



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

CIVIL SUIT NO. 288 OF 2004

HON. MARTHA KARUAPLAINTIFF

VERSUS

RADIO AFRICA LTD t/a KISS F.M. STATION

CAROLINE MUTOKO

WALTER MONG'ARE alias NYAMBANE.....DEFENDANTS

RULING

The plaintiff Hon Martha Wangari Karua is an Advocate, a member of Parliament and a Cabinet Minister. She filed a defamation suit against African Broadcasting Corporation t/a KISS FM STATION (but following an amendment the 1st defendant name was changed to RADIO AFRICA) and two others. The suit was commenced by way of a plaint filed on 25th March 2004. She claims inter alia that the defendant's presentation contains words that were false, malicious, disparaging the plaintiff professionally, politically and socially and that the presentation in a radio morning talk-show constitutes a gross violation of the plaintiff's rights of privacy and also violates the law of decency and that the presentation has caused the plaintiff serious distress, agony and embarrassment. She has as a result sought general damages including exemplary damages for the alleged dissemination at the radio presentation and in a sensational manner. She claims that the words are slanderous and reckless. She further seeks a permanent injunction restraining the defendants jointly and severally by either themselves, their servants and or agents from repeating carrying out or authorizing to be carried out any presentation adverse or negatively portraying the person and character of the Plaintiff.

(1) By a Chamber Summons of the same date the Plaintiff sought and obtained an ex-parte order temporarily restraining the defendants and/or their agents from airing, broadcasting or presenting or referring to the applicant in any manner whatsoever adverse to her reputation and standing or which ridicules and portrays her negatively in the eyes of the general public pending the hearing and determination, of the suit. On the same day an interim order was granted by his Lordship Justice Lenaola. The order was granted until 8th April 2004 when the application was to come up for hearing inter-partes.

(2) The application was set down for hearing inter-partes for 8th April 2004 and the matter was listed before Mr Justice Kihara Kariuki. The Judge was informed that the defendants had a preliminary objection to raise. The Preliminary objection was filed on 5th April, 2004 raising inter-alia grounds (a) to (j) which grounds include:

- a) The plaint does not set out verbatim the precise words complained of, that were allegedly spoken by the 2nd and 3rd defendants and disseminated by each and all the defendants;
- b) The plaintiff has not alleged or stated that the words or the effect of the words complained of were defamatory of her;
- (8) The granting of an interim injunction offends section 79(1) of the Constitution of Kenya and international human rights laws which include freedom of expression and freedom to hold opinion without interference;
- (3) The plaint was amended once without leave on 31st March 2004 as per the requirements of the Civil Procedure Rules;
- (4) The plaintiff filed a Request for Particulars on 15th April 2004 and a Reply to Defence
- (5) By an application filed on 28th April 2004 the Plaintiff sought to further amend the plaint on the ground that at the time of filing suit the plaintiff did not have the recorded cast/text which gave rise to the suit but the plaintiff was then in possession of the cast hence the need for the further amendment to the amended plaint.
- (6) On 8th April 2004 Kihara J adjourned the Chamber Summons for inter-partes hearing on 21st April 2004 and extended the interim injunction until then
- (7) On 21st April 2004 the inter-partes hearing did not take place because the defendants had earlier filed an application by way of a Chamber Summons dated 19th April 2004 and filed on 20th April 2004 only a day before the hearing. The Chamber Summons reiterated the objections raised earlier and it was pleaded that the plaint did not disclose a reasonable cause of action. The court ordered that the Preliminary objection by the defendant be disposed of first and it stood over the matter to 3rd May 2004 as the date for the hearing of the preliminary objection (ie) the “p.o.” dated 5th April 2004.
- (8) On 3rd May 2005 the matter was listed before Ojwang J. At this point in time the plaintiff had already filed an application dated 23rd April 2004 to further amend the plaint. The court heard submissions from counsel for both parties on the order of hearing of the pending applications including the Preliminary Objection. At this time the defendants had also filed an application to strike out the plaint. The court gave a ruling on merit that the application to further amend the plaint would be heard in priority and before the Preliminary Objection and the application to strike out the plaint. The court further directed that once the plaintiff had argued the application for amendment the defendant would be free to elect either to argue its Preliminary objection or take any other action that they may deem necessary and expedient.

