REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 380 of 2004

HONOURABLE JAKOYO MIDIWO …….……
PLAINTIFF

- VERSUS –

KENYA TIMES MEDIA TRUST LTD. …….……1ST
DEFENDANT

FREDRICK ODIERO …….……2ND
DEFENDANT

R U L I N G

The Honourable Jakoyo Midiwo (hereinafter referred to as "**the Plaintiff")** is the Member of Parliament for Gem Constituency in Siaya District, Nyanza Province.

Kenya Times Media Trust Ltd., the First Defendant, (hereinafter referred to as "**the First Defendant**") is the proprietor and publisher of the "**Sunday Times**" Newspaper.

Fredrick Odiero, the Second Defendant, (hereinafter referred to as "**the Second Defendant**") was at the material time employed by the First Defendant as a reporter.

On the 19th April 2004, the Plaintiff filed a suit against both Defendants claiming damages for alleged defamation contained in an article carried in the "**Sunday Times**" issue of the 15th February 2004.

In the article, under the banner headline: "**Gem MP involved in Bar Brawl,"** it was alleged —

"**Gem Member of Parliament Jakoyo Midiwo was involved in a fierce brawl which left a 27 year old man seriously injured in the wee hours of yesterday morning at a famous bar in Kisumu.**

Trouble started at about 4 a.m., when the MP picked up a quarrel with other men in Mamba Hotel, prompting the scuffle that almost turned chaotic before police intervened.

Sources said trouble started when the MP arrived in the company of a lady and a bodyguard and rowdy patrons started shouting "Koinange Street" ……..

Other police sources indicated that the MP had picked up a quarrel over a disagreement with other men in the bar prompting the fight …….…

……. It is understood that the MP, his bodyguard and other few people had arrived in the hotel at about 10 p.m. on Friday night and drunk up to 4 a.m. when the scuffle ensued ……"

The Plaintiff maintained that the report was false and that its publication was malicious. By letter dated the 26th February 2004 through his advocates, the Plaintiff wrote to the First Defendant and demanded that it publishes an apology for the false report. On the 28th February 2004, the First Defendant published in its other newspaper, the Kenya Times, an apology in the following terms:

"**Clarification on Midiwo article"**

"**In the issue of the Sunday Times our sister publication of 15th February 2004, we carried out an article on page 2 titled "GEM MP INVOLVED IN BAR BRAWL."**

"**In the article we reported that the Honourable MP Jakoyo Midiwo arrived at Mamba Hotel in Kisumu in the Company of a lady and bodyguard. We further reported that the MP picked up a quarrel with other men in the said Hotel prompting a brawl that almost turned chaotic before police intervened.**

We have since established that the Hon. Jakoyo Midiwo was not accompanied by a lady as stated in our said article. We have also since established that it was not the Honourable MP who picked up the quarrel that led to the altercation.

We unreservedly apologize to Hon. Jakoyo Midiwo for the wrong impression created by our said publication and equally to his family, friends, colleagues and business associates."

As I have already noted hereinabove, the apology was published on the 28th February 2004 and on the 19th April 2004, the Plaintiff filed this suit claiming damages for defamation based on the article in respect of which the First Defendant had already issued an apology on the date aforesaid.

Subsequently, and the 3rd May 2004, the Defendants filed therein joint Statement of Defence which contains some 21 paragraphs in which they denied the Plaintiff's claim. I will refer only to the paragraphs which I consider to the relevant to this application. In paragraph 3 of the Defence, the Defendants admit that the words complained of were printed and published but they deny that the words were false and malicious. By this plea, I understand and take the Defendants to mean that the words were true. In paragraph 4 of the joint Defence, the Defendants deny that the words were printed recklessly, maliciously and falsely. In paragraph 10 of the Defence, the Defendants say that the words were printed and published in the public interest and in paragraph 16 of the Defence, they deny that the statement published was false, malicious or defamatory of the Plaintiff or that it was actuated by malice or spite. Finally, in paragraph 18 of the Defence, the Defendants aver that the apology published did not amount to admission of liability of the Plaintiff's claim.

