

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

Civil Suit 612 of 1996

J. P. MACHIRA T/A MACHIRA & COMPANY ADVOCATES.....PLAINTIFF

VERSUS

KAMAU KANYANGA.....1ST DEFENDANT
THE STANDARD LIMITED.....2ND DEFENDANT

J U D G E M E N T

This case came before me after Kuloba, J., who was hearing it, retired before it was concluded. The learned judge had dealt with an application to strike out the defence and also took the evidence of the Plaintiff and his two witnesses. It was agreed by learned counsel for the parties that I proceed with the trial under and pursuant to the provisions of Order 17 rule 10 (1) of the Civil Procedure Rules. That provision enables a judge other than the judge who took evidence at the trial to take over the suit and proceed with it if the judge who heard it is prevented from concluding the matter by death, transfer or other cause. I think retirement is “ **other cause** ” within the meaning and for all purposes of that sub-rule. As counsel for the Defendants opted not to call any witnesses, I heard submissions, both oral and written, from counsel for both parties.

Mr. John Patrick Machira, the Plaintiff in this case (hereinafter referred to as “ **Mr. Machira** ”) is an advocate of the High Court of Kenya and senior partner in the firm of J. P. Machira & Company, Advocates. He was admitted to the Bar on the 17th November 1975. On the 12th March 1996, Mr. Machira filed this suit against East African Standard Ltd. as Defendant but on the 3rd June 1996, he filed an Amended Plaintiff naming Kamau Kanyanga as First Defendant and the Standard Ltd. as the Second Defendant. The name of East African Standard Ltd., the original Defendant, was deleted from the pleadings. The First Defendant was sued and the Editor of the “ *East African Standard*, ” one of the leading newspapers in Kenya. The Second Defendant is the proprietor and publisher of the “ *East African Standard* ”.

Mr. Machira instituted this suit to recover damages following a report carried by the *East African Standard* in its issue of the 10th November 1995 which Mr. Machira claimed was defamatory of him. That report, which appeared on the front page under the sensational heading “ **GOT YOU!** ”, showed Mr. Machira held by the neck by an angry woman and being assaulted by her watched by a crowd of numerous onlookers. More pictures of the incident appeared on page 7 of the newspaper depicting different stages of the assault under the heading “ **LEGAL TUSSLE** ” and a sub -hearing stating “ **Punch -- up brings High Court to a stand - still.** ” The woman, identified by the paper as one Grace Wahu Njoroge, appeared to be screaming at Mr. Machira as she collared him. Mr. Machira did not appear to fight back and appeared to have been pleading with the woman to stop the assault. The report stated that Grace Wahu Njoroge claimed that Mr. Machira owed her the sum of K. Shs. 1. 5 million. Mr. Machira contended that the report was not only false but also that it was malicious because it was published after he had taken the trouble to explain to the Defendants

the correct position and had produced documentary evidence in support of his explanation. According to Mr. Machira, there was no legal tussle between him and his attacker nor was there a punch - up which brought the High Court to a stand - still as alleged in the report or at all.

The Defendants filed a defence claiming that they only reported what had actually happened. They claimed that the report was true in substance and that the publication was made in the public interest. The Defendants also denied any malice. As I have already observed, Mr. Machira applied to strike out this defence. The application was heard by Kuloba, J., who struck out the Amended Defence on the 15th November 2001 and entered interlocutory judgment in favour of Mr. Machira. Accordingly, the issue of liability was settled by that judgment against which the Defendants have not appealed, leaving only the issue of damages. It was for that purpose that evidence was led before Kuloba, J., and submissions subsequently made before me, leading to this judgment.

In his Amended Plaintiff, Mr. Machira claims general damages, exemplary and aggravated damages, interest on the decretal amount and costs of the suit. He gave evidence and called two witnesses to prove his claim. The Defendants did not give evidence and called no witnesses.

In his evidence, Mr. Machira told the court that he is a respected lawyer of long experience and standing and a member of the Nairobi and the United Kenya Clubs. He testified that since his admission as an Advocate, he had never had any disciplinary problem with, or any action taken against him by the Law Society of Kenya. He said that as he was being assaulted by Grace Wahu Njoroge, the Defendants were busy taking photographs of him which they then sensationally published on Friday, the 10th November 1995 accompanied by what Mr. Machira regarded as a defamatory statement. The Defendants portrayed him to the public as a thief and a dishonest and evil person. Mr. Machira claimed that the Defendants' intention in so doing was to destroy his career as an Advocate.

Mr. Machira further testified that after the incident and its publication in the *East African Standard*, he was traumatized and for a considerable length of time stayed at home and did not go to the office. He could not face the public, his friends, relatives or clients. Friends and relatives telephoned his house to find out whether what had been reported in the press was true. Clients were also calling his office seeking explanation. He told the court: -

**“ Generally, I am a very subdued person. I am no longer what I used to be before the publication. Some nasty lawyers tell me of this incident. As late as last year, a client of mine introduced me to a Mr. Kiarie, who said after looking at me:-
“ This face is familiar. He is the one who was fighting with his client over client's money.”**

I was being introduced by Mr. A. A. Ngotho, at the Nairobi Club. I was very embarrassed.”

