



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 557 of 2000

**JOHN SAVAGE.....
PLAINTIFF**

VERSUS

**NATION MEDIA GROUP LTD.1ST
DEFENDANT**

**ERIC SHIMOLI2ND
DEFENDANT**

**WANGETHI MWANGI3RD
DEFENDANT**

RULING

(1) On the 7th April 2000, John Savage, the Plaintiff, filed a suit against Nation Media Group Ltd., Eric Shimoli and Wangethi Mwangi (the First, Second and Third Defendants respectively). The Plaintiff filed the suit to recover damages arising out of a story which was carried in the “**Daily Nation**” on Thursday, 10th June 1999, alleging that –

“Vice-president George Saitoti and Cabinet Minister Nicholas Biwott exerted undue pressure to have Shs.850 million of public money released to a project that failed to get off the ground, an official report has revealed. The Shs. 850 million was paid to Mr. John Savage of Savage Holdings in August 1990. The Attorney-General should investigate the transaction and if any crime is revealed those responsible should be prosecuted says PAC.”

(2) The Plaintiff claims that the report was false and defamatory of him and portrayed him as a corrupt and dishonest person.

On the 31st May 2000, the Defendants filed a Defence to the Plaintiff’s claim. They admitted having published the story out of a sense of public duty, without any malice towards the Plaintiff and in the honest belief that the charges were true. The Defendants also said that the words were contained in the Public Investment Committee Report and were published on a privileged occasion.

(3) The Plaintiff filed a Reply to Defence on the 16th June, 2000 joining issue with the Defendants on the denials, allegations and contentions contained in the Defence.

On the 7th August 2000, the Plaintiff applied by Notice of Motion under Order 6 rule 13(1) of the Civil

Procedure Rules, to have the Defence struck out, judgment entered in his favour and the suit set down for assessment of damages. He also asked for an injunction to restrain the Defendants from publishing further defamatory articles about him.

(4) The application was opposed but it was never heard and concluded. After several adjournments for one reason or another, it was finally withdrawn on the 23rd November 2004.

(5) After withdrawing the Notice of Motion, the Plaintiff filed a Chamber Summons on the 1st December 2004, seeking prayers similar to those he had sought in the Notice of Motion. This second application to strike out the Defence was brought more than four years and eight months since the Plaintiff was filed on the 7th April 2000. The supporting affidavit is sworn by the Plaintiff. The affidavit is wide-ranging and contains not only matters of fact but also points of law. There are certain averments in this affidavit which only the Plaintiff's Advocate could have made by way of submissions but which have been deposed to by the Plaintiff. As no objection was taken by the Defendants' learned counsel to any part of this affidavit, I have to accept it as it is. But I must nonetheless draw the attention of the learned counsel for the Plaintiff to the mandatory provisions of Order 18 rule 3(1) of the Civil Procedure Rules.

(6) In his affidavit dated the 1st December 2004, the Plaintiff makes a number of points.

He says that he has not seen any certificate signed by the Speaker of the National Assembly that there was a report of either the Public Accounts Committee ("**the PAC**") or the Public Investment Committee ("**the PIC**") to the effect that he was paid Shs 850 million. And that there is no affidavit verifying any such report and that failure to produce these two documents is an abuse of the process of the court. The plaintiff also says that the report on which the Defendants rely does not contain the words they published about him. And so he maintains that the publication was malicious. And for good measure he says that the Defendants do not pass the test set by Section 11 of the Defamation Act (cap 36) which requires them to show that what they wrote of him was an extract of a parliamentary report.

(7) James Kinyua, the Company Secretary of the Nation Media Group Ltd (the first defendant) swore a replying affidavit on behalf of all three defendants. He says he saw and read the PAC report for the year 1995/96 and confirmed that the article complained of is based on the report. He has annexed to his affidavit pages 278 and 279 thereof and the passage on which the article appears to have been based is on page 279. He has also annexed a certificate dated the 6th December 2004 signed by the Clerk of the National Assembly stating:

"This is to certify that the Report of the public Accounts Committee on Accounts of the Government of Kenya Volumes 1 and 11 1995/96 were tabled in the House on Tuesday 8th June 1999 and that the attached Report herein is a certified copy of the original Report."

(8) Mr. Kinyua maintained that the article complained of is a fair and accurate report of the report of the PAC and that the Defendants have a valid defence to the Plaintiff's claim, which they should be allowed to put forward at the trial.

(9) Mr. Stephen Mwenesi, learned counsel for the Plaintiff, submitted that the Defendants have no defence to the Plaintiff's claim and that the Defence is a sham. He advanced a number of arguments in support of that position. In order to determine whether or not the Defendants have put forward a reasonable defence to the Plaintiff's claim, I have to look at the Defence they have filed.

