



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

Civil Case 505 of 1998

PETER BARAZA RABADO.....PLAINTIFF

VERSUS

NATION NEWSPAPER LTD.....DEFENDANT

JUDGMENT

On the 30th of October, 1998, the defendant (*Nation Newspapers Limited*) published in its Daily Nation edition No.11792 the following story concerning the plaintiff, Peter Baraza Rabado;

“MAN IS INJURED MILKING JUMBO

A young farm hand suffered two broken ribs, and a dislocated shoulder... after trying to milk an elephant. The elephant, which had been browsing peacefully with her calf, suddenly realized that she was being handled and indignantly tossed 21 year old Peter Baraza into the air together with his half filled can of milk. Badly winded, he struggled to escape by climbing a nearby tree, but she seized the tree with her trunk, uprooted it with one violent tug and waved it in the air with Peter clinging desperately to a branch...witnesses said he tried to milk the elephant when he came across her near the Kenya Agricultural Research Institute in Ol’joro Orok Division, last Saturday. The Kenya Wildlife Service area partnership officer Mrs. Mary Thigera visited him in hospital to offer her condolences...Baraza, she (Mrs. Thigera) said, had obtained almost one pint of milk from the elephant before he was attacked.”

On the 4th of November, 1998 the defendant published another story concerning the plaintiff under the following headline;

“THE MAN WHO MILKED A JUMBO

The story of the young man’s escapade spread through the country like a bush fire.

Twenty two year old Peter Baraza is a daring man. He did what nobody ever attempted to do- he milked a rogue elephant. Baraza concedes that he had never seen a jumbo before but his encounter with the mammal will ever be imprinted in his memory for the rest of his life...”

Accompanying the story was a picture of the plaintiff holding a can full of milk. At the background of the picture was an elephant. It is evident that the picture of the plaintiff was manipulated to give the visual effect of the plaintiff holding a can of milk. The plaintiff’s picture was superimposed on the picture of the elephant to give an impression to the reader of the article of the story that had been published concerning the plaintiff.

The plaintiff filed suit against the defendant complaining that the story published by the defendant defamed him. In paragraph 6 of his plaint, the plaintiff pleaded that the words contained in the said story were meant to portray him in the ordinary meaning of the words that he was;

- (a) *A daring man*
- (b) *That the plaintiff could not differentiate between a cow and an elephant*
- (c) *That the plaintiff could tame a rogue elephant*

In paragraph 7 of the plaint, the plaintiff averred that the innuendo in the words were meant to mean and were actually understood to mean that;

- (a) *The plaintiff was a fool*
- (b) *The plaintiff was an idiot or a person of unstable mind or crazy.*
- (c) *The plaintiff was a man of very low intelligence or a very stupid person.*
- (d) *That the plaintiff is a person who is a drunkard and or a drug addict.*
- (e) *That the plaintiff believes in superstitions and or uses supernatural powers.*

The particulars in support of the innuendo were stated to be;

- (a) *It is only a fool who can attempt to milk a rogue elephant.*
- (b) *It is only a mad person or one who is sick in the head who can attempt to milk a rogue elephant.*
- (c) *It would require a person of very low IQ to think of milking a rogue elephant.*
- (d) *Only a person acting under the influence of drugs like alcohol, bhang e.t.c. can attempt to milk a rogue elephant*
- (e) *One must be a believer in superstitions to require elephant's milk.*

The plaintiff pleaded that as a result of the defendant publishing the said story concerning him, his credit, character and reputation had been injured and lowered in the estimation of the right thinking members of the society and had exposed him to hatred, ridicule, scandal, odium, contempt and made the plaintiff a laughing stock. The plaintiff averred that the defendant had printed the story out of malevolence and spite of the plaintiff and had refused to publish a retraction or correction or offer an apology when the plaintiff made the demand. The plaintiff therefore asked the court to grant him general damages for defamation and for injurious falsehood.