Perhaps it is useful to set out what our learned brother, Hon Mr Justice Ojwang said on 3rd May 2006:

“The direction I would give at the moment is that the preliminary objection be deferred because it could be addressing pleadings that have changed in character. I will give priority to the hearing of the application to further amend the plaint. Once this is heard and if it is ruled that the plaint be further amended then the defence will have another look at it and to determine what preliminary objections may be taken.”

It seems clear to the court that the Preliminary objection was sufficiently addressed by the court. The court in this case means our two learned brother Judges Hon Justice Ojwang & Hon Justice Lenaola. The initiative to take up the issue of any objections was left to the defendants after the amendments.

A perusal of the court record reinforces the above due to the following:

- I. On 1st July 2004 Amended statement of Defence to Further Amended Plaintiff was filed by the Defendants,
- II. On 6th July 2004 an Amended Reply to Amended Statement of Defence was filed;
- III. On 20th July 2004 an application for leave to deliver interrogatories was filed by the defendant;
- IV. On 7th July 2004 the plaintiff filed a list of issues;
- V. On 21st July 2004 the defendant filed a list of issues;
- VI. On 17th September, 2004 the application for leave to administer interrogatories was dismissed by Hon Mr Justice Lenaola;
- VII. On 22nd September, 2004 the defendants filed an application for leave to lodge an appeal in the Court of Appeal against the ruling of 17th September, 2004;

On 19th May 2004 Lenaola J observed:

“This case needs to be put on track. Parties should now proceed to the substance of it and put the acrimonious exchanges behind them. As Ojwang Ag J said earlier in the proceedings “parties should halt the barrage of applications as they are unnecessarily time – consuming and will considerably delay the hearing of the case”. I respectfully adopt my brothers directions and ask that the parties should move on to the expeditious determination of the suit without further delay ...”

We have deliberately given priority to setting out in extenso the factual background as above, and as reflected in the court record, so that the context in which the four declarations are sought in the notice of motion filed on 23rd September, 2004 may be properly understood. The declarations sought are as under:

1. A declaration that the refusal by the Honourable Court to hear the preliminary objections raised by the defendants contravened section 70(a) and s 77(9) of the Constitution, thus denying the defendants the right to secure protection of the law and a fair hearing;
2. A declaration that the refusal by the Honourable court to hear the preliminary objection raised by the defendants and therefore by default making a determination on the objection violated the principles of natural justice and more particularly the doctrine of *audi alter am partem* and hence to the extent applicable contravened sections 70(a) and 77(9) of the Constitution;
3. A declaration that the allegations made in the plaint and the prayers sought in the plaint herein have contravened and are likely to contravene section 79(1) of the Constitution;
4. A declaration that the allegations made and the prayers contained in the plaint have contravened, or are contravening and/or are likely to contravene the International Bill of Human Rights particularly Art 7 and 19 of the Universal Declaration of Human Rights and Articles 14, 19 and 26 of the International Covenant on Civil and Political Rights (ICCPR)
5. The filing of the suit herein is for an improper and ulterior motive extraneous to the law of defamation as the true intention of the plaintiff is to seek punishment of the defendants by the Government;
6. The duplication of the orders sought in this Honourable Court and the action sought by the plaintiff from the Minister for Information and Tourism, is in the circumstances vexatious, oppressive and an abuse of the process of court.

The parties have filed written skeleton arguments with lists of authorities and the court has taken this into consideration in preparing this ruling.

Although we have fully considered the authorities cited, it is our view that for the reason which will become apparent in this ruling, we have deliberately avoided reviewing the authorities in detail because we are of the view that making some of the determinations sought would be prejudicial to the future conduct of this matter. We are also alive to the fact that ours is a limited jurisdiction.

We shall therefore confine our attention to the constitutional principles raised especially on the nature of rights and freedoms and any applicable limitations as set out in the Constitution and the relevant laws. We shall steer clear of any factual findings. The reason for being guarded and economical in what we say is that the suit is ongoing and all issues and the law are at large for determination by the court dealing with the suit on merit.