In the apology, the Defendants stated that contrary to what they had said in the article, they had since established that the Plaintiff was not accompanied by a lady. Further, the Defendants went on to say that they had also since established that it was not the Plaintiff who had "**picked up"** (sic) a quarrel that had led to the altercation. The Defendants therefore tendered unreserved apology to the Plaintiff, his family, friends, colleagues and business associates for the wrong impression created by the article.

In my judgment, the apology tendered by the Defendants was a clear and unequivocal admission that the allegations they had made against the Plaintiff were false. Once they admitted that the allegations were untrue, I cannot begin to comprehend how the Defendants can then turn around and file a Defence saying that the words were true or that they were not false. Going by the sequence in which the apology and the Defence were respectively issued and filed, I am inclined to believe that the apology states the true

position of the Defendants. That being the view I take, the denials in the Defence must be hollow and I so hold. It is, so to speak, a defence filed simply to postpone the judgment day. The Defence is a sham and quite clearly frivolous, scandalous and an abuse of the process of the court and merely intended to delay the Plaintiff.

In the case of **J.P. Machira t/a Machira & Company Advocates v. Wangethi Mwangi and Another** (Civil Appeal No. 179 of 1997) (unreported), the Court of Appeal had before it a defence not dissimilar, if not identical, to the one in this case which defence the superior court (this court) had declined to strike out. In that appeal, the Respondents had tendered an apology in which they admitted that the words they had published were false but like in the present case, they had purported to resile from that position and had filed the defence in the superior court maintaining that the words of the Appellant complained of were not false. Mbogholi Msagha, J held that notwithstanding the apology, the defence contained triable issues which, in the opinion of the learned Judge, should go for trial. On this aspect of the appeal, Omollo, J.A., in his leading judgment, succinctly had this to say at page 9: —

"If I understand the Appellant's case correctly, his contention in his application to strike out the defence was that even if the Respondent's denials in their defence were to be held to be a sufficient traverse to the allegations made in the plaint, those denials could not possibly be sustained on the material which he placed before the superior court. The Respondents had called Ms. Grace Wahu Njoroge a client of the Appellant Ms. Njoroge was not a client of the Appellant and the Respondents had accepted that position in their purported apology to the Appellant. It was accordingly, scandalous, frivolous and vexatious and an abuse of the process of the court for the Respondents to insist in their statement of defence that Ms. Njoroge was a client of the Appellant. Again the Respondents had, in their offending publication, said that Ms. Njoroge was fighting the Appellant over some money. The Appellant contended that that was false and in their purported apology to the Appellant, the Respondents had specifically acknowledged that the dispute between Ms. Njoroge and the Appellant was that of a vendor and purchaser. It was, accordingly, scandalous, frivolous and vexatious and an abuse of the process of the court for the Respondents to insist in their statement of defence that Ms. Njoroge fought the Appellant over some money.

For my part, I have no hesitation whatsoever in agreeing with the Appellant that even if the denials set up by the Respondents were to be held to be a sufficient traverse of the allegations in the plaint the denials could not possibly be sustained were a trial on the merits to be held. The Respondents have themselves agreed that Ms. Njoroge was not the Appellant's client. The Respondents also agree that the dispute between her and the Appellant was due to their relationship as vendor and purchaser. Naturally money would be an issue in such a relationship but the Respondents did not, either in their written statement of defence or in anything else, put forward any explanation as to why they had picked on the issue of money and made it the central issue of the dispute. I agree that disputes ought to be heard and determined on oral evidence in open court, but I would at the same time point out that there is no magic in the act of holding a trial and receiving oral evidence; in other words a trial cannot be held merely because it is normal or usual to hold trials. A trial must be based on issues, otherwise it would become a farce. Surely, it cannot require any evidence to prove a lawyer would be hurt in his profession if it is alleged against him that he is being assaulted by his client over money. In my view, that was the substance of what the Respondents conveyed by their front page photograph of the Appellant being collared by Ms. Njoroge. By their apology or clarification which I have already set out the Respondents admitted that the impression was wrong, by which I understand them to mean it was false.

