



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 57 OF 2004**

HON. AMB. CHIRAU ALI MAKWERE.....PLAINTIFF

VERSUS

ROYAL MEDIA SERVICES LIMITED.....DEFENDANT

JUDGMENT

The Plaintiff claims for general, aggravated and exemplary damages for libel from the Defendant, together with an order for injunction restraining the Defendant from further publishing the alleged defamatory words complained of plus costs and interest.

The Plaintiff claims that on or about 16th December 2004 the Defendant falsely produced, recorded, broadcasted, aired and published the following words of and concerning him in its Citizen Radio Station in Kiswahili, which report when translated would be as follows:

“Today listener I shall take you up to the street of prostitution of Koinange here in Nairobi where it is alleged that a minister, an assistant minister, Member of Parliament and Businessmen were caught pants down with prostitutes.

Investigations which were done involve the cabinet ministers of Labour, Ali Charau Mwakere who is also the Member of Parliament of Matuga, Assistant Minister Mwangi Kiunjuri who is also the Member of Parliament of Laikipia and the Member of Parliament of Gem, Jakoyo Midiwo. The astonishing fact is that even before their names were mentioned, these honorable ministers ran to the broadcasting stations to defend themselves with threats of taking the broadcasting stations to court reason being that the report which was given showed that they were the ones.

The right course of action to be taken is that the members of Parliament to be taken to court, those who are cabinet ministers Kiunjuri and Mwakere to be sacked and at once to be removed from the committees dealing with AIDS at their representations in parliament.

... the truth of this query must be told because people of Laikipia East, Gem and Matuga elected people to represent them in Parliament and not to go to Koinange street running after girls. Koinange is not Gem, Laikipia nor Matuga.

In a further perpetuation of the defamatory statement referred to above, the Defendant published the following words in its English news feature:

“Investigations by citizen Radio and T.V have unearthed unconfirmed reports that the Ministers who were found by police soliciting sex on Koinange street were Ali Mwakere of the Ministry of Labour, Assistant Minister Kiunjuri and Legislator Jakoyo Midiwo.

Efforts to reach Ali Mwakere were unsuccessful but Mwangi Kiunjuri issued a statement this afternoon denying the allegations. Legislator Midiwo could not be reached to confirm or deny our

story. It is not clear whether the police will take further action against them.

The Plaintiff claims that in their natural and ordinary meaning the words were understood to mean:

1. The Plaintiff is a man of loose moral character.
2. The Plaintiff as a father and husband is of loose moral character.
3. The Plaintiff is a pervert who preys on vulnerable members of the society
4. The Plaintiff is a person who due to his conduct is not fit to be a Member of Parliament and Minister in the government.
5. The Plaintiff is a man of loose religious belief.
6. The Plaintiff is unworthy and extremely unreliable.
7. The Plaintiff is unworthy of his standing in society.
8. That the Plaintiff is a sleazy character.
9. The Plaintiff is a man unworthy of holding public office.
10. The Plaintiff has committed a criminal offence.

The Defendant filed a defence in which it admitted publishing the words complained of. The defendant in an unusual defence relied on the American case of **New York Times Vs Sullivan US 254** which states that a publisher is not liable for publishing pertinent facts pertaining to a public figure.

The Plaintiff gave evidence as to his illustrious background culminating in his appointment as the present Minister for Foreign Affairs in the Government of Kenya. He also related at length on the distress which was caused to him and his family as a result of the words printed in the reports referred to above.

In cross examination he was asked a number of questions which were predicated on the basis that the allegations in the report were true. I allowed the questions but warned the Defendant's counsel that this could only increase the damages if the allegations were not substantiated.

At the close of the Plaintiff's case the Defence called a witness, Miss Immaculate Mwende. Before the substance of her evidence could be recorded Mr. Ahmednasir raised an objection to the evidence and arguments ensued between the parties' advocates resulting in my Ruling of the 16th November 2004 in which I refused to allow evidence of justification to be adduced as the plea of justification had not been included in the Defence filed.