The defendant filed a defence. It admitted that it had published the articles concerning the plaintiff. It however denied that the said articles were defamatory to the plaintiff. In paragraph 7 of the defence, the defendant stated that the words which were printed were fair comment made in good faith and without malice upon a matter of public interest, namely;

- (i) *The act of the plaintiff in trying to milk an elephant, a prized wild animal in the country whose safety and preservation is a matter of public interest.*
- (ii) *The possibility of people obtaining an alternative source of milk from elephants and the perils attendant to it.*
- (iii) *The danger that elephants pose to people who live adjacent to the National Parks and*

enlightening people on the perils and risks that elephant pose which issue is one of public interest.

(iv) *The origin of the elephant at Lake Nakuru National Park has no elephants and is secured by an electric fence, thereby alerting people to the presence of stray elephants which is a matter of public interest.*

The defendant averred in paragraph 8 of its defence that the words printed consisted allegations of facts which were true in substance and in fact and in so far as it expressed opinion, it was fair comment made in good faith and without malice upon matters of public interest. The defendant then pleaded particulars under **Order VI Rule 8 of the Civil Procedure Rules** and stated that;

(i) *The plaintiff was admitted into Nyahururu District Hospital after being attacked by an elephant with two broken ribs, a dislocated shoulder and severe shock.*

(ii) *The plaintiff admitted the incident to the Kenya Wildlife Services area partnership officer Mrs. Mary Njigira while recuperating at the hospital.*

(iii) *The plaintiff was attacked by an elephant, was tossed into the air and the tree on which he was on was uprooted by the elephant.*

(iv) *The plaintiff was unconscious after the incident and in shock when he came to and could not recollect what had transpired.*

The trial commenced before Visram J, who heard the plaintiff's testimony. The plaintiff then closed his case. Visram J, was however transferred from Nakuru before concluding the case. The parties to this suit agreed by consent for this court to proceed with the case from where it had reached. This court therefore heard the testimony of the defendant. The defendant informed this court that they would call three witnesses to testify on their behalf. However, at the hearing of the case, they were only able to call one witness, DW1 John Mugo Njeru, a Senior Writer with the Defendant's newspaper and who wrote the story. The defendant was not able to call any other witnesses.

According to the plaintiff, on the 30th of October 1998 while he was weeding in a maize plantation, he heard people shouting "Njogu! Njogu!" The plaintiff not being a member of the Kikuyu community did not know what the word meant. When he came out of the maize plantation, he saw an elephant. The elephant made noise which frightened him. The plaintiff fell to the ground. The elephant grabbed the right leg of the plaintiff and threw him into the maize plantation. The plaintiff lost consciousness and only came to two days later when he was already admitted at the Nyahururu District Hospital. He produced the treatment cards as *plaintiff's exhibit No.1*. He was admitted at the hospital for over a week and when he was discharged from the hospital he was shocked and surprised to see the stories which had been published by the defendant. He testified that the said stories subjected him to ridicule to the extent that he was forced to leave his casual employment and return to his rural home at Kakamega.

The plaintiff denied that he had attempted to milk the elephant or even tell anyone that he had made such an attempt. He testified that the stories published by the defendant portrayed him as an idiot, a person who believes in superstition and made him to be a laughing stock of the right thinking members of the society in Kenya. He testified that the publication of the said stories had affected his social life because people thought him to be a person who smoked bhang. He could not be able to get a wife because no woman was willing to marry an idiot. He testified that after the stories were published, he wrote a demand letter to the defendant seeking to have the defendant publish a retraction and an apology. The demand letter was produced as *plaintiff's exhibit No.4*. The defendant however replied to the said demand letter and refused to admit liability or publish an apology. The defendant's response was produced as *plaintiff's exhibit No.5*. The plaintiff prayed for this court to grant him damages as prayed in his plaint.

The defendant, as stated earlier, called one witness; the reporter who wrote the stories. DW1 Mugo Njeru testified that he was then working as a reporter based at Nyahururu. He received information from

one of his sources that a person was injured by an elephant. He went to investigate and learnt that a person had been injured while attempting to milk a rogue elephant. He testified that he interviewed the people who saw the incident and confirmed that indeed the person had attempted to milk the elephant. He testified that he saw an empty Kasuku tin which the person, who is the plaintiff in this case, had attempted to collect the milk which he had milked from the elephant. He testified that he went to the Nyahururu District Hospital and saw the plaintiff who was badly injured. DW1 was unable to interview the plaintiff because of the nature of his injuries. He interviewed the Kenya Wildlife Services area partnership officer Mrs. Mary Njigira who confirmed to him that she had seen the plaintiff at the hospital, interviewed him and confirmed the story to be true. The defendant however did not call Mrs. Mary Njigira to testify in court to corroborate the testimony of DW1.