How can they then be allowed to deny the allegations to that effect made by the Appellant in his plaint?"

Applying the legal principles enunciated by the learned Justice of Appeal to the present case, the Defendants in their apology admitted that the Plaintiff was not accompanied by a lady as they had claimed in the report. Further, they also accepted that it was not the Plaintiff who had "**picked up"** (sic) the quarrel that led to the altercation. In these circumstances, I ask myself if the Defendants can be allowed to change tack and claim that those allegations were not false. I think not. As I have already

pointed out, the Defendants in their Statement of Defence said that the allegations were not false. I think not. As I have already pointed out, the Defendants in their Statement of Defence said that the allegations were true. They maintained this stand both in their grounds of objection dated the 7th February 2005 and in the replying affidavit made by the Second Defendant on the 8th February 2005 and filed in opposition to the Plaintiff's Chamber Summons application herein dated the 7th July 2005 and filed on the 18th August 2005.

The deponent of the replying affidavit aforesaid is the reporter who claimed, attributing the same to "**sources**" undisclosed, that the Plaintiff arrived at the Mamba Hotel Bar, Kisumu, with a lady in tow and also alleged in is report that it was the Plaintiff who picked the fight. He depones in his affidavit to be well versed with the matters pertaining to this suit – as he should well be – and so well placed to swear the affidavit on behalf of both Defendants.

The following is what the Second Defendant stated in paragraphs 7 and 8 of his said replying affidavit: —

"**7. THAT the 1st Defendant did publish the said apology as was preferred by the Plaintiff/Applicant. The Defendant states that at no point did it admit liability whatsoever."**

"**8. THAT the words were printed and published as fair information on a matter of public interest and the words were printed and published bona fide without any malice or intention to defame the Plaintiff/Applicant".**

The Second Defendant seems to imply in paragraph 7 of his affidavit that the First Defendant was forced by the Plaintiff to issue the apology. This cannot be correct as I cannot imagine that a proprietor and publisher of a newspaper such as the First Defendant could or would allow itself to be forced by the Plaintiff to do anything against its will and not in its best interests.

The Second Defendant goes on to say in his affidavit that the apology did not amount to an admission of liability. In so doing, the Second Defendant probably does not appreciate or realize that the cause of action in a claim for defamation is based on the publication of a false statement of or about the Plaintiff. In the apology reproduced hereinabove, the First Defendant stated categorically and without any qualification that it had established that the Plaintiff was not accompanied by a lady and that the Plaintiff did not provoke the fight as the Defendants had claimed in the article. As previously observed, this is a clear admission that the allegations had no factual basis and were utterly false. Once the falsity of the allegations is admitted, there is no defence left, at law, which the Defendants can be allowed to canvass in a suit for defamation. What the First Defendant said in apology was the admission that what the Second Defendant had said of or about and concerning the Plaintiff was malicious falsehood. Having concocted a lie against the Plaintiff which the Second Defendant knew or ought to have known to be untrue, he cannot now be heard to say, as he has attempted to say in paragraph 8 of his replying affidavit, that the information printed was published in good faith and without malice.

Having considered the evidence before me in light of the submissions made by both learned counsel and the law, I find and hold that the Second Defendant was actuated by malice. I do not believe nor accept that the public is interested in the dissemination of malicious falsehoods about their elected leaders.

In view of this finding, it is my well considered view that o useful purpose would be served by holding a trial on the merits. For the reasons I have stated hereinabove, the Plaintiff's Chamber Summons application dated the 7th July 2004 succeeds and is allowed and granted accordingly. It is ordered that the Statement of Defence dated the 29th April 2004 and filed on the 3rd May 2004 be and is hereby struck out. Consequently, I enter interlocutory judgment in favour of the Plaintiff and further order that the Plaintiff be and is hereby allowed formally to prove his claim. The Plaintiff will also have the costs of the application and it is so ordered.

Dated and delivered at Nairobi this fourth day of March 2005.

P. Kihara Kariuki

Judge