



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

**AT ELDORET**

**CIVIL CASE 161 OF 2000**

**DANIEL KAIMASACH ..... PLAINTIFF**

**VERSUS**

**KALAMKA LIMITED ..... 1ST DEFENDANT**

**LEONARD WEKESA ..... 2ND DEFENDANT**

**JUDGEMENT**

This is a case in which the plaintiff - Daniel Kaimasach has instituted proceedings against the first defendant Kalamka Limited as publisher of "The People Daily" newspaper and the second defendant Leonard Wekesa, as the person who authorized an article in "The People Daily newspaper issue of 2nd December 1999. The story complained of was published in the sports page of "The People Daily" hereinafter referred to as "The People" under the caption "corrupt officer holds up team." According to the plaint, the plaintiff claims that the said article was defamatory of his character and would be understood by right thinking members of the community to mean inter alia that he:

i) Demanded and received bribery money from Jastina Siti and or Kitale Ladies Hockey Club; ii) Was corrupt, greedy and/or a criminal or had criminal inclinations; iii) Is generally a dishonest person who should not intermingle with the rest of the citizenry and unworthy of holding public office; iv) Acquired money from one Jastina Siti or Kitale Ladies Hockey Team irregularly and in violation of the law; v) Committed an offence under the Prevention of Corruption Act;

vi) Is untrustworthy and an unscrupulous person who should be shunned and despised by the general public. The plaintiff averred that the defamatory words were motivated by ill will and malice. The plaintiff therefore filed this suit and sought judgement against both defendants jointly and severally for general damages, exemplary, punitive and aggravated damages, and an order for publication of an apology and clarification, costs and interest. The defendants filed a joint defence through their counsel Messrs. Gathaiya & Associates Advocates.

They admitted that they published the article, the subject matter of the suit and that the article referred to the plaintiff. They however maintained that the words in the said article were an accurate and fair account of the events that took place at Malaba border on 1st December, 1999 involving the Kitale Ladies Hockey Team. They averred that the words published were published on an occasion of qualified privilege in the honest belief that the said words were true and the subject matter was a matter of public concern. They therefore denied that the plaintiff was entitled to general, exemplary, punitive or aggravated damages or an apology. This case was partly heard by Justice Etyang in the year 2002. It was mentioned before me in December 2003 and I decided to proceed with the case from where it had stopped.

During the hearing before Justice Etyang the defendant was represented in court by Mr. Kitiwa advocate holding brief for Mr. Gathaiya. However, when the matter came for hearing before me, no advocate appeared for the defendants, though the advocates for the defendants Messrs. Gathaiya & Associates were served and acknowledged that service of the hearing notice by an endorsement. I therefore proceeded with the further hearing of the case in the absence of the defendants and their counsel. The plaintiff called four witnesses in the case, while the defendant did not call any witness. PW1 Daniel Kaimasach was the plaintiff himself. He testified that he was an Immigration Officer of 20 years service. That on 2nd December, 1999 he received a telephone call from the Assistant Principal Immigration Officer Kisumu who was his boss.

He was informed by the said Assistant Principal Immigration Officer of an adverse report against him that appeared in The People. He obtained a copy of the newspaper and he saw an article authored by the second defendant Leonard Wekesa. The newspaper belonged to the first defendant Kalamka Limited. He produced a copy of the article in court as exhibit 1. The article stated that he delayed the Kitale Ladies Hockey Team at Malaba and received a bribe from them of Kshs.10,000/= to allow them cross to Uganda. They bribed him with Kshs.10,000/- after he had demanded from them a bribe of Kshs.20,000/- . He testified that the contents of that article were false. He testified further that he had dealt with the team at Malaba on 26th November, 1999 but did not take any bribe at all as alleged in the article. That Jastina Siti (Jastina) the patron of the team, came to him with a letter from the District Commissioner Trans Nzoia District That letter was addressed to the Immigration Officer Malaba and introduced the Kitale Ladies Hockey Team which was traveling to Uganda. It was dated 24th November 1999.