Mr. Machira was not cross-examined and his evidence was not challenged. I accept what he said as true.

Mr. Anthony Athanas Ngotho an Architect in private practice, was called as a witness by Mr. Machira. He met Mr. Machira in 1981 and since then Mr. Machira has handled his legal work. He told the court that when he read the story and saw the pictures, his immediate reaction was the feeling that his lawyer (Mr. Machira) was a crook and had taken money from a client. Eventually, he contacted Mr. Machira to find out what had happened. Mr. Machira told him that the woman who had assaulted him was not his client and that he had not taken her money as alleged in the report or at all. Mr. Ngotho found it difficult to believe Mr. Machira. Mr. Ngotho confirmed what had happened when he introduced Mr. Machira to Mr. Kiarie, a professional Accountant, at the Nairobi Club. Mr. Ngotho, too, was not cross-examined and his evidence remains unchallenged - I accept it as true

The last witness called by Mr. Machira was Mr. Simon Kimondo Mubea, an Advocate and a brother of Mr. Machira. He was at the material time employed by Mr. Machira. He explained in some detail the subdued atmosphere prevailing in Mr. Machira's office at that time and the difficulties he and other members of staff experienced in trying to convince curious and skeptical clients that the report they had read was not true. Mr. Mubea told the learned judge:-

“ for over one month after the publication of the story, Mr. Machira stayed away from the office. Clients were unhappy; we as employees were being laughed at by our colleagues along court corridors about the incident. We had to keep on explaining the true position. ”

Mr. Mubea was cross-examined by Mr. L. O. Oluoch, learned counsel for the Defendants, but as his evidence was not shaken, I accept it also as true.

Prior to the taking of this evidence by Kuloba, J., the Defendants, and after considerable prodding, had published what they purported to call an apology. It was not given the same prominence as the report complained of by Mr. Machira and was hidden in the inside pages of the issue of the *East African Standard* of the 5th January 1996. The apology was addressed to one “ **J. P. Macharia.** ” It does not surprise me in the least that Mr. Machira rejected the apology. Apart from not complying with the conditions Mr. Machira had stipulated for the publication thereof such as prominence, the publication of the apology was obscure and in any event, it was addressed to a Mr. J. P. Macharia and not to the Plaintiff.

Having reviewed this evidence, there is absolutely no doubt in my mind that this was a grave libel maliciously published by the Defendants which soiled Mr. Machira's reputation as a person and had a detrimental effect on his legal practice. Mr. Machira had worked long and hard to establish a reputable legal firm but this was destroyed at a stroke by irresponsible journalism under the purported exercise of the freedom of the press. This is an important freedom in a democratic and civilized society, but like all freedoms, it must be exercised responsibly and with circumspection. In this case, the Defendants clearly failed the test. I find as a fact and hold that they were actuated by malice. Just because Mr. Machira happened to be an Advocate, the Defendants jumped to the conclusion that the only reason the woman had assaulted him must have been because he had stolen her money. The Defendants saw the assault as a contest between a dishonest advocate and an aggrieved client over money. They reasoned, unreasonably and without any justification whatsoever, that the only reason anyone would have resorted to violence against an advocate must have had something to do with money – hence the sensational banner headline: “ **GOT YOU !** ” .

What I now have to decide is the level or quantum of damages Mr. Machira should be awarded for the libel. On the evidence, he is entitled to general and aggravated damages. He has also asked for exemplary damages but with great respect to his learned counsel, Mr. Stephen Mwenesi, the evidence does not justify an award under this head. It is not in dispute that Grace Wahu Njoroge did, in fact, assault Mr. Machira. The pictures taken and published clearly show what happened. That is not denied and cannot be denied. The reason why Mr. Machira sued the Defendants is the interpretation which they put on the incident. If the Defendants had taken the pictures, published them and said that Mr. Machira was assaulted by Grace Wahu Njoroge and simply left it at that, I entertain little doubt that this suit would almost certainly not have been instituted. But the Defendants decided to put a spin on the story which was not only erroneous but also totally baseless. Malicious as this may be, it is not a ground for awarding exemplary damages. It is evidence of malice and goes to reinforce the award for aggravated damages, and I so hold.

As regards general damages, learned counsel for Mr. Machira urged me to make an award of at least the sum of K. Shs. 20,000,000/- and Mr. Mwenesi relied on a host of judicial and

other authorities to justify this figure. I will refer but only to just a few of them.

In the case of **John Patrick Machira v. Wangethi Mwangi and Nation Newspapers Ltd.** (Nairobi HCCC No. 1709 of 1996) (unreported), Kasanga Mulwa, J., awarded the Plaintiff the sum of K. Shs. 8,000,000/= in general damages; K. Shs. 2,000,000/= as aggravated damages and a further K. Shs. 200,000/- for failure on the part of the Defendants to offer an apology.