JURISDICTION

With the above factual background we consider it important to ascertain, if in the first place, this court has jurisdiction to adjudicate on the issues raised in view of the fact that the application before us is a Notice of Motion filed in current proceedings, which is a suit still pending. The Notice was filed to challenge our brother judges orders in the pending suit in so far as they relate to the alleged failure to hear the preliminary objections described above and the challenge is also directed at instituting the defamation suit itself. The judges are therefore of equal rank to us hence the need for exercising great caution and extending due deference, in approaching this matter; by first ascertaining whether we have jurisdiction and the extent of that jurisdiction. The Notice of Motion is based on Rule 10 of the Constitutional rules made by the Chief Justice pursuant to s 84(6) of the Constitution. The application purports to invoke s 84(1) and (2) of the Constitution. On the issue of jurisdiction we hold that we do have original jurisdiction to hear the matter in terms of s 84 (1) and (2) of the Constitution. Rule 10 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules 2001 (now revoked) provides:

“Where a violation of fundamental rights and freedoms is alleged in any proceedings in the High Court, application for determination of the question shall be made by Notice of Motion in the matter and in that case the provisions of Order L of the Civil Procedure Rules shall, as far as practicable apply.”

In the case of *LABHSONS LIMITED v MANULA HAULERS LIMITED t/a TAUSI TRAVELLERS HCCC 204 OF 2003* Nyamu J observed:

“Whereas I am acutely aware that I am of equal rank with the judge who made the challenged order and cannot seat (sic) on appeal over his order I see a new line here this being a constitutional application. Firstly s 84 gives the High Court original jurisdiction, secondly s 84 is not subject to any other exception save the rules made under s 84(6). Thirdly the section provides for two rights namely a direct right of access to the High Court under s 84(1) and a referral right under s 84(3) from the subordinate courts and an application under the section is a constitutional right in terms of the section and anything that purports to hinder the hearing of any such application would in my opinion clearly violate the section and has to and must give way.”

In the same case Nyamu J at pages 16 to 17 did address the principle behind this special jurisdiction as far as the challenge is in relation to the court or judges as under:

“What happens when Judges orders are challenged. My reference to this has no bearing or relevance to the facts of the matter before me now and I pass no judgment at all on my brother’s challenged order. But in “WHAT NEXT IN THE LAW” Lord Denning at page 330 on the chapter with the heading of “The Judges Themselves” has this very interesting observation:

“There remains the most touching question of all. May not the judges themselves sometimes abuse

or misuse their power. It is their duty to administer and apply the law of the land. If they should divert or depart from it and do so knowingly it is a misuse of power. So we come up against Juvenal's question *sed quis custodiet ipsos custodes* (But who is to guard the guards themselves)"

The answer to Lord Denning's question in the context of our situation as to who is the guard of the guards themselves is in my opinion the Constitution itself and the law."

In the subsequent case of ***K.J. KINYANJUI v ATTORNEY GENERAL*** a constitutional court consisting of Nyamu J and Emukule J focused on the extent of the jurisdiction and went on to dismiss the challenge relating to a two Judge criminal appeal. The court fully endorsed the principle as set out in the case of ***MAHARAJ v ATTORNEY GENERAL OF TRINIDAD & TOBAGO (No 2) 1982 ALL 670*** where this special jurisdiction was described as:

(1) the claim for redress in the motion fell within the original jurisdiction of the High Court under s 6(2) of the Constitution (similar to our s 84(2). Since it involved an enquiry into whether the procedure adopted by the Judge before committing the appellant to prison had contravened the appellants' rights under s 1(a) of the Constitution not to be deprived of liberty ...

Accordingly Scott J, though of equal rank to the Judge who made the committal orders had jurisdiction to entertain the motion."

Finally in the recent case, ***PETER NGANGA MUIRURI v CREDIT BANK LTD ...*** where the ruling of the Hon the Chief Justice was challenged Nyamu J addressed the issue at page 48 as under:

"It would in my view be a grave matter for the courts or Judges to insulate themselves against constitutional challenges since public law vindicates in a very special way the rule of law and provides an important pillar of safeguarding, securing and enforcing fundamental rights and freedoms, providing for a way of applicants accessing the courts for this purpose can only enhance our system of justice and cannot possibly demean it! The task cannot also possibly be transferred to any other body except the courts because the courts must remain solely responsible for the lawfulness of what they do!