No further witnesses were called for the defence which closed its case. On the evidence before me, I find that the words published of the Plaintiff in the absence of their truth being proved, which I did not allow, are defamatory on the face of them as they were likely in the time honored words to bring the Plaintiff into hatred, ridicule and contempt from fair minded members of the public.

I find the innuendos alleged in the Plaintiff proved. It is not in dispute that the words were published and were likely to cause the Plaintiff damage.

The Defence of qualified privilege is defined in the Defamation Act. None of the matters set out in Sections 6, 7 and 8 of The Defamation Act and the Schedule thereto apply to this case.

The defendant has, as I have said, chosen to rely on a Defence based on the American case of **New York Times Vs Sullivan US 254**. This does not bind the courts in this country and cannot override the

provisions of the Defamation Act.

I accept that a person in the public arena is a target of comment and can be criticized more openly than a private individual. The comment must however be reasonable and fair and does not extend to making untrue statements about a public figure which impute some grave wrongdoing to him or her of which they are innocent.

This is such a case where the Plaintiff has been attacked in his personal life. As the Defendant has not pleaded nor proved justification in that the words were true this defence is not open to it.

So far as privilege is concerned I do not find that this exists in this case and therefore I hold that the Defendant is liable to the Plaintiff for the defamation and that the Plaintiff is entitled to damages.

Turning to damages this is a serious libel defaming as it does a prominent politician and Minister of Government.

I take into account the conduct of the Defendant who has failed to apologize but instead has insisted on pursuing the matter in court.

In this case so far as damages are concerned I refer to the case of **Akilano Molade Akiwumi Vs Andrew Morton and another HCCC NO. 1717 of 1999**. In that case allegations were made imputing corruption on the part a judge; Mr. Justice Akilano Molade Akiwumi, I awarded Kshs 3 Million for general and exemplary damages. I stated what I considered to be the principles for assessing damages in libel matters:

“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 exceptional cases. Defamation being one of them. It is 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.”

Also in the case of Hon. **Martha Karua Vs The People Limited Mukalo Kwayera HCCC NO. 412 OF 2004** I awarded Kshs 700,000. The claim arose out of an article which appeared in the People on Sunday of the 4/1/2004 and which I found to be defamatory of the Plaintiff.

In the case of **J.P Machira T/A Machira & Company Advocates Vs Kamau Kanyanga & The Standard Ltd HCCC 612 of 1996** Justice Paul Kariuki said: With utmost respect to the respective learned judges who made the following awards, I must confess that I am quite unable to understand the rationale for awarding what in my humble view are grossly exorbitant sums:

- i. **Joshua Kulei Vs Kalamka Ltd** Justice Kuloba awarded Kshs 10,000,000 in general damages;
- ii. **Honorable Christopher Obure Vs Tom Oscar t/a Headline Publishers** Justice Lenaola awarded Kshs 15,000,000 general damages and Kshs 2,000,000 in exemplary damages and
- iii. **Hon. Nicholas Biwott Vs Clays Ltd** where an award of Kshs 30,000,000 was made respectively.

The learned Mr. Justice Kariuki awarded the Plaintiff a sum of Kshs 1,250,000 in general damages and Kshs 250,000 as aggravated damages Taking all of these factors into account, I award Kshs 1 Million by way of general damages to vindicate the Plaintiff’s reputation to the world and to compensate for the injury to his feelings.

So far as exemplary damages are concerned, these are to punish the wrongdoer. I award in this respect a sum of Kshs 1 Million.

I also award Kshs 1 Million by way of aggravated damages, making total in all of Kshs. 3 million. I grant the order for injunction restraining the Defendant from further publishing the alleged defamatory words complained of.

The plaintiff will have the costs of the suit and interest at court rates from the date of this award.

Finally I would like to thank both counsel for their eradiate and reasoned submissions in this case not to mention the relevant quotations from Shakespeare.

Dated and Delivered at Nairobi this 10th day of May 2005

P.J RANSLEY

JUDGE