



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

**CIVIL SUIT NO 1760 OF 2002**

**OCHIENG & 8 OTHERS ..... PLAINTIFFS**

**VERSUS**

**STANDARD LIMITED ..... DEFENDANT**

**JUDGMENT**

The plaintiff herein whom I shall refer to as “the Ochiengs” are father, mother, brothers and sisters respectively and all are the in-laws of one, Jacqueline Moraa Otieno, wife of the late Aloyce Obiero, son and brother of the plaintiffs, respectively.

They have come to this court jointly and in their plaint dated 19th November 2002 they seek orders as follows: -

- a) An order that the defendant do make a full and an unqualified apology, amends and withdraws the said remarks and statements and such an apology, amendment or withdrawal be given the widest possible circulation similar to the publication complained of.
- b) General damages and aggravated damages for defamation.
- c) Costs of this suit.
- d) Interest on (b) and (c) above the court rates from the date hereof.
- e) Any other and/or further relief as this Honourable Court may deem just and fit.

**FACTS IN SUPPORT**

It is claimed by the plaintiffs in their claim against the Standard Limited that on 13th April 2002 the defendant company as publisher of the “East African Standard” falsely and maliciously wrote or caused to be written and published to the public at large an article concerning the plaintiffs entitled “Going African”. It is said that the offending words in that article were these: -

“Jacky started designing clothes in 1994 after quitting her job as a tour consultant. In 2000, she lost her husband in the Kenya Airways plane crash aboard which he was traveling to buy more fabric. She suffered a big blow as a result and her in-laws scrambled to divide her property among themselves.”

It is averred in the plaint that these words in their natural and ordinary meaning were defamatory of the

plaintiffs and were understood to mean that *inter alia*: -

- a) The plaintiffs are cheats and thrive on untrustworthiness.
- b) The plaintiffs are grabbers of their late brother's property.
- c) The plaintiffs are insensitive and inconsiderable to the widow's plight.
- d) The plaintiffs are unethical and unscrupulous persons.
- e) The plaintiffs are inhuman, inconsiderate, without human feelings and sympathy and have no respect for human life.
- f) The plaintiffs are thieves.
- g) The plaintiffs are shrewd and sly.
- h) The plaintiffs should be shunned and avoided by all right thinking members of the society.

It is further averred that the said words were published with malicious intent and were solely meant to injure the plaintiffs in their personal and professional image. Particulars thereof are set out at paragraph 5(a) to (f) of the plaint and in summary, it is contended that the defendant knew or ought to have known that the offending words were untrue but proceeded to publish them anyway. In any event, it is said that when asked to publish a suitable apology, the defendant refused to do so and the damage has not been mitigated to-date.

On its part, the defendant generally denies all the complaints in the plaint and raises only two issues of relevance in my view: -

- i) that the publication is incapable of being construed either expressly and/or by necessary implication or even innuendo, to the plaintiffs,
- ii) in the alternative, it is averred that the publication is attributable to one Jacky Obiero who made the allegations through an interview and if the words are found to be defamatory, then the defendant would seek indemnity from the said Jacky Obiero.

But I am now aware, that whatever defence the defendant has is of no consequence as on 29th January 2003, the said defence was struck out with costs to the plaintiffs by Aluoch J.

What then remains for me to do is to get down to the not so tidy job of assessing damages.

Before doing so however, I must say something about the effect of the offending words on the plaintiffs. Not all of them testified but the Hon Justice Fred Andago Ochieng, the 4th plaintiff did testify on his behalf and on behalf of the other plaintiffs. At the time of the publication complained of, he was in the practice of law, as a partner in the firm of Kaplan & Stratton Advocates. On the day of the publication, he received an early morning telephone call from a friend and colleague at the Bar, one Kamau Kibuthu, advocate. Mr Kibuthu expressed surprise that the 4th plaintiff whom he knew quite well and his family could stoop so low as to deprive a widow of her late husband's property. As the 4th plaintiff had not read the article, he asked his friend to read it out to him on the phone. He was devastated.

The 4th plaintiff spoke of similar experiences by the other plaintiffs. What made the matter more offending was the fact that the late Aloyce Obiero died in a publicity-attracting plane crash which the entire country and the world was made aware of. The 4th plaintiff and Jacqueline Obiero were in the press regularly prior to and subsequent to the discovery of the deceased's body. They were with the then president Daniel Arap Moi to receive the bodies of the dead and lay wreaths at the airport. It was a well-known fact that Jacqueline Obiero's in-laws were the plaintiffs and reference to her in-laws could only

have been reference to them.

As regards the statement that the plaintiffs scrambled to take away the late Aloyce Obiero's property, the 4th plaintiff painfully narrated how none of them has tried to do so. All of the US \$300,000 paid for the death of their son and brother went to Jacqueline. She took all his other properties including his death dues from his employer, NCR Ltd. I was referred to HCCC No 2114/2001 where she sued Kenya Airways Ltd in her own name and obtained judgment. I was similarly referred to Succession Cause No 387/2001 wherein she is the applicant. It is only the 1st and 2<sup>nd</sup> defendants who sought to be enjoined as co-administrators of the estate of Aloyce Obiero. They were his father and mother respectively. I perused those files and confirmed these facts.

