construction Company Ltd. the plaintiff was more often than not associated with the said company but the loss by the company if any, was not in law a direct loss to the plaintiff.

Damages in a libel case are at large and the latitude can be very wide. In a recent decision by the Court of Appeal, **JOHNSON EVAN GICHERU vs ANDREW MORTON & ANOTHER**, Civil Appeal No.314 of 2000, the court reviewed several libel cases and restated the various factors and principles that ought to be taken consideration in assessing damages. Without enumerating them, I have taken due consideration of the same in this judgment.

In **JOHN vs MGN LTD.** [1997] QB 586 at Page 607 it was held as follows:

*“In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel, the more closely it touches, the plaintiff’s personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to handful of people.”*

I agree that the libel in this case touches on the Plaintiff’s integrity and honour but most important his courage since he was portrayed as such a weak man who would weep uncontrollably in court simply because a ruling which was not in favour of a company where he was a director had been delivered and the same totally sapped his reservoir of courage.

Taking into consideration all the circumstance of the case, I award **Kshs.1,500,000/= as compensatory damages**. No basis was laid for awarding aggravated damages. Such damages are awarded to compensate a plaintiff for the defendant’s egregious conduct from the date of the publication to the time of judgment which causes additional injury to the plaintiff. These include failure to make any or any sufficient apology and withdrawal, repetition of the libel, conduct calculated to deter the plaintiff from proceeding, persistence, by way of prolonged or hostile cross-examination of the plaintiff or in turgid speeches, conduct designed to publicise the case and persecution of the plaintiff, see **JOHN vs MGN LTD** (supra). Such was not demonstrated by the plaintiff.

I will also award costs of the suit to the plaintiff.

DATED, SIGNED AND DELIVERED at Nakuru this 10<sup>th</sup> day of March, 2006.

**D. MUSINGA**

JUDGE