As I have already said, the Defendants filed their Defence on the 31st May 2000. In paragraph 10(c) of the Defence, the Defendants averred that the words that were published in the **Daily Nation** on the 10th June 1999 concerning the Plaintiff, were contained in the Public Investments Accounts Committee report, a copy of which they had obtained. Accordingly, they contended that the words were published on a privileged occasion.

(10) In the article itself, Eric Shimoli, the Second Defendant, who was the author of it identified his source as report by the Public Accounts Committee (the PAC). It was there alleged that Shs.850 million

was paid to Mr John Savage of Savage Holdings in August 1990. John Savage is, of course, the Plaintiff in this case. He has sued the Defendants to recover damages for libel because he denies ever being paid or receiving the money alluded to in the report publication of which he contends, was malicious.

(11) While the hearing of this application was still continuing, the Defendants with the consent of the Plaintiff amended their Defence on the 23rd June 2006, to indicate that the basis of their report was the Public Accounts Committee Report.

(12) Mr. James Kinyua, who swore the replying affidavit on behalf of the Defendants, annexed to it part of the Report of the Public Accounts Committee on the Government of Kenya Accounts for the Year 1995/96. The part that contains the report which was carried in the Daily Nation is to be found at page 279, where the PAC noted with concern the non-implementation of the recommendations made by the Public Investments Committee during the year 1994/95 that the financial activities of Mr. John Savage of Savage Holdings Ltd. including the payment of KShs.850 million be investigated. Also annexed to the affidavit is a certificate dated the 6th December 2004 signed by the Clerk of the National Assembly certifying that the Report of the Public Accounts Committee on Accounts of the Government of Kenya Volume 1 and 11 1995/96 were tabled in the House on Tuesday, the 9th June 1999, and that the attached Report is a certified copy of the original Report. The report carried in the **Daily Nation** appeared on the 10th June 1999, two days after the PAC Report was tabled in parliament.

(13) If the words the Defendants published in the **Daily Nation** were based on the PAC Report a copy of which was annexed to Mr. Kinyua's affidavit, then it seems to me, prima facie, that they were based on extracts from a parliamentary report within the meaning and for the purposes of Sections 9, 10 and 11 of the Defamation Act, and consequently privileged.

(14) Mr. Mwenesi, in a very elaborate submission, contended that the certificate signed by the Clerk is not a proper certificate because it was not signed by the Speaker of the National Assembly. For that reason, he submitted that the Defendants have failed to demonstrate that the words they published were an extract from or an abstract of a parliamentary report. In the circumstances, he contended that there is no defence which should go to trial. If those submissions were made at a hearing of the suit on the merits, the court would have been called upon to make findings on the points based on evidence. My duty at this interlocutory stage, however, is not to decide whether the defence of privilege has been proved. I cannot and must not do that because I am not hearing the suit. All I am required to do at this stage is to look at the Defence filed by the Defendants and decide whether it discloses a reasonable defence to the Plaintiff's claim. The Defendants say that the words were published in an occasion of privilege and in support of that averment they have produced a copy of the Report of the PAC and a certificate signed by the Clerk of the National Assembly. Whether or not those documents satisfy the requirements of section 9, 10 and 11 of the Defamation Act must be left to the Judge who will try the suit to decide.

(15) I have looked at the copy of the PAC Report produced by Mr. Kinyua and have noted that the allegation that the Plaintiff was paid KSh.850 million which was carried in the **Daily Nation** on the 10th June 1999, may well have been taken from that report. And that is the gist of the defence of privilege put forward by the Defendants. In the face of that evidence, and with respect, I cannot agree with Mr. Mwenesi that the Defence does not disclose a reasonable or any defence to the plaintiff's claim and that it is a sham. I am satisfied that the defence of privilege advanced by the Defendants is the sort of defence which, if proved, is a complete answer to the Plaintiff's claim. It would be a travesty of justice to deny the Defendants the right and opportunity to canvass that defence at the trial.

(16) For the reasons I have given, I am afraid I can see no merit in the application and I accordingly order that the Chamber Summons dated and filed on the 1st December 2004 be and is hereby dismissed. In view of the Plaintiff's advanced age and ill health coupled with the fact that this suit was filed more than six years ago, I make no order as to costs.

(17) Finally and having due regard to the Plaintiff's circumstances as highlighted by Mr. Mwenesi, I would like to hope that this case can finally be set down for hearing instead of continuously engaging in interlocutory applications which more often than not only impede the expeditious disposal of cases. It is

in the Plaintiffs interest to push for an early trial.

Dated delivered at Nairobi this Thirty First day of August of 2006.

P Kihara Kariuki

Judge