REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO 612 OF 1996

J. P. MACHIRA T/A

MACHIRA & CO., ADVOCATES ……PLAINTIFF

VERSUS

EAST AFRICA STANDARD LTD …… DEFENDANT

R U L I N G

By an amended chamber summons dated October 29, 1999, the plaintiff (applicant) asks the court to make orders that the amended defence be struck out, judgment be entered for the plaintiff as prayed in the amended plaint, with the consequence that the matter proceeds for assessment of damages ("formal proof"), and the costs of the application be provided for. The basic grounds on which the application is brought are that the said amended defence is a sham for delaying the final hearing and determination of the suit; it does not raise triable issues; it is frivolous, vexatious and an abuse of the process of the court; and it is evasive.

The application is opposed on grounds, basically, that it is frivolous and an abuse of this court; that it is legally without merit and incompetent; that it is an afterthought tailored to blur the defendant' application "to strike out" and designed to confuse issues; that its supporting affidavit is incompetent; that it cannot lie because there are defences of justification and fair comment. In addition it is said for the respondents, that the application should fail, because "the defendant merely narrated what actually happened as evident from the pictures taken and the application for summary judgment cannot possibly succeed against it". The application is further opposed on the grounds that "the defendant did make apologies to the plaintiff … completely without admission of liability, and the application must fail"; that there are 'strong and viable defences to this claim which cannot be overlooked or summarily struck out; that the claim is itself completely without merit or probability of success and cannot found a basis for striking out; and that the application cannot lie insofar as it seeks damages over and above the apologies made, and attempts to secure more remedies than legally allowable.

The learned advocates for their respective parties elaborated at great length, their grounds at the hearing of the application which took about four days.

This application arises out of a suit by the plaintiff, an advocate of the High Court of Kenya, against The Standard Ltd., which is the proprietor and publisher of a newspaper called *the East African Standard* , and an editor of that paper, one Kamau Kanyanga, in which the plaintiff complains that by certain specified pictures and statements in the above newspaper which has a very large and influential circulation, the defendants defamed the plaintiff. The various pictures and written matter complained of are contained in a number of cuttings of the newspaper of Friday, November 10, 1995, beginning on the front page and continuing on page 7. They form annexed exhibits in the present application.

Both on the front page and at page 7 of the newspapers in question are pictures admittedly of the

plaintiff, a woman and a group of other persons, all in different pictorial castings, with an apparent effort to maximize their conspicuity. As if the publishers felt that the large sized near full-page pictures might not catch the eye of everyone, they ran and juxtapositioned screaming captions and headlines of an interpretative kind to help a reader who might otherwise miss to understand the pictures the way the publishers wished to put across. So, with the from page picture there is what appears inset exclamatory matter "GOT YOU!" as the heading of a story which opens with some of the words complained of in this suit, namely:

> "An angry businesswoman collars a High Court advocate yesterday – in a punch-up that brought court proceedings to a standstill. The fight started in the corridors".

The story continues to page 7 where again there are not less than five pictures of the plaintiff, the woman and other persons, all under a large headline 'LEGAL TUSSLE", with a prominent heading "Punch-up brings High Court to a standstill", under which what a reader might not see for himself in the picture is again interpreted for him and told to him by the publishers, that:

> "The excited crowd were clearly on Mama Njoroge's side. Prison warders unaware of what was happening, locked up the High Court exist gate – leaving the two protagonists fighting in a corner. Finally a court orderly escorted the two protagonists to Kenyatta International Conference Centre Police Post. There the lawyer thanked the orderly for saving him from the angry crowd."

It is said that the statements complained of were published, notwithstanding the fact that on the evening of November 9, 1995, the defendants had been appraised of the true factual position and had been furnished with documents to verify the true position showing a contrary factual position to what the defendants were portraying of the matter which was false, malicious and defamatory of the plaintiff in his personal and professional standing. The particulars of malice and spite are set out in the amended plaint, at paragraph 5; and the plaintiff says that by reason of all or any of those things, his reputation and intergrity were destroyed.

In particular, the plaintiff highlights that the defendants chose to publish incorrect and misleading matter despite having been briefed and furnished with the necessary documents and the true position of the matter; the defendants knew well that the plaintiff did not fight or exchange blows with the lady and that although he was assaulted and battered, the plaintiff kept cool in a dignified manner, not retaliating at all; that members of the public sympathized with the plaintiff throughout the ordeal and urged the lady to resort to law if she had a grievance, and not to take the law in her own hands, and they were not impressed by her assault on the plaintiff; that there was no legal tussle and there was no court case between the plaintiff and the lady; that the plaintiff did not owe any money to the lady, and this fact was communicated to the defendants a night before the publication of the matter complained of; that there was no punch-up but only an assault and battery on the plaintiff who innocently kept his calm, not retaliating; that there was no standstill of High Court proceedings; that the pictures published tell a different story from what the defendants wrote and published. These and other particulars in the amended plaint which I have not set out herein, are what gave rise to the complaints of the plaintiff in this suit.

In their amended defence to the amended plaint, the defendants admit (para 3) that there was printed and published in their local daily the matter concerning the plaintiff; but they deny that the published matter are false or malicious in any way, and they aver that the matter complained of consists of merely statements of fact which were true and *bona fide* statements made in the public interest. They pleaded that the words consisted of allegations of fact which were true in substance and in fact, while expressions of opinion were fair comment made in good faith and without malice on matters of public interest, namely, the accosting of a senior advocate by a member of the public within the precincts of the High Court and the tussle ensuing.