Again in the same case at pages 13 Nyamu J held:

"The jurisdiction I am now exercising in this matter or any other High Court Judge placed in a similar situation, does not certainly extend to considering or reviewing the merits of the ruling of another judge. In my view where there is a final order or ruling the jurisdiction extends to whether in the process or procedure adopted in obtaining the ruling there were any procedural improprieties which could have led to any violation or contravention of the fundamental rights and freedoms of the applicant e.g. was there a fair hearing as per the constitutional requirements or a breach of procedural and statutory requirements which are aimed at safeguarding a fair trial. On the other hand where a court regardless of its status refuses to hear an applicant at all or is in clear breach of an applicant's right like sending him to prison for contempt contrary to the process of the law the court's jurisdiction is in my view much wider.

In the same case, the court in dismissing the challenge undertook the inquiry at page 20 as under:-

"With the above in view it is quite clear to the court that his Lordship the Chief Justice did give to both parties an opportunity to argue the preliminary point. In other words he gave them the equality of hearing or what is also referred to as according the parties the right of equality of arms or giving them an adversarial hearing. It is significant to note that there is no challenge concerning the impropriety of the procedure followed in hearing the preliminary objection before the Honourable the Chief Justice."

WAIVER

In their written skeleton arguments the Respondents have strongly contended that there is waiver of the objection. It is significant to observe that the defendants did take important steps in the proceedings. They filed further amended defence to the further amended plaint and also they sought leave to administer interrogatories, sought leave to appeal, prepared a list of issues for determination and participated in taking a date for the hearing of the case on merit was set down for 27th September, 2004. Our view is that for the reasons explained above touching on the special jurisdiction and the need to avoid any prejudice it is for the Judge handling the matter to rule on the respondents' contention on waiver. According to Justice Ojwang's ruling the objections could still be raised and the application to strike out the plaint as well, and a determination made if the applicant were to set them down for hearing. We therefore decline to adjudicate on the issue of waiver. However our finding concerning the objection is that the conduct of the matter has not violated any constitutional right of the applicant. We find no procedural impropriety. The principle of equality of arms was not violated.

RIGHTS AND FREEDOMS, CONSTITUTIONAL BALANCE

The defendants claim that the institution of the suit by the plaintiff violates their fundamental rights and freedoms protected by s 70 and 79(1) of the Constitution and that the alleged failure by the Court to hear the preliminary objection violated their right of fair hearing as set out in s 77(9) of the constitution.

As held in the cited case of *KENYA BUS SERVICE LTD & 2 OTHERS v ATTORNEY GENERAL & OTHERS Misc Civil Application No. 413 of 2005* the fundamental rights and freedoms in Kenya although dearly cherished are not absolute. They are subject to the right and freedoms of others. The freedoms and rights of others are equally protected by the Constitution and guaranteed to every person. In addition the rights and freedom are subject to the public interest. It is therefore quite evident from the relevant provisions that as far as the other persons are concerned the fundamental rights and freedoms are on an equal footing and that there is no hierarchy of rights and that all must enjoy the same rights and freedoms. It is therefore a serious contradiction for a litigant to want to muzzle, stifle or extinguish other persons rights and freedoms in the name of enforcing theirs. Nothing could be more unconstitutional. The reason why the fundamental rights and freedoms are subject to the rights of others and the public interest as per the Constitution of Kenya is that they create a mutuality in terms of their enjoyment and responsibility. They are subjected to the public interest because it is absolutely necessary to achieve the common good for all.

To illustrate this point take the defendants asserted rights to a fair hearing under s 70 and s 77(9) of the Constitution, the plaintiffs equally enjoy the same and a constitutional court cannot deny the plaintiff the right to fair hearing in the defamation suit unless the suit is unconstitutional under the specific limitation in s 79(1).

Section 77(9) reads:

“A court or other adjudicating authority prescribed by law for the determination of the existence of extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.”

It is clear that the court currently charged with the task of hearing the determination sought is the court contemplated by the section.

This is why this court cannot accept the invitation to halt the civil proceedings commenced by the plaintiff allegedly because the right to a fair hearing has been denied to the defendants in the suit. Both are entitled to the protection to the same extent and the question of balancing their respective rights does not arise because they enjoy equal rights under the section. Similarly the right to protection of law under s 70 has been accorded to every person. The Constitution gives equal protection in relation to the enjoyment of fundamental rights and freedoms. It is only where a right or freedom has permissible limitations when the court is called upon to consider competing values and interests such as necessity of

limitation, reasonableness, whether reasonably justifiable in a democratic society, proportionality (whether the means justify the end).