DW1 admitted that after writing the first story, he wrote a feature article on the 4th of November 1998 whereby he analyzed the story and made comments on the story because the story was a human interest story. DW1 testified that he took the photograph of the plaintiff and interviewed him. He testified that the plaintiff was reluctant to confirm the story because at the time he wished to be paid compensation for the injuries that he had sustained by the Kenya Wildlife Services. He denied that he had maliciously written the story which had no iota of truth as alleged by the plaintiff. He reiterated that the story was true. He admitted that the stories portrayed the plaintiff as very daring but stupid. This was because the plaintiff ought to have known that the elephant was a dangerous animal. He admitted that the act by the plaintiff, if true, was something which was daring and which could have positive or negative effect depending on the person who read the story. He denied that he had seen the plaintiff's letter demanding that the defendant retract the story and publish an apology. It was his evidence that if the plaintiff actually attempted to milk an elephant then he ought to be considered a hero.

After the close of the defendant's case, the parties to this suit agreed by consent to file written closing submissions. The plaintiff and the defendant filed written submissions. I have carefully read the pleadings that were filed by the parties in this suit. I have considered the evidence that was adduced by the plaintiff and the defendant in this case. I have also carefully considered the written submissions which were filed by the parties to this suit. The first issue for determination by this court is whether the articles published by the defendant concerning the plaintiff were false and whether the said articles defamed the plaintiff. Another issue for determination, if the first issue is determined in favour of the plaintiff, is what damages, if any, should be paid to the plaintiff.

The facts of this case are disputed. It is the plaintiff's case that while he was going on with his normal work of weeding maize, he was attacked by a stray elephant which injured him. The plaintiff testified that when he heard the people shouting "*Njogu! Njogu!*" he did not understand that he was being warned that there was a stray elephant in the area. He did not understand that the word "*Njogu*" meant elephant in the Kikuyu language. He walked out of the maize plantation and was confronted by the elephant which attacked and injured him. He lost consciousness and came to two days later when he was already admitted at the Nyahururu district hospital. He denied that he had attempted to milk the elephant thus causing him to sustain the injuries.

On the other hand, it is the defendant's case that the plaintiff actually attempted to milk an elephant. DW1 testified that he interviewed the people who saw the elephant attack the plaintiff. He testified that he confirmed as a fact that the plaintiff had attempted to milk an elephant before he was injured by the elephant. DW1 testified that the Kenya Wildlife Services area partnership officer Mrs. Mary Njigira told him that she had interviewed the plaintiff at the hospital and indeed established that the plaintiff had been injured by the elephant while he was attempting to milk it. The defendant did not however avail any of the eye witnesses to testify before court as to the truth of its story. Mrs. Mary Njigira, who was quoted in the article and whom the defendant, indicated it would call as a witness did not testify before this court.

I have carefully evaluated the evidence adduced. It is clear to this court that the version of events as narrated by the plaintiff was obviously the truth. The story published by the defendant was false. DW1, the writer who wrote the story, did not confirm the truth or otherwise of the story before it was published by the defendant on the 30th of October, 1998. DW1 confirmed that he was not able to interview the plaintiff to confirm the truth of the story because he was informed by the doctors at Nyahururu District

hospital that the plaintiff was in a critical condition after sustaining the injuries inflicted by the elephant. The defendant went ahead and published the story without first confirming it with the plaintiff. On the 4th of November, 1998, the defendant published another story further to the story concerning the plaintiff which was published on the 30th of October, 1998. This time, DW1 interviewed the plaintiff. The plaintiff however denied that he had attempted to milk the elephant when he was injured. DW1 in his opinion, however attributed the denial of the plaintiff of the allegation that he had milked the elephant to the fact that the plaintiff desired to be paid compensation by the Kenya Wildlife Services for the injuries that he had sustained.