When he received the letter he advised Jastina that the Assistant Principal Immigration Officer Western Kenya had given instructions that members of the public travelling to Uganda be advised that they should use temporary permits or passports. Jastina then stated that as it was a Friday they would not be able to travel to Kisumu to obtain those documents and participate in the hockey tournament, which was to be played the following day. He then decided to use his discretion to allow them travel to Uganda. Therefore he asked Jastina to make a photocopy of the Trans Nzoia District Commissioner's letter. She went to make the photocopy with the assistance of a clearing agent who was known to him by the name Rodgers Mulembi (PW2). After 10 minutes Jastina came back with the photocopy.

By that time she was in the company of two other people. One was Mr. Leonard Wekesa, the 2nd defendant. The other person was Stephen Seroney. Jastina then told him that the two people were their drivers who should be included in the list in the District Commissioner's letter. The 2nd defendant said that he was a teacher at Nasakhol Girls Secondary School. He said that he knew plaintiffs daughters Dorcas and Ruth. He therefore included the 2nd defendant's name in the District Commissioner's letter, as well as the name of Stephen Seroney. He allowed them to proceed to Uganda. When he read his name in the article in The People newspaper, he was embarrassed to the lowest, as it was alleging something that he had never done. He was offended by the fact that he was said to have demanded a bribe. That allegation was absolutely false. It was written without consulting him. Though it was stated that Jastina made a complaint to senior officers at the Immigration Office, he had never been summoned by those senior officers.

He instructed his lawyers Messrs. Nyairo and Company Advocates to write a notice to the owners and the publishers of The People newspaper. The advocate wrote a letter dated 3rd May 2000. The letter was copied to him. No response to that letter had been received from the publishers. The false newspaper article in The People was read by friends and colleagues who knew him. Whenever he met friends in Nairobi, Kitale, Nakuru and Eldoret they expressed concern about the allegation against him. The publication in The People newspaper was read throughout Kenya and even abroad. It portrayed him as a corrupt officer, who was unfit to work, and it endangered his work. He would have been sacked if the story was proved to be true. The allegation was a very serious offence. There had been no apology published. He therefore asked for damages against both defendants In cross examination he stated that a passport would cost Kshs.2000/- while a temporary permit would cost Kshs.800/-. Those people who crossed to Uganda on this occasion did not pay for passports or permits because he relied on the Trans Nzoia District Commissioner's letter and the team was a national team. He was later transferred to Wilson Airport Nairobi which was a less busy transit point. The evidence of PW2 Rogers Mulembi was that he

worked at Malaba border with Majuk Agencies, who were a clearing house.

On 26th November 1999 he was at Malaba Customs yard at about 10.30 a.m. A mini bus with passengers arrived. The passengers in the mini bus were from a club. One woman alighted and asked him to show her the Immigration Office. He showed her the office and she got inside while he remained outside. Then the Immigration Officer, whom he knew before, called him inside the office. That Immigration Officer was the plaintiff. The Immigration Officer asked him to take the woman to a place where she could take photocopies of documents. He went with the woman to the photocopying shop, where she took photocopies. Then the woman returned to the office of the plaintiff. However, before that, the woman went to the mini bus. She was joined by two other people from the mini bus.

The three of them got into the plaintiff's office while he remained outside. The three remained in the plaintiff's office for about ten minutes. Then they came out, got into the mini bus and went their way. Later he saw a report in The People newspaper of 1st December 1999 that the plaintiff had received money from that woman and the passengers. The report was false because he was present. He had not previously heard that the plaintiff was corrupt. In cross-examination he stated that he did not see what was happening in the office. He also did not know whether those people crossed from Kenya to Uganda without passports or temporary permits. He knew the plaintiff as his friend. He denied lying to the court.