Halting the proceedings would deny the equal protection and would therefore be unconstitutional. Except where there are limitations clearly set out in the Constitution or any written law made pursuant to the Constitution a court of law cannot impose a limitation to the enjoyment of the right at all. Even when there is a specific limitation to the enjoyment of a right or freedom such a limitation is designed to ensure that the enjoyment of those rights and freedoms by an individual does not prejudice the rights and freedoms of others or the public interest. Thus, the limitations are aimed at ensuring that the rights and freedoms are equally enjoyed and the enjoyment achieves common good and also exercised responsibly so as to achieve the equilibrium and an orderly society!

It is significant to note that unlike other fundamental rights and freedoms there is no limitation at all to the enjoyment of s 77(9) of the Constitution.

It has been strongly argued that the protection of freedom of expression as set out in s 79(1) is a crucial right in a democracy and that it does occupy a special position. Several authorities from various jurisdictions have been cited in support of importance of the right. However it is clear from the reading of the relevant provision that unlike s 77(9) s 79(1) has three limitations (a)(b) and (c). The conditions for the Limitations are.

The limitation must be contained or done under the authority of any law and

- (a) the limitation must be reasonably required in the interests of defence, public safety, public order, public morality or public health
- (b) the limitation must be reasonably required for the purpose of protecting the reputations and rights and freedoms of other persons ...
- (c) in the case of public officers the restriction must be reasonably justifiable in a democratic society;

It is not in dispute that Kenya has enacted a Defamation Act and that such a law is an illustration of the law contemplated in the creation of the limitation under s 79. What has been contested or is being contested is the application of such a limitation to the freedom of the press or expression in a democratic society such as Kenya. In other words is there a place for defamation suits by public officials in Kenya. Is the limitation to the right of expression based on the law of defamation reasonably required for the purpose of protecting reputations or rights and freedoms of other persons.

We, as a constitutional court must remain guarded concerning what we say or not say in this ruling because we are not the court seised with the taking of evidence, evaluating it and giving a verdict. This shall remain the responsibility of a civil court. We can only declare that under our Constitution the right of expression is recognized and that the Constitution also recognizes the limitations described in s 79(1). The reason for us to say as little as possible is to prevent any prejudice to the trial and to desist from making any final determination on the limitation which shall ideally turn on the evidence to be adduced since for example, the reasonableness of the limitation varies with the facts of each case and on a case to case basis.

Having guided ourselves as above concerning this special jurisdiction the only point we can pronounce on is whether there was any procedural impropriety in the proceedings which in turn violated the rights and freedoms of the defendants. On this we find that the court in ruling that it had to hear the application for amendment before the preliminary objection did not violate any procedural rule. The court in our view correctly exercised its discretion in allowing the amendments so that the real questions in controversy as between the parties can be determined. In exercising this discretion the court did give the Advocate for other parties equality of hearing as per the court record. Amendments can be allowed at any stage of the proceedings under Order VIA and on such terms as may be just. This principle is clearly set out in the relevant procedural Order. The court after according the parties a hearing through their respective

counsel directed the defendants to consider their position after the amendments but the applicants have never set down the preliminary objections for hearing as would be expected of an aggrieved party. Instead they ignored whatever is left of the objection and went on to frame issues based on the amended pleadings and took steps to have the matter set down for hearing and prepared for full hearing on merit as urged by Lenaola J.

We therefore find that the defendants were accorded the right of hearing and since the hearing has not been concluded they are still in a position to articulate all their grievances at the hearing on merit and a final determination made by the court in the suit. As a result our findings are that our inquiry does not reveal any contravention or violation of the defendants right and the declarations and orders must therefore fail. Moreover taking into account the provisions of s 6 of the Judicature Act and the principle enunciated in the MAHARAJ No2 (supra), failure to join the Attorney General is a fatal defect. In addition the fundamental rights and freedoms apply vertically not horizontally and are secured, guaranteed and protected by the State and the plaintiff as a person in the suit is articulating her individual right to a fair hearing and cannot under the Constitution be liable to the defendants for any violations of the Constitution.