The tone of the article published on the 4th of November, 1998 is to the effect that the plaintiff denied the story due to the fact that he intended to financially gain from the injuries that he had sustained. The defendant did not consider that the plaintiff could have been telling the truth. To add colour to its story, the defendant published a picture of the plaintiff holding a can full of milk superimposed on a background image of an elephant. It is clear that the said picture accompanying the article was manipulated to give full effect to the thrust of the article that the plaintiff had daringly milked a rogue elephant. I hold that the story published by the defendant concerning the plaintiff was false. No witness was brought to this court to confirm the veracity or the truth of the story which was published by the defendant.

Having found that the stories which were published concerning the plaintiff were false, did the said articles defame the plaintiff's character? The plaintiff testified that after the said articles were published, he was subjected to ridicule and odium because people thought he was stupid, an idiot and some one who probably took bhang. He testified that the right thinking members of the society could not fathom how a sane person could attempt to milk an elephant which is known to be a dangerous animal and which can kill. It is trite law that any statement which is published imputing on an insane state of mind of a person is *per se* defamatory.

It is clear that the said articles were published by the defendant because it was a sensational and incredulous story. A right thinking member of the society would obviously interpret the contents of the articles to imply that the plaintiff was a very daring but stupid man. The innuendo intended was that the plaintiff was an obvious idiot who would attempt to milk a wild elephant. I agree with the plaintiff that the said articles portrayed him in the eyes of the right thinking members of the society to be an idiot.

To reinforce the thrust of the said articles, particularly the article published on the 4th of November 1998, the defendant manipulated a picture of the plaintiff to show the plaintiff holding a can full of milk. At the background of the picture was a superimposed image of an elephant. The innuendo of the said picture was clear for a right thinking member of the society to see. It was meant to portray the plaintiff as an idiot who dared milk an elephant. It was further meant to portray the plaintiff as having been lucky to survive after daring to do such a stupid act as trying to milk a wild elephant.

As was held by Hancox JA (*as he was then*) in the Court of Appeal case of **Nation Newspapers Ltd vs Chesire [1984] KLR 156** at page 165;

***“An action for libel by innuendo depends for its success on the proof by the plaintiff that special circumstances, or as it is frequently put, extrinsic facts, are known to persons who read the offending publications (See Clerk & Lindsell on Torts 14th edition paragraph 1701, Gatley on Libel & Slander 6th edition paragraph 116.) Evidence must therefore be led of special circumstances which were known to the recipient of the libel. As is demonstrated in Hough vs London Express Newspapers Ltd (Supra) per Slessor LJ at P.34, the evidence does not have to establish that the witness or witnesses understood the words complained of in a defamatory sense, but there was some fact known to them which would be sufficient to entitle any reasonable man with such knowledge to interpret the words in a defamatory sense...*”**

In the present case, a reasonable man reading the articles and seeing the picture would have interpreted the articles published to imply that the plaintiff was stupid or an idiot. The said articles portrayed the plaintiff as an oddity in the society in that he attempted to do what a reasonable man would never dare

even contemplate.

I also hold the defence put forward by the defendant to the effect that the said articles were factual and the commentaries made thereto to be fair comment and made in good faith and without malice to be unfounded. It is clear that the said articles published falsehoods concerning the plaintiff. As was held by Kuloba J, in the case of **Machira t/a Machira & Co. Advocates vs East African Standard [2001] KLR 638** at page 644;

“A defendant is permitted to plead justification only where it is clear that the allegations he made and are complained of are true in fact or substantially so. He cannot be allowed to set out a version of a statement which differs materially from that complained of and justify that version. For him to rely on justification he must accept the plaintiff’s version of the statement or a statement which is in substance identical with the plaintiff’s version; Brembridge v Latimer (1864) 12 WR 878 at 879, per Byles, J, Rassam v Budge [1893] 1 Q B 571 at 574, CA (Where the defence was struck out as embarrassing and tending to prejudice the fair trial of the action, or to delay the fair trial); and Watkin vs Hall (1868) LR 3Q B 396 at 402. You have only to look at the defence in the instant case to be convinced that it falls far below this requirement. Terminologically, “Justification” as used in the law of defamation, means “truth”.”