The evidence of PW3 Michael Omoit Karani was that he used to work at the Immigration Office Malaba. He was a clerk in that office in 1999. His boss was the plaintiff. On 26th November, 1999 at 10.00 a.m. he was in the Office. The office was an open office without a partition. It was shared by the plaintiff and other employees. The plaintiff used to sit at the front area while other employees were at the rear.

On that day one woman came from Kitale with a letter introducing players. She wanted clearance to proceed to Uganda with the players. The plaintiff found that the document that the woman had carried was not a travel document, and she was advised so by the plaintiff. The woman insisted that she had to go to Uganda because of the game that the players were to play. The plaintiff then told her to go and make photocopies of the document. She did so and returned to the office with two other people, whom she introduced as drivers of their vehicle. She requested that the names of those two people be included in the list of those that were to travel to Uganda. These two additional people were Leonard Wekesa (2nd defendant) and Stephen Seroney. Leonard Wekesa (2nd defendant) told the plaintiff that he knew him and wanted to be assisted. The plaintiff stamped the document as "Exit" for them to be able to travel to Uganda. He was present in the office all this time. Later he learnt that the plaintiff had received Kshs.10,000/- from the woman and those people in order to allow them to travel to Uganda. He did not see any money being given out. As far as he was concerned, the plaintiff assisted that woman and her companions freely.

Later, the plaintiff was transferred to Wilson Airport. In cross-examination he stated that ordinarily people paid Kshs.800/- per person for a temporary permit. This would be a total of Kshs. 19,200/- for the whole group that traveled to Uganda. The discretion to allow people to cross free was for funerals and other similar reasons, but was restricted to the Malaba area and not beyond. Traveling to Kampala would require clearance from the Kisumu Office. On 26th November 1999 it was only the plaintiff as an Immigration Officer who was on duty in the office. The plaintiff was later transferred to Wilson Airport Nairobi where he was promoted to Senior Immigration Officer I.

The evidence of PW4 Musa Pusia Lodea was that he lived at Makutano in Pokot District. He was a farmer and knew the plaintiff Daniel Kaimasach as a neighbour at Makutano. The plaintiff was an Immigration Officer who had now retired. He remembered that in 1999 the plaintiff was working at Malaba Immigration Office. The plaintiff complained of a story about himself that was published in The People newspaper. He read the newspaper and confirmed that the plaintiff was mentioned in the story. He saw the report on 2nd December 1999. The report was that Kaimasach was bribed to clear players who were going to play in Kampala.

He knew the plaintiff for over 15 years. He was surprised by the story. He lost faith in him. He got the impression that the plaintiff was a conman and corrupt. Before then, he knew the plaintiff as a trustworthy

person. He was not aware of any correction that was made in the story that was in The People newspaper. That was the plaintiff's case. The defendant was not present and did not offer any evidence. At the close of the plaintiff's case counsel for the plaintiff filed written submissions.

This is a case of defamation. Though the defendants filed a defence, they never tendered any evidence in their defence. Defamation has been defined in the book Winfield & Jolowicz on Tort 16th Edition at page 404 paragraph 12.2 as – "The publication of a statement which reflects on a person's reputation and tends to lower him in the estimation of right-thinking members of society generally or tends to make them shun or avoid him."

The ingredients of defamation are that firstly, the statement complained of must be false. Secondly that the words complained of were published, i.e. communicated to at least one person other than the claimant. Thirdly that the words complained of tended to lower or actually lowered the character or reputation of the plaintiff in the eyes of right thinking members of the Society. Fourthly, that the words actually referred to the plaintiff. I will start with the element of the words referring to the plaintiff. Clearly, from the article in The People newspaper of 2nd December 1999, the plaintiff is mentioned in name as Daniel Kaimasach.

He was the officer employed by the Immigration Department at Malaba who is said to have received Kshs.10,000/- as a bribe to allow the Hockey Team to travel to Uganda. The defendants in paragraph 3 of their defence, stated that they actually referred to the plaintiff. They do not challenge the reference to the plaintiff at all. They admit it. All the witnesses who testified knew the plaintiff by that name and therefore there could not be a mistake at all. I find from the evidence on record that the words in the article referred to the plaintiff and to no one else.