On the issue of the extra judicial complaints by the plaintiff to the Minister and the Media Council or committee, a competent court has already ruled on the matter by a stay order and thereby halting any extra judicial parallel proceedings and there is nothing we can usefully add to this.

THE COURTS TASK

(1) Turning again to the issue of rights freedoms and limitations the court in conducting the inquiry has to do it in two stages. The first stage of inquiry is to determine whether the right or freedom in question has been infringed. The courts have to look first at the ambit of the fundamental right or freedom and then whether the law or act complained of has interfered with its exercise. The final authority to define the scope of rights and freedom, is in the hands of the court or judges who have the last word in this respect so as to fix the boundary between legislation and judicial supremacy. If there is no infringement or contravention the court needs not go to the second stage.

(2) The second stage is to consider the conceptual structure of the limitation to the rights and freedoms. In the case of the Constitution of Kenya, textually and structurally this springs from s 70 itself which stipulates that the rights and freedoms contained in Chapter 5 are protected and guaranteed subject to the rights others and the public interest. When considering the limitation the court must carefully examine the limitation clauses attached to the different rights in the Chapter. With a few exceptions the limitations follow a basic formula eg.

“subject to such limitations as are prescribed by law and are shown to be reasonably justifiable in a democratic society in the interest of public order, health, safety etc”

As regards the role of the court in the first stage we would like to endorse fully the observations of Justice McIntyre in the Canadian case of *IN REFERENCE RE PUBLIC SERVICE EMPLOYEE RELATIONS ACT, LABOUR RELATIONS ACT AND POLICE OFFICERS COLLECTIVE BARGAINING ACT (1987) 38 DLR 4TH 161* where the judge warned:

“While a liberal and not an overly legalistic approach should be taken to constitutional interpretation the Charter should not be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time. The interpretation of the charter, as of all constitutional documents, is constrained by the language structure and history of the constitutional text, by constitutional traditions and by the history, traditions and underlying philosophies of our society.”

Perhaps we should also add that the fundamental rights and freedoms have over the years acquired an international dimension which can no longer be ignored by the municipal courts. Courts should therefore recognize that there is international public law dimension to the Chapter 5 rights and freedoms and also that the interpretation should also be guided by the underlying purpose of the right or freedom

Reasonableness

On the issue of reasonableness in relation to the limitation we fully approve and endorse the reasoning in the Canadian case of *R v OAKES (1986) 26 DLR 4TH 200*. One of the principles in the case concerning reasonableness of the limitation is that the interest underlying the limitation must be of sufficient importance to outweigh the constitutionally protected right and the means must be proportional to the object of the limitation. Our interpretation of the use of reasonableness in the limitation clause is that since what is at stake is the limitation of fundamental rights, that must mean the legislative objective of the limitation law must be motivated by substantial as opposed to trivial concerns and directed towards goals in harmony with the values underlying a democratic society.

Proportionality:

Proportionality test requires the following of any limitation:

- (a) that it be rationally connected to its objective,
- (b) that it impairs the right or freedom as little as possible and
- (c) that there is proportionality between its effects and its objectives – see OAKES case (supra)

Justifiable in an open and democratic society

For the meaning of this we prefer the approach adopted by the European Commission in the case of *HANDYSIDE v UNITED KINGDOM 1 E HRR737* where the approach of the Commission was summarized at page 93 as follows:

“The questions which fall to be considered are the needs or objectives of a democratic society in relation to the right or freedom concerned. Without a notion of such needs, the limitations essential to support them cannot be evaluated. For example, freedom of expression is based on the need of a democratic society to promote the individual self-fulfilment of its members, the attainment of truth, participation in decision making, and the striking of a balance between stability and change. The aim is to have a realistic, open, tolerant society. This necessarily involves a delicate balance between the wishes of the individual and the utilitarian “greater good of the majority.” But democratic societies approach the problem from the standpoint of the importance of the individual, and the undesirability of restricting his or her freedom. However, in striking the balance certain controls on the individual’s freedom of expression may, in appropriate circumstances be acceptable in order to respect the sensibilities of others. In this context freedom of expression is commonly subject in a democratic society to law importing restrictions considered necessary to prevent seditious, libellous, blasphemous or obscene publications. Indeed, the legal codes of all the Member States of the EU contain legislation restricting in one way or another the right to freedom of expression in the context of indecent obscene or pornographic objects and literature. This can be regarded as a clear indication of the need for such legislation in a democratic society.”

