REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Case 1717 of 1999

AKILANO MOLADE AKIWUMI ……. PLAINTIFF

VERSUS

ANDREW MORTON AND ANOTHER …… DEFENDANTS

JUDGMENT

The plaintiff claims damages for libel and exemplary damages from the defendants together with an order for an injunction restraining the defendants from further publishing the alleged defamatory words complained of plus costs and interest. The plaintiff claims that the defendants published the following words falsely and maliciously in a Book written by the first defendant and published by the second defendant as follows:

> **"In September 1990, at the end of his 110 day inquiry, Troon handed over his weighty 150 page report to the Attorney-General, Mathew Muli, fully expecting the immediate arrests of his two principal suspects, Nicholas Biwott and Hezekiah Oyugi. Instead, the government set up a judicial inquiry chaired by Mr. Justice Evans Gicheru.**
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> **At the time the President took no action because the man who briefed him on the conclusions of Troon's report was one of the main suspects, Hezekiah Oyugi. He poured cold water on much of Troon's evidence, sometimes emphasizing the suicide theory, sometimes the possible involvement of his principal rival at State House, Nicholas Biwott. "Oyugi thoroughly doctored the report", calls the former Cabinet Secretary, Professor Philip Mbithi. "It took a long time before the President discovered the full extent of Oyugi's treachery.**
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> **Oyugi even tried to direct the inquiry's conclusions, regularly entertaining the commission judges at his home, on at least one occasion slaughtering a goat in their honour. It was only after the commission had been sitting for a year that Troon was called back from Britain to give his evidence. For the first time the two principal suspects were named in public. By now, though, the full extent of Oyugi's duplicity was beginning to be appreciated by the President, and these suspicions were confirmed when James Kanyotu, the Head of the Special Branch, bugged the hotel rooms of the three judges. Transcripts of their conversations showed that Oyugi was attempting to direct the commission to find Biwott guilty.**
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> **The fact that the commission had lost sight of its original brief by admitting all kinds of wild and often malicious conjecture lay behind the President's decision, in November, 1991, to bring its deliberations to an end. At the same time, now aware of the true nature of Troon's evidence, he ordered the arrest of Oyugi, Biwott, the former Nakuru District Commissioner Jonah Anguka, the Nyanza Provisional Commissioner Julius Kobia and**

others."

The plaintiff who is a former High Court Judge and Judge of the Court of Appeal in Kenya alleges that the said words referred to him as being one of three commissioners duly appointed to preside over the judicial inquiry referred to in the said passage. The plaintiff claims that in their natural and ordinary meaning the words were understood to mean:-

(a) That the plaintiff had been compromised in the discharge of his duties by a party implicated in the matter he was inquiring into.

(b) The plaintiff was corrupt.

(c) The plaintiff was not a fit and proper person to be a Judge.

(d) The plaintiff had manipulated proceedings in which he was presiding contrary to his undertaking as a judicial officer.

(e) The plaintiff was not honest and lacked integrity.

The defendants filed an Amended joint statement of defence in which they admitted the publication of the said book but denied that the words were injurious, false and malicious.

They pleaded justification or that the words referred to the plaintiff and that the words were not defamatory. They further denied that the words were capable of the meaning ascribed to them in paragraph 6 of the plaint and set out particulars of this allegation.

In the alternative the defendants state that the words set out in paragraph 6 of the plaint were fair comment made in good faith and without any malice.

The contents of paragraphs 7, 8 and 9 of the plaint are denied or that the plaintiff has suffered damages.

The plaintiff applied for further and better particulars of paragraphs 2(ii) and 4(a) of the defence which were not supplied and the Plaintiff sought to strike out these paragraphs. By an order of Mr. Justice Nyamu of the 26.1.2004 the said paragraphs were struck out.

The suit was set down for hearing on the 25.10.2004 and came on for hearing before Mr. Justice Kihara Kariuki when Mr. Wagara for the defendants stated that he had been unable to obtain instructions from the defendants and sought to cease acting for the defendants.

An order was made for the defendants' advocate to file an application for withdrawing from acting for the defendants to be heard on the 11.11.2004 and for service on the defendants by Registered Post. The suit was set down for hearing on the 8.12.2004 and the plaintiff was granted leave to serve the hearing notice by Registered Post.

The matter came before me on the 8.12.2004 when the defendants did not appear and the plaintiff produced an affidavit of service filed in court on the 6.12.2000 to which was annexed a postage document showing that the documents annexed to the affidavit had been sent to the defendants by registered post. I accept therefore that the defendants were duly served with the hearing notice herein.

The plaintiff gave evidence in which he highlighted his illustrious and prestigious career both in Ghana and Kenya and other African countries.

He read the passage set out herein and stated that he was one of the judges of the commission appointed by the President to inquire into the death of the late Dr. Ouko. He stated it was not true that Oyugi was attempting to direct the commission to find Mr. Biwott guilty. James Kanyotu did not attempt to direct the commission as alleged. It was not true that the plaintiff was entertained in Oyugi's house. He did not

know where his house was and he did not slaughter a goat in the commissioners' honour.

Although his name did not appear in the passage it was a fact that the plaintiff was one of the Commissioners which fact was well known to members of the Kenyan public.

When he first heard of the words complained of the plaintiff was the Chairman of another Commission into the Tribal Clashes in Kenya. He said he was devastated by the allegations made. Many people contacted him and expressed sorrow at the way he had been defamed.

The plaintiff stated he was well known in Kenya and asked that his career be taken into account in considering the effect upon him of the allegations.