On the issue as to whether the words complained of were false, the defendants in their written statement of defence stated in paragraph 4 – "4. The defendants aver that the said words were an accurate and fair account of the events that took place at Malaba border point on 1st December, 1999 involving the Kitale Ladies Hockey Team and the plaintiff." The plaintiff, at the hearing, gave evidence that the words in the article were not true. His witnesses, especially PW3 Michael Omoit Karani who was present in the office stated that he was in the Immigration Office throughout with the plaintiff and that he did not witness money changing hands. The article was written by the second defendant. He never came to testify in court to support the averment that the article was a statement of the events that took place at Malaba Immigration Office on 26th November 1999 (or 1st December 1999 as alleged in the defence). No other witnesses stated that what was reported in the article was what happened. In those circumstances, I hold that the contents of the article were false.

On whether the words were published, the defendants themselves in paragraph 5 of their written defence admitted that the words were published. They averred that they were published in an occasion of qualified privilege. The article in The People newspaper speaks for itself. The article was printed in the newspaper which was distributed for sale. It was read by witnesses who testified in court. Therefore the words were published by printing in The People newspaper as well as by circulating the newspaper for sale and reading by the public. That was publication in the technical term of the word and the defendants admitted the same in their written statement of defence. I therefore find that the words complained of were published. As for the assertion by the defendants in their written statement of defence that the publication was on an occasion of qualified privilege, I find no substance in that argument. That defence would only be of assistance in a situation where the person who made the communication had an interest or a duty, legal, social or moral to make it to the person to whom it was made, and the person to whom it was made had a corresponding interest or duty to receive it (see University of Nairobi –vs- Mbutia 1985 KLR 821).

In my view, this situation only covers official or semi official communications, not the publishing of articles in newspapers for sale and general readership of the public. On the issue as to whether the article tended to lower or actually lowered the reputation of the plaintiff, my answer is yes. The article was specific that Jastina gave the plaintiff Kshs.10,000/- to influence him to let the team cross the border at Malaba to Uganda.

That she gave that amount after the plaintiff demanded for Kshs.20,000/=. This was a clear allegation of bribery or corruption. Corruption is a criminal offence and a moral wrong. The article itself is headed “corrupt officer holds up team.” In my view, any right thinking person in society would conclude that the plaintiff was a corrupt man with no sense of integrity at his work. That he was using his official position of responsibility as an Immigration Officer to commit acts of corruption.

The evidence was that the plaintiff was called on the phone by his boss the Assistant Principal Immigration Officer from Kisumu on the subject. Also PW3 Michael Omoit Karani and PW4 Musa Pusia Lodea testified that they got the impression that the plaintiff was a corrupt person from reading the article. The plaintiff testified that his friends in Nairobi, Kitale, Nakuru and Eldoret expressed concern about the allegations. That, in my view, would be a natural consequence of any right thinking person in society reading the article. I find that the said article lowered the reputation of the plaintiff in the eyes of right thinking members of Society.

The upshot of the above findings is that I find that the plaintiff has proved a case of defamation against both the defendants on the balance of probabilities. The defendants are therefore liable jointly and severally for defaming the plaintiff. I now turn to quantum of damages. The plaintiff’s counsel in submissions has asked for an award of general damages of Kshs. 1,500,000/- and exemplary or punitive damages of Ksh.200,000/- making a figure of Kshs.1,700,000/-. He also asked for an order of publication of an apology, and in default, for an award of a further Kshs.200,000/-.