Closer home in the South African case of *S. MAKWANYANE AND ANOR 1995 (6) BCLR 665 (cc)* Chaskalson (P) stated:

“The limitation of constitutional rights for a purpose that is ... and necessary in a democratic society involves the weighing up of competing values and ultimately an assessment based on proportionality ... the fact that different implications for democracy, and in the case of our Constitution where “an open and democratic society based on freedom and equality” means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established but the application of those principles with particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality which calls for the balancing of different interests.”

Turning to the Kenya situation and this matter in particular and while adopting almost the same principle as set out by Chaskalson above we must however consider the textual scope of our Constitution that is the balancing in s 70 and s 79 must take into account the rights of others (which are equivalent) and the public interest. Finally in analyzing the constitutional beacons touching on the interpretation of the rights and limitations s 83 of the Constitution does permit derogation as regards s 72,76,79,80,81 and 82 of the Constitution upon the coming into force of an order for preservation of public security order under s 85. This is very much unlike Article 19(2) of the German Basic law which states that in no case may the essence of the basic right be encroached upon. The protection offered must be complete. It is noteworthy that the African Charter does not allow any derogations, and therefore there is need to harmonise this in any future Constitutional dispensation.

With the above analysis of the law in view, we decline to grant all the declarations and orders sought and wish to conclude that the civil court dealing with the adjudication of the civil obligations and rights in this suit is at liberty to rule on all the rights and freedoms including the effect of limitation in so far as the subject matter of the suit is concerned after receiving evidence and evaluating it on merit.

The role of the courts was well described by the European Court of Human Rights in *HANDYSIDE CASE v THE UNITED KINGDOM (Supra) para 49 in these words:-*

“The Court’s supervisory functions oblige it to pay the utmost attention to the principles characterizing a ‘democratic society.’ Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 it is applicable not only to information or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’. This means amongst other things that every ‘formality’, ‘condition’, ‘restriction’ or ‘penalty’ imposed in this sphere must be proportionate to the legitimate aim pursued:”

Under the law it is clear from the provisions of the Constitution and the Defamation Act that limitations to this right are properly recognized and it is wrong in our view to purport to articulate this right by suppressing the right of a fair hearing. We cannot as a court suppress or stop the hearing of a case on merit. Indeed, the definition of the rights and their limitations where applicable must result from the exercise of the right to a fair hearing and it is in such a hearing that the court has to consider the principles enunciated in the HANDYSIDE CASE above.

THE INTERNATIONAL DIMENSION CONCERNING LIMITATIONS.

The defendants have argued that the suit instituted by the plaintiff is a threat to press freedom and that the court should find that the limitations expressed in s 79 should be disregarded or that they ought not to apply because they negate the press freedom.

However as set out in s 70 of the constitution, limitations on the exercise of fundamental rights and freedoms are the result of a delicate but deliberate balance between the individuals interest and the public interest and for the limitation to be lawful it must as regards the specific limitations in each section:

- i. be defined by law (as per the requirements under the Constitution in the case of Kenya eg. S 79 and the Defamation Act);
- ii. be imposed for one or more legitimate purposes;
- iii. be necessary for one or more of these purposes in a democratic society (another way of describing the test of proportionality);

In order to be necessary the limitation on the rights and freedoms, both in general and as applied in the individual case, must respond to a clearly established social need. It is not sufficient that the limitation is

desirable or that it is harmless as regards the functioning of the democratic constitutional order.

As indicated above the defendants contention that the limitation on press freedom or the right to freedom of expression should not apply in the case, as a matter of law, lacks proper foundation in that nearly all international instruments recognize the limitations and that there is a social need to protect the rights and freedoms of others, reputations, morals and national security etc. These are carefully weighed social interests. The recognition of the need for limitations is clearly evident in the entire European Union landscape as demonstrated above in the case of HANDSIDE.

Article 12(3), 13, 18(3) 19(3) 21, 22(2) of the International Covenant on Civil and Political Rights and Article 11 and 12(2) of the African Charter on Human and People Rights and also Articles 11(2), 12(3), 13(2), 15 and 16(2) of the American Convention on Human Rights and finally Articles 8(2) – 11(2) of the European Convention on Human Rights all recognize the need for limitations on the rights.