Mr. Mwenesi also cited the case of **Hon. Christopher Obure v. Tom Oscar Alwako t/a Headline Publishers and Others** (Nairobi HCCC No. 956 of 2003) (unreported) in which, and after considering the Plaintiff's status in society and the circulation of the tabloid that had libeled him, Lenaola, Ag. J., (as His Lordship then was) awarded the Hon. Obure a sum of K. Shs. 15,000,000/= general damages and K. Shs. 2,000,000/= in exemplary damages.

Learned counsel also cited the unreported case of **Joshua Kulei v. Kalamka Ltd.** (Nairobi HCCC No. 375 of 1997) where O' Kubasu, J. (as His Lordship then was) awarded Joshua Kulei the sum of K. Shs. 10,000,000/= in general damages against Kalamka Ltd., the publishers of *The People* newspaper.

I was also referred to the decision in **Hon. Nicholas Biwott v. Clays Ltd.** [2000] 2 E A 334 where an award of K. Shs. 30,000,000/= was made.

For the Defendants, it was submitted that an award of K. Shs. 50, 000/= would be adequate. Their learned counsel referred me to the case of **Fred Ojiambo v. The Standard Ltd. and Two Others** (Nairobi HCCC No. 1996 of 1997) (unreported) in which the Plaintiff, a Senior Counsel and a prominent Advocate, was awarded the sum of K. Shs. 1, 000, 000/=. In another case of **George Oraro v. Eston Barrack Mbajah** (Nairobi HCCC No. 85 of 1992) (unreported), an award of K. Shs. 1, 500, 000/= was made in favour of the Plaintiff, also a prominent Advocate and senior partner in one of the leading law firms in Nairobi. The last case on the Defendants' list I wish to refer to is **Johnson Evan Gicheru v. Andrew Morton and Another** (Nairobi HCCC No. 214 of 1999) (unreported) where Aluoch, J., awarded K. Shs. 2, 000, 000/= in general damages. At the time the cause of action arose, the Plaintiff was a senior judge of the Court of Appeal and is now the Chief Justice of Kenya.

The allegation against Mr. Fred Ojiambo was that he had been corruptly used by the Government of the day to derail the constitutional review process. On his part, Mr. George Oraro was accused of playing a sinister role in the murder of the late Dr. Robert Ouko, who at the date of his death was Kenya's Minister for Foreign Affairs and International Cooperation. The allegation against the Hon. Mr. Justice Gicheru was that he had been bribed while sitting as the Chairman of the Judicial Commission of Inquiry established in 1990 to inquire into the circumstances of the disappearance and subsequent death of the late Dr. Robert Ouko.

With the utmost respect to the respective learned judges who made these awards, I must confess that I am quite unable to understand the rationale for awarding what in my humble view are grossly exorbitant sums to Mr. Joshua Kulei, Hon. Christopher Obure and Hon. Nicholas Biwott respectively. That view also goes for the award made to Mr. Machira in his case against Wangethi Mwangi and Nation Newspaper Ltd. (**supra**) which award was made in relation to the events which gave rise to the present case. In assessing damages in this case, that fact must be taken into account and I am fortified in this regard by the provision in section 16 (2) of the Defamation Act [Cap. 36] which states as follows: -

“ (2) In any action for libel or slander the defendant may give evidence in mitigation of damages that the plaintiff has recovered damages, or has brought actions for damages, for libel or slander in respect of the publication of words to the same effect as the words on which the action is founded, or had received or agreed to receive compensation in

respect of any such publication. ”

Though Mr. Mwenesi urged me not to take into account the damages awarded to Mr. Machira against Wangethi Mwangi and Nation Newspaper Ltd. in respect of the same libel, I must and do reject that submission in light of the clear statutory provisions of section 16 (2) of the Defamation Act aforesaid.

Having reached this conclusion, I am also of the very firm view that the damages payable to Mr. Machira should be assessed within the league in which he plays in his profession. I consider lawyers like Mr. George Oraro and Mr. Fred Ojiambo to be his peers and in his league as Advocates. I also take into account that Mr. Machira has already been awarded the not inconsiderable tidy sum of K. Shs. 10, 000, 000/= for the same libel. I therefore award Mr. Machira the sum of K. Shs. 1,250,000/= as general damages.

As I have also already found that the Defendants acted with malice and did not apologize for what they did, I award the Plaintiff a further sum of K. Shs. 250,000/= as aggravated damages. I have already said that there is no legal basis for the claim for exemplary damages and the same is hereby dismissed.

Accordingly, I enter judgment for the Plaintiff for the sum of K. Shs. 1,500,000/- against both Defendants jointly and severally together with interest thereon at court rates from the date of judgment until payment in full.

As regards costs, the Plaintiff's learned counsel urged me to grant a certificate for two counsel. With respect, I do not detect any complexity in this case that would justify my granting such an order. Consequently, I award the Plaintiff costs of the suit but limited to one counsel on the ordinary scale.

Orders accordingly.

Dated and delivered at Nairobi this 4th day of April 2005

P. Kihara Kariuki

Judge