In cases of defamation, damages awardable are firstly, compensatory damages for injury to the plaintiff’s reputation and hurt to his feelings. The court can also award the plaintiff aggravated damages where the defendants conduct caused the plaintiff additional injury beyond what would have flowed solely from the offending words. This is the case where the defendant acted out of an improper motive, such as where he was motivated by malice. The court may also award exemplary damages, which are punitive damages where it is proved that the defendant knew that he was committing a tort, or was reckless whether his action was tortious or not and proceeded to publish it anyway, because the prospect of material advantage outweighed that of material loss (see *Machira v.s. Mwangi*[2001] 1 EA 110 (Mulwa .J.)

The plaintiff brought this action against both the author of the article and the owner of The People newspaper. As was held by Mulwa .J. in the case of *Machira –vs- Mwangi* [2001] 1 EA 110 at page 113 – “A person who considers himself defamed can bring an action against the person who authorized the defamating material or caused it to be published.” Therefore in my view, the plaintiff can recover damages from both defendants in the case herein jointly and severally.

The justification for awarding a plaintiff damages for the purpose of vindicating him for the wound done to him in defamation cases was stated in the English case of *John –vs- Man Ltd.* (1996)1 ALL ER 35, in which the English Civil Appeal court stated: - “The successful plaintiff in a defamation action is entitled to recover, as general compensation damages such sum as will compensate him for the wrong suffered. That sum must compensate him for damages to his reputation, vindicate his name, and take account of distress hurt and humiliation which the defamatory publication has caused.”

In our present case the plaintiff has asked for Kshs.1,500,000/- under this head. He was an Immigration Officer at the time of the publication of the story. The People was sold throughout Kenya, but I was not told about how many copies were in circulation per day. The publication definitely caused the plaintiff distress, hurt and humiliation. These damages are in the form of general damages. The plaintiff was later transferred to Wilson Airport but there was no evidence that it was due to this publication or that he was demoted. In fact PW3 Michael Omoit Karani stated that the plaintiff was promoted. In those circumstances I find that a figure of Kshs.1,000,000/- is adequate compensation for the plaintiff under this head.

The plaintiff also sought for punitive damages of Kshs.200,000/-. The submissions for the plaintiff are that there was malice and there were no mitigating factors. I again go back to the case of *Machira –vs- Mwangi* [2001] 1EA 1100 at page 113 where Mulwa J. held;- “Exemplary damages on the other hand go beyond compensation and are meant to “punish” the defendant. Aggravated damages will be ordered

against a Defendant who acts out of improper motive, for example, where it is actuated by malice, insistence on a flimsy defence justification or failure to apologise.”

In our present case, though it was not easy to prove malice, it was clear that the defendants filed a flimsy defence claiming qualified privilege. They also failed to apologise, insisting that what was in the article was true and an accurate account of what happened. Though the plaintiff’s counsel in submissions asked for exemplary or punitive damages, what comes out is a claim for “aggravated” damages. In my view, exemplary or punitive damages are awardable when the publication is done with guilty knowledge for the motive that chances of economic advantage outweighs chances of economic or physical penalty. In our present case the defendants filed a flimsy defence of qualified privilege and never made an apology. Therefore, the proper award would be for aggravated damages, not exemplary damages. I consider that an award of Kshs.200,000/- as aggravated damages is adequate compensation. As for the pecuniary claim of 200,000/- in lieu of making an apology, I find that with the lapse of time, there is no need for the defendants making an apology. It will not serve any meaningful purpose. However, I consider that the amount of Kshs.200,000/- requested by the plaintiff in lieu of an apology is on the higher side. I consider that an award of Kshs.100,000/- damages for the same is adequate.

In the result the plaintiff’s suit succeeds. I therefore entered judgement for the plaintiff against the defendants jointly and severally as follows: - 1. General Damages of Kshs.1,000,000/-. 2. Aggravated damages of Kshs.200,000/-. 3. Damages of Kshs.100,000/- in default of an apology. TOTAL – Kshs.1,300.000/-. The plaintiff shall have the costs of the suit and interest.

**Dated and delivered at Eldoret this 9th Day of June 2005.**

**George Dulu**

**Ag. Judge**