The defendants set out particulars, in which they said, among other things, that the plaintiff was accosted by the lady and a tussle ensued which tussle was photographed and the photographs show the lady having a hold on the plaintiff's tie and collar in a fighting stance; that the plaintiff, although he did not retaliate by blows parried the lady's blows and defended himself "which in the circumstances of the

incident amounted to a fight"; that the photographs showed that a majority of onlookers looked at the unfolding scene with apparent bemusement and clearly were on the side of the assailant; that the incident did actually bring the High Court to a standstill as the people who were within earshot of the altercation came out to find out or to determine the "course of the said altercation"; that the lady assaulted the plaintiff and alleged that the plaintiff owed her money with regard to a land deal. They conclude that in the premise, the words complained of were fair comment in expressing the opinion that the altercation was a legal tussle that brought the High Court to a standstill.

They add, however, (at para 6), that the defendants published in later issues of the daily newspaper, a correction and appropriate apology to the plaintiff; ands they further state (para 6A), a rectification by way of a press release was made on November 11, 1995 after the defendants received notice that they were or might be defamatory of the plaintiff, and apologies were published in subsequent issues. There are a number of defences denying allegations in certain paragraphs of the amended plaint, and others seeking to invoke some provisions of the Defamation Act (Cap 36) , e.g., sections 13-15 of that Act.

Having considered the pleadings on both sides, the grounds in support of the instant application as well as those in opposition thereto, plus the copies of the actual newspaper where the complained of matter was carried, this court after seriously studying the oral submissions presented to the court by the learned advocates for their respective parties, finds that indeed, at any rate to a considerable extent, the matter complained of were libellous, admittedly published of and concerning the plaintiff, and by the defendants. The court finds that the amended defence is indeed a sham one for the predominant purpose of delaying a fair trial of the action; it is an abuse of the process of the court; it is frivolous; it is vexatious. Why, and how does the court reach these conclusions and findings?

Obviously no trial and oral evidence or documentary evidence is required to show that there was a "punch-up" between the plaintiff. A "punch-up" in the context of the story in question carries the ordinary meaning of that term, namely a bout of fighting with the fists. A "fight" in this context means a violent struggle involving the exchange of physical blows or the use of weapons. The defendants told the public in general that punches were exchanged, hence, a "punch-up", by one does not see such a scenario in the pictures which were published with the intention to paint such an occurrence. One does not see the plaintiff deliver any single punch. A "punch is a straight or thrusting blow delivered with the fist: it is to strike or thrust forcibly with a fist. The defendants have conceded in their amended defence that the plaintiff did not throw a blow.

They admit that it was a one sided affair: the lady accosted the plaintiff, held his tie and collar in a fighting stance, and all that the plaintiff did was to parry (which simply means to ward or keep off, or turn aside, block or evade, a blow or a thrust of an attack). This is not fighting. There is no dispute that the plaintiff did not fight back, and that he kept cool under the lady's attack. The defendant's story and misinterpretation of the photographs are all misleading and misrepresent to the public what did not occur – no fight, no punch-up. Even if the matter went for trial, this lie will not be turned into truth.

Then there is this eye-catching caption " GOT YOU". It is not stated as a quotation of words spoken by either of the persons in the picture. These were an interpretation by the defendants of what they considered should be the meaning of the photograph accompanying those words. Obviously these are not laudatory words. Ordinarily they are words employed when one is caught up with after he has been eluding justice or after he has been getting away with wrong doing. On the present amended defence, one does not see how a trial can establish that this was true of the plaintiff. And in the absence of pleaded factual material, there is nothing from which one can reasonably say that those words were a fair comment on anything, or that they were words in which the public had an interest.

The *Standard* newspaper itself on 5th January, 1996, carried a tiny apology, saying that the defendants had subsequently been advised that there was no punch-up or a fight as they had earlier published. This is the kind of advise they should have sought to verify the factual position before publishing the offending matter. Now having acknowledged in that apology, that they had been differently advised, and not having come up with facts to contradict the advice on which they published the apology, one wonders where the defendants will manufacture new rewww. discovered factual matter to prove "punch-ups" and a "fight", if

a trial were to be held.

In fact, in their defence, the defendants change the story to be one that the parties were in al altercation, which members of the public nearby came out to see. To altercate is to dispute heatedly to argue. Not a word by either the plaintiff or the lady, is quoted, to show who said what in a heated disputed or argument. This shifting from “punch-up”, “fight” “got you!”, to “altercation”, simply cannot be allowed to form a basis for going to a trial.

Supposing we go to the hearing of the suit, what is pleaded in the amended defence to show that the defendants will be able to prove that court proceedings went to a “standstill”. Things come to a standstill when there is a cessation of movement or activity or any happenings: they simply come to a halt, go dead and remain in a state of being unable to proceed. The story complained of in this case does not have any qualifying words demarcating or limiting a part of the High Court which went dead and stopped. The entire High Court is portrayed as having come to a standstill. It is not pleaded anywhere that judges and magistrates adjourned court proceedings to go and watch “bemused” what was happening on the court corridors. Do the defendants seriously and honestly expect to prove that the Chief Justice of this Republic abandoned what he was doing to come and watch on the corridors? Do they expect Judge X, Magistrate Y, plaintiffs and Defendants, to come and testify at the trial of this case, that they left their court proceedings and went out to see what is reported? Which court proceedings were put aside? None is pleaded; and so none will be proved even if we let the suit to float to the trial.

Clearly the pretended defence of justification cannot stand a chance of success at the hearing. A defendant is permitted to plead justification only where it is clear that the allegations he