The defendants contention that the intention of the suit in exercise by the plaintiff of her right to a fair hearing on merit is contrary to the named International Instruments lacks any legal basis or substance whatsoever. Most countries have passed the necessary laws to provide for the limitation to safeguard certain social interests including reputation, morals and the right to respect for ones private and family life. We find that the limitations are consistent with a sense of responsibility by those involved and the need to discourage impunity. We further find that the limitation on the right of expression or freedom of expression is not inconsistent with what is now almost an universally accepted principle that freedom of expression is the basic element of the public order of a democratic society and that it presupposes both the widest possible circulation of news, ideas and opinions and the widest possible access to information by society as a whole and that the hallmark of the concept of public order in a democratic society is free debate that is to say (as ably argued by the defendants counsel) a debate in which dissenting opinions can be fully heard and views can therefore be disseminated although they may shock , offend or disturb. After all as often repeated a society that is not well informed is not truly free.

A careful consideration of international jurisprudence concerning the reputation of public figures and their rights clearly demonstrates that their right is also recognized although criticism and scrutiny limits are wider in their case than against ordinary persons. This in turn underlines the findings in this ruling that there is need for a civil court to hear the matter on merit and be at liberty to apply this higher scrutiny and come up with a proper finding on the facts. There cannot be a better illustration of the scrutiny test for public figures than the finding of the European Court of Human Rights in the EUR COURT HR, CASE OF *LINGENS v AUSTRIA*, judgment of 8th July 1986 Series A No.103 pp 2-23 paras 26-30 where the court observed!

“Freedom of the press furthermore afford the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention. The limits of acceptable criticisms are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10(2) enables the reputation of others – that is to say of all individuals – to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.”

We would like to emphasize the common good which is achieved by respecting the rights of others while enjoying our own ie mutuality. Thus, in the Inter American Court of Human Rights in the case of *COMPULSORY MEMBERSHIP IN AN ASSOCIATION PRESCRIBED BY LAW FOR THE PRACTICE OF JOURNALISM (Art 13 ad 29 AMERICAN CONVENTION ON HUMAN RIGHTS), ADVISORY OPINION OC5/85 of NOVEMBER*, 13, 1985 Series A, No.5 p 105 para 41 it was held:

“the rights of each person are limited by the rights of others, by the security of all, and by the just

demands of the general welfare in a democratic society.”

A democratic society in turn encourages a large measure of broadmindedness in approaching all issues including the enjoyment of rights and freedoms.

CONCLUSION

Under s 79 of the Constitution just as in Article 19(3) a of the International Covenant on Civil and Political Rights the words rights or reputation of others, relate to either, other persons or to a community as a whole.

While the court recognizes the central role the right of expression plays in safeguarding even the other fundamental rights it is apparent from the above analysis of the law that it has limitations recognized by many civilized states most of which have provided for reasonable limitations by law. In our view it is for the courts dealing with the facts and evidence in defamation suit to come up with appropriate findings so that the substance of the right of expression is never taken away and that its exercise goes with a reasonable measure of responsibility. The ability to maintain the correct balance will in turn depend on the facts of each case and it is therefore not the function of a Constitutional court to prescribe what is to be applied. This is why we have confined ourselves to the elaboration of the general principles including an analysis of the extent of limitations under the Constitution and international level, including comparable jurisdictions. In this task the Courts have to bear in mind that at the end of the day it has been accepted that the true hallmark of a democratic society are prularism, tolerance and broadmindedness and although of necessity, individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail; a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position – see HANDYSIDE CASE (supra). We hope that pluralism is not the choice between good and evil because the first one builds the society and the second one destroys.”

With regards to the right of hearing we have stressed that it has no specific limitations in the Constitution and to us it is a cradle right which each baby asserts upon birth by calling the attention of “mama” with that first cry! Similarly the baby asserts its right of expression at the same time and in the same breath. The only difference is that the right of expression is limited while the right of hearing is unlimited. This right of hearing cannot be taken away even from the mighty and this is why the suit must proceed on merit. We accordingly dismiss the Notice of Motion with costs to the Respondent/Plaintiff. The file is hereby referred to back to the Civil Division.

DATED and delivered at Nairobi this 21st day of July 2006.

J.G. NYAMU

JUDGE

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