In the present case, like in the case referred above, the defence put forward by the defendant cannot stand once this court reached the decision that the articles published were not factual but were in fact opinionated falsehoods. In the circumstances of this case, having carefully evaluated the evidence, I do hold that the plaintiff has established his case on a balance of probabilities that he was defamed.

On quantum as to damages, as was held by the Court of Appeal in **Johnson Evans Gicheru vs Andrew Morton & Another CA Civil Appeal No.314 of 2000 (unreported)** (per Tunoi JA who delivered the judgment of the court) at page 9 of his judgment;

“I would think that in the instant case to arrive at what could have been said to be a fair and reasonable awards the learned trial judge could have drawn considerable support in the guidelines in JONES VS POLLARD [1997] EMLR 233, 234 and where a checklist of compensable factors in libel actions were enumerated as;

- 1. The objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published, and any repetition.*
- 2. The subjective effect on the plaintiff’s feelings not only from the prominence itself but the defendant’s conduct thereafter both upto and including the trial itself.*
- 3. Matters tending to mitigate damages, such as the publication of an apology.*
- 4. Matters tending to reduce damages.*
- 5. Vindication of the plaintiff’s reputation past and future.”*

In the present case, the plaintiff has submitted that he should be awarded general damages of Ksh.40,000,000/=. He has relied on the decision of **K.N.K Biwott vs Clays Limited Nairobi HCCC No.1067 of 1999 (unreported)** where the plaintiff was awarded damages of Ksh.30,000,000/=. The defendant on its part has submitted that the plaintiff should be awarded Ksh.50,000/=. It has relied on the High Court decision of the **Standard Limited vs Scolastica Omondi & Anor. Nairobi HCCA No.772 of 2001 (Unreported)** where the plaintiff was awarded Ksh.200,000/=.

I have considered the said submissions made. I have also considered the fact that the defendant published two articles concerning the plaintiff and even went to the extent of manipulating a photograph for maximum effect of the defamatory articles published. I have considered also that after the said articles were published, the plaintiff demanded the defendant to retract the story and publish an apology.

The defendant contemptuously replied to the plaintiff that it would do no such thing, and to quote the letter written by the defendant's advocate dated the 13th of November, 1998;

“Our client, the Nation Newspapers Limited, denies entirely, the allegations directed at it in your said letter. Your client's allegations of defamation are totally lacking in foundation. Your client will strain very hard to show where, in our client's publication, the materials adverted to in paragraph 5 of page 2 of your letter arise. You will realize, from the foregoing, that the apology you demand shall not be forthcoming.”

It is clear that the defendant was dismissive of the distress the plaintiff was experiencing when he sought the defendant to retract the story and publish an apology. The defendant made no effort to apologise to the plaintiff or publish a retraction. I have also taken Judicial notice of the fact that the defendant's newspaper has the highest circulation in this country.

In assessing damages to be paid to the plaintiff, I have put in mind the dictum of Tunoi JA, in **Johnson Evan Gicheru vs Andrew Morton & Anor. Case (Supra)** at page 8 where he held that;

“In BROOM VS CASSEL & CO. [1972] AC 1027 the House of Lords stated that in actions of defamation and in any other action where damages for loss of reputation are involved, the principle of restitution in integrum has necessarily and even higher subjective element. Such actions involve money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, but, in case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charges. As Windeyer J, well said in UREN V JOHN FAIRFAX & SONS PTY. LTD, 117 C.L.R. 115, 150;

‘it seems to me that, properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways – as a vindication of the plaintiff to the public and as a consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money.’ ”

In the present case, doing the best that I can, and taking into account the factors that I have enumerated hereinabove, I hereby assess the general damages to be paid to the plaintiff for being defamed by the defendant to be Ksh.2,000,000/=. The plaintiff shall of course have the costs of this suit.

It is so ordered.

DATED at NAKURU this 15th day of November, 2006

L. KIMARU

JUDGE