



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

**Civil Suit 155 of 2004**

**MATHEW KYALO MBOBU..... PLAINTIFF**

**VERSUS**

**ROSE MBITHE NDETEI..... DEFENDANT**

**JUDGMENT**

The Plaintiff herein, Mathew Kyalo Mbobu is an advocate of the High Court of Kenya of over 17 years standing who, apart from practicing law, also lectures in the Faculty of Law, the University of Nairobi among other professional engagements. He has brought this suit against Rose Mbithe Ndetei, whose name has since changed to Rose Mbithe Mulwa following a divorce. This judgment and subsequent orders therein shall therefore be directed to the Defendant in the new name as ordered by this Court on 5<sup>th</sup> September 2005.

In his plaint, filed 20<sup>th</sup> February 2004 and amended on 30<sup>th</sup> November 2004 the Plaintiff claims the following reliefs from the Defendant.

- a) **General and Exemplary and/or aggravated damages for defamation**
- b) **An injunction order to restrain the Defendant by herself, her servants and/or agents or otherwise from further uttering or publishing or causing to be published defamatory words against the Plaintiff**
- c) **An order directing the Defendant to retract and publish the retraction of the defamatory parts of the letter complained of herein dated 24<sup>th</sup> February 2003 and defamatory remarks made in Court on 15<sup>th</sup> February 2004**
- d) **Costs and interest.**

The facts of the case are that the Plaintiff happened to have been engaged by the Defendant's former husband to act for him in divorce proceedings between them wherein a divorce was entered and the parties thereafter proceeded with applications in respect of the distribution of their matrimonial property. The Defendant's husband continued to retain the services of the Plaintiff while she herself was represented by lawyer Chris Mutuku. Apparently the proceedings were affected by the well known delays in the securing of a hearing date and on a number of occasions the same was listed before the wrong Court. The Defendant was unhappy with the slow pace of the proceedings and blamed it all on the Plaintiff. It is in the course of this that on 24<sup>th</sup> February 2004 the Defendant wrote the letter complained of in the paragraph 6 of the Amended Plaint out of which offensive parts can be gleaned as follows.

**“I applied for division of matrimonial property –  
Case No. 6 of 2002 (O.S) between myself and  
one Prof. David Musyimi Ndeti. It was initiated  
by my lawyer Chris Mutuku Advocates in  
February 2002 and certified to proceed. However  
opposing advocate Kyalo Mbobu insisted his diary  
was full until the end of the year!....Come February  
2003 he again purported to have a full diary.....  
This deliberate behaviour causes unwarranted  
discomfort to the parties concerned more so  
when the delay is purely out of malice.....It is  
advocates like Kyalo Mbobu, on realization that  
they are losing a case who do not avail themselves  
for its prosecution....It is hoped that in this era of  
change and morality, the sitting government,  
professional bodies and the ministers involved  
shall stamp out such unprofessional and unbecoming  
behaviour...By this letter I urge the L.S.K. to caution  
advocates who are exposed (sic) of such misdeeds  
so that other people in society are protected....”**

As appearing in the tendered extract the letter was written to the Law Society of Kenya (L.S.K.) and copied to The Chief Justice of Kenya, the Minister of Justice and Constitutional Affairs, Honourable Mr. Kiraitu Murungi, The Kenya Human Rights Commission and the Federation of Women Lawyers – Kenya (FIDA). Indeed the opening paragraph of the said letter states that the same was written in the spirit which ushered in a government “concerned with human rights and exposing those who violate the same.”

In her defence filed herein on 25<sup>th</sup> May 2004 the Defendant admits having written the letter complained of but denies that she did so falsely and/or maliciously or that the contents thereof were defamatory. She further contends in paragraph 9 of the Defence that the same were written under a sense of public duty and without malice and in the honest belief that they were true. The Defendant contends further that she was exercising her right as a member of public

**“to ventilate her grievance over what she felt  
were wrongs and irregularities being committed**

**against her rights”**

She denied that the Plaintiff’s character as a professional has been tarnished and puts the Plaintiff to strict proof of that fact.

Interestingly, the Defence is filed by the same Chris Mutuku, advocate who wrote an apology to the Plaintiff (produced in evidence as Exb. “P1-6”) which I now reproduce herein as follows:

**“I received with utter disbelief your letter of 3<sup>rd</sup>**

**March 2003 addressed to the L.SK. and**

**copied to me, among others.**

**I was never a party to the drafting of the tirade**

**against you, and indeed, I only learnt of it after**

**receipt of your letter under reference. You must,**

**understandably, feel offended and insulted and for**

**whatever it is worth, you have both my profound**

**sympathies and sincere apologies.**

**You know me as a person and I trust you respect**

**me enough to accept that I am incapable of such**

**an outrage.”**

After receipt of the Defendant’s complaint of 24<sup>th</sup> March 2003, the Law Society invited the Plaintiff’s comments of the same. It is in the copy of his reply to the Defendant’s advocate that the Plaintiff enquired of the said advocate as follows:

**“How could you allow your client to vilify us**

**in this manner? We call for an apology.”**

It was in reply thereto that the apology copied hereinabove was tendered. It is worthy of note here that the Law Society dismissed the complaint and wrote to the Defendant on 1<sup>st</sup> April 2003 the letter produced as Plaintiff’s exhibit P.1-7 advising her that the law society

**“(have) no reason to believe that Mr. Mbobu,**

**advocate has engaged in any professional**

**misconduct to warrant such complaint.**

**We would advise that you allow the matter before the Courts to run to its natural conclusion, under advisement (sic) from your advocate. We are proceeding to close our file and we will not entertain any further correspondence in this matter.”**