There is no doubt that the words complained of are to the effect that Oyugi tried improperly to influence the minds of the commissioners to find Mr. Biwott guilty of murdering Dr. Ouko.

I accept that there was no question of the commissioners, including the plaintiff, being either entertained by Oyugi or being influenced by him to find Biwott guilty.

In the absence of the defendants appearing to present their defence I find that the words complained of had the meanings ascribed to them in paragraph 6 of the plaint.

I also find that the words published as they are in a well known book were published for and read by many people. I also accept that the words caused the plaintiff considerable pain and anguish having regard to his unblemished and distinguished career.

In the result I find the defendants liable in defamation.

With regard to damages Mr. Ngatia relied on the cases of Ki**pyator Nicholas Kiprono Biwott Vs clays Ltd & 3 Others HCCC No. 1067 of 1999** in which Visram, J referred to the principles governing the question of damages in libel cases and cited with approval a passage from the case of **Cassel & Co. Ltd v Broome & Anor (1972) 1 ALL ER 801** in which Lord Hailsham said:

> "**In actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of restitution in integrum has necessarily an even more highly subjective element. Such actions involve a 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 at a sum awarded by a jury sufficient to convince a bystander of the baseless of the charge.**"

Visram, J also stated:

> **"In assessing damages the court must look at the whole conduct of the plaintiff and the defendant from the time of the publication until the time of judgment. The court will look at the conduct of the parties before action, after action and in court during trial. Malicious and insulting conduct on the part of the defendant will aggravate the damage to be awarded. These "aggravated damages" (as distinguished from exemplary damages) are meant to compensate the plaintiff for the additional injury going beyond that which would have flowed from the words alone, caused by the presence of the aggravating factors.**
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> **Exemplary damages go beyond compensation and are meant to "punish" the defendant. Where exemplary damages are to be awarded against joint tortfeasors, only one sum should be awarded and this must represent the highest common factor, that is to say, it must not exceed the highest sum which the least blameworthy defendant ought to pay by**

way of punishment. I think similar principles apply to aggravated damages".

I would with respect adopt this statement of the law.

He also referred to the case of **John Evan Gicheru & Andrew Morton & Anor. HCCC No. 214 of 1999** in which the present Chief Justice was awarded a sum of Kshs. 2.25 million in respect of the same words which the plaintiff herein complains of. It is in fact the same libel.

The learned justice, Mr. Justice Visram considered the award too low and found reason for it in the statement of the learned Judge Lady Justice Aluoch where she stated:

"The prayer for damages as I see it was left to the Court's discretion as no obvious principle to be followed in calculating damages was given by either of the 2 lawyers".

I accept the reasoning of Mr. Justice Visram on the principles to be considered in awarding damages for libel both ordinary and exemplary. However, I am of the view that he took a quantum leap in awarding a sum of KShs. 30 million by way of damages in that case especially having regard to the awards of damages which were awarded in the cases of **George Oraro v Barack Wiston Mlaga (HCCC No. 85 of 1992)** in which the High Court awarded Kshs 1.5 Million for defamation contained in an affidavit sworn in the U.S.A but published in Kenya and **Abraham Kipsang Kiptanui v Francis Muchiri (HCCC No. 42 of 199**7) in which the High Court awarded Kshs 3.5 Million for libel contained in a Kenyan newspaper called "Target" as well as the Gicheru case.

His reason is stated at page 27 of his judgment as follows:

"I believe that time is propitious to send a clear message to all those who libel others with impunity, and who get away with ridiculously small awards, that the courts of law will no longer condone their mischief. No person should be allowed to sell another person's reputation for profit where such a person has calculated that his profit in so doing will greatly outweigh the damages at risk."

Justice Visram awarded the plaintiff a sum of Kshs 15 million for compensation damages and Kshs. 15 million for punitive damages in a case where the plaintiff a politician was accused of being implicated in a murder.

The other case Mr. Ngatia relied on was **Obure v Alwaka t/a Headline Publishers and Others HCCC No. 956 of 2003** where Lenaola Ag. J awarded a sum of Kshs. 17 million to the plaintiff who was a politician for allegations of sexual misconduct which affected his family the sum awarded Kshs. 15 million as compensation damages and Kshs. 2 million punitive damages.

The rationale for any award of damages in our legal system is to try to compensate the injured person with a sum sufficient to reinstate that person back into the same position they were in prior to the injury being suffered. Hurt feelings are only awarded in a few exception cases. Defamation being one of them. It is to some extent a metaphysical exercise to gauge what sum will compensate for hurt feelings. It must however in my view be considered in light of the prevailing economic, social and financial state of Kenya. One Million is a large sum of money to the vast majority of Kenyans although it may not represent such a large sum in other wealthier nations. Turning to the Plaintiff in this case, he is an eminent person and well respected judge although now retired from the Kenyan Judiciary. He still, however holds high judicial office in Botswana. I bear in mind that the judiciary has been vilified for corruption and that to implicate a judge in corrupt practices is defamatory if not true. I also bear in mind that Lady Justice Joyce Alouch made an award arising of the same subject matter and allegations in the case of the present Chief Justice.

Taking all of these factors into account I award Kshs 2.5 Million by way of compensatory damages to compensate the Plaintiff's hurt feelings and vindicate his character to the world.

So far as exemplary damages are concerned, these are to punish the wrongdoer. I award in this respect a sum of Kshs 500,000 making total in all of Kshs. 3 million. I grant the other relief sought. The plaintiff will have the costs of the suit and interest at court rates from the date of this award.

Dated and delivered at Nairobi this 28th day of January 2005.

P.J RANSLEY

JUDGE