Having set out the fact that the statements so published clearly had no basis, and judgment having been entered in favour of the plaintiffs, I hold that the offending words were clearly defamatory of the plaintiffs jointly and severally.

They were cast as if they were callous, uncaring and greedy. They were presented to the world as a family of people without the slightest regard to their son's widow or her children.

That the words were uttered by Jacqueline Obiero does not absolve the defendant from liability. It published the words and is not to be excused merely because it did not originate the words.

Defamation has been defined to mean,

“a publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt or ridicule.”

(Lord Wensley date in *Pamiter vs Compland* (1840) 6 Maw 105, 108)

The 4th plaintiff gave an example of the effect of the publication and I shall restate the matter for effect. He was having a drink at Kengele's Restaurant, Nairobi West. A lawyer in the firm of Kaplan and Stratton was in the same restaurant with her boyfriend. A stranger was introduced to her in the usual social manner and on being told where she worked, the man burst out about how could she work with that horrible man, “*Ochieng*” who was in the press as having taken away a widow's property. That is the effect of defamation, which entitles a party to damages.

The estimation of the 4th plaintiff and certainly of the others was lowered. Cave, J in *Scort vs Sampson* (1882) & QBD 491, at 503, had this to say: -

“Speaking generally the law recognizes in every man a right to have the estimation in which he stands, in the opinion of others unaffected by false statements to his discredit; and if such false statements are made without lawful excuse, and damage results to the person of whom they are made, he has a right of action.”

I am satisfied that the plaintiffs have passed the test set by Lord Atkin in *Sim vs Stretch* [1936] 2 All ER 1237 at 1240 when he said; - “... after collating the opinion of many authorities I propose in the present case the test; would the words tend to lower the plaintiff in the estimation of rightthinking members of society generally?”

In this case, that strangers can form an ill opinion of the 4th plaintiff is sufficient to warrant a positive finding in the plaintiffs favour by this court.

Which then leads me to the question of assessment of damages but before I do so, I must say something about the fact that the plaintiffs have sued jointly and severally yet only one testified. I am aware that where a group of plaintiffs sues as a class, the claim is not actionable as the number may be unidentifiable but where for example as in this case they are suing as the “*in-laws of Jacky Obiero*”, I am certain that the claim can stand for each of them separately and collectively. I have shown that references made were definitely to the plaintiffs and to no other persons.

In awarding damages I am guided by the speech of Pearson LJ in *McCarey vs Associated Newspapers Ltd (No 2)* as quoted with approval by Lord Justice Otton in *Bennet & Others vs Canadian Newspapers Ltd* (1997) EWCA Civ-815 (22nd January 1997) where he said;

“Compensatory damages in a case in which they are at large, may include several different kinds of compensation to the injured plaintiff. They may include not only actual pecuniary loss and anticipated pecuniary loss or social disadvantages which may result, or may be thought likely to result, from the wrong which has been done. They may also include the natural injury to his feelings – the natural grief and distress which he may have felt at having been spoken of in defamatory terms, and if there has been any kind of high-handed, oppressive, insulting or contumelious behaviour by the defendant which increases the mental pain and suffering by the defamation and may constitute injury to the plaintiff’s pride and self-confidence, those are proper elements to be taken into account in a case where the damages are at large.”

As has now become common in cases of this nature our courts have often quoted *Carter-Ruck on Libel*, 4th edition as authoritative on what constitutes “*damages at large*” – I need not repeat the statement but a clear analysis is found in the Judgment of Juma, J in *Kiptanui vs Mwaniki & Others* – HCCC No 42/1997.

To my mind, the injury to the plaintiffs’ feelings and reputation is what I would call “*mild*” compared to say what happened in: -

i) *Khasakhala vs Aura & Others HCCC No 1709/1987*, where the plaintiff was called a murderer and awarded Kshs 3,000,000 in general damages.

ii) *Oraro vs Barrack Mbajah*, HCCC No 85 of 1992 where a lawyer was awarded Kshs 1.5 million for allegation that he lured his client, a former minister to his death, or even

iii) *John Evan Gicheru vs Andrew Matin & Another*, HCCC No 214/1999 where the Hon the Chief Justice had sued for defamation in a book entitled “*Moi; the making of an African Statesman*”. He was awarded Kshs 2.25 million.

I am satisfied from the circumstances of this case, the authorities I have quoted and the dates of delivery of judgment for these other cases that even where the defamation is not as scorching as in these ‘past cases’, an award of Kshs 3,500,000 in general damages is sufficient.

As the defendant refused to publish an apology and yet it almost admitted in its defence that it had no cause to publish the offending words, I shall award Kshs 1,000,000 in aggravated damages.

I shall also grant prayer 1 of the plaint in the words set out at page 1 paragraph 2 of this ruling regarding the appropriate apology, the same to be tendered 14 days after service of the decree herein on the defendant.

Costs of this suit are to be paid to the plaintiffs.

In the event, I grant judgment for Kshs 4,500,000 plus costs and interest as prayed in the plaint together with an apology aforesaid.

Orders accordingly.

**Dated and Delivered at Nairobi this 19th day of March 2004.**

**I.LENAOLA**

**AG. JUDGE**