The above caution notwithstanding it appears the Defendant was not about to let go of her indignation. The Plaintiff stated in his evidence that receiving the apology and a copy of the Law Society’s response to the Defendant, he could let the matter lie in the hope that the Defendant would be permanently restrained. He had received his copy of the said response on 16<sup>th</sup> April 2003. The Plaintiff has testified that the Defendant continued with her accusations and verbally repeated the same whenever she saw the Plaintiff both within the Court precinct and outside. He stated that she once accosted him in public at a grocery. On 15<sup>th</sup> January 2004 the defendant is said to have repeated the words of her letter of 24<sup>th</sup> February 2003 in the presence of litigants, court clerks, advocates members of the public outside the late Justice Kamau’s chambers and even before the Judge himself. This incident has been confirmed by the testimony of one such advocate Mrs. Judith Guserwa and the judge’s clerk Stephen Kaniaru. The latter testified having witnessed the Defendant call the Plaintiff a liar, useless and most corrupt advocate in the city while holding him and pushing him. He also testified that she told him she had complained about him to the Law Society, the Minister for Justice, the Advocates Complaints Commission and the Chief Justice. The Plaintiff takes this to have been in reference to the letter of 24<sup>th</sup> February 2003 and I do think he is right in so assuming. The commotion of 14<sup>th</sup> January 2004 is said to have caught the attention of Justice Kamau who had just heard the Defendant’s application, causing him to summon the parties back into his Chambers and to caution the Defendant in the presence of her advocate who, according to clerk Kaniaru, apologized on her behalf. According to the Plaintiff’s witnesses the incident was shocking, humiliating and embarrassing. Mrs. Guserawa testified that she was disturbed as she knew the Plaintiff as a person “not befitting of the description ascribed to him by the Defendant” while Kaniaru did not think the Defendant was justified in her allegations against the Plaintiff. He also testified that the judge in his caution did tell the Defendant that her accusations were serious and unwarranted.

There being no advocate-client relationship between the Plaintiff and the Defendant in the matrimonial suit it is quite absurd for the Defendant to have accused the Plaintiff for the delays in her suit. It is clear from the letter she wrote that she definitely referred to the Plaintiff as an advocate who would deliberately delay cases “purely out of malice” and one who is guilty of “unprofessional and unbecoming behaviour.” The circumstances of this case are such that the Defendant cannot be said to have been justified in directing such accusations as she did against the Plaintiff. I would agree with the Counsel for the Plaintiff’s submission that the words uttered by the Defendant were so uttered “out of a deep-seated malice and venomous attitude towards the Plaintiff.” I find the words in the offensive letter and those uttered on the 15<sup>th</sup> January 2004 obviously defamatory of the Plaintiff since they clearly disparage him in his reputation in relation to his office, profession and calling as an advocate. Considering the circumstances of the case there cannot possibly have been any justification for the Defendant’s conduct. She may have been reasonably frustrated by the process but obviously chose to vent her anger and frustration on the Plaintiff in a most malicious and injurious manner which calls for legal consequences. It being plainly obvious that the Plaintiff herein has suffered injury to his reputation I hold that he is entitled to compensation for the same. He has submitted various authorities as a guide to the quantum, one of them being the judgment of this Court in YAHYA SAID YAHYA –vs- THE KENYA TIME MEDIA TRUST & TWO OTHERS, H.C.C.C. No.1678 OF 2000. I find it appropriate to draw the Plaintiff’s attention to my comment at pages 11-12 of the said judgment that the Court must not be seen as a platform where “run away” awards are made without any justification, a position supported by the Court of Appeal in a recent judgment namely JOHNSON EVAN GICHERU –vs- ANDREW

There being no real yardstick in measuring damages for libel and defamation generally and the same being “at large”, the law requires that each case be considered in its own merits wherein the nature and extent of publication is a prime consideration.

I find that, the publication in this case having been to a limited group of people, most of whom appear to have dismissed the Defendant as a misguided litigant, and perhaps one suffering from the venomous fury of a scorned woman, the injury herein cannot be said to have far reaching consequences save for the great embarrassment, humiliation and momentary ridicule occasioned the Plaintiff in the Court corridors. An award of Kshs.20,000,000/= as requested herein would be outrageous in the circumstances.

I find that the authorities cited do not provide a valuable comparisons taking the nature and extent of publication in each case. I am of the considered view that a sum of Kshs.1,000,000/= is suitable herein as general damages. Considering the Defendant’s “stiff-necked” attitude herein and the lack of an apology from her, aggravated damages are appropriate. I asses the same at Kshs.500,000/=. That the Defendant is capable of repeating the libel is not in doubt. I therefore grant the prayer for an injunction over and above the damages herein awarded. The letter to the Law Society of Kenya having been trashed by the parties to whom it was published I do not think an order for retraction is necessary. I note from the written submissions filed herein that this prayer appearing in the Plaint was indeed left out in the final prayers made during the examination in chief.

Taking all the facts in consideration, the evidence tendered herein, the submissions by Counsel as well as the authorities cited in support of this suit I find that the Plaintiff has, on a balance of probabilities proven his case against the Defendant. Accordingly I enter judgment in his favour and award him a sum of Kshs.1,500,000 being general and aggravated damages, an injunction in terms of prayer (b) of the Amended Plaint, Interest on the damages awarded at Court rates from the date of judgment until payment in full. I also award the costs of the suit to the Plaintiff with interest at Court rates. Orders accordingly.

Dated and Delivered at Nairobi this 11<sup>th</sup> day of November 2005.

**M.G. Mugo**

**Judge**

***In the presence of:***

***Miss Mwendo for the Plaintiff***

***N/A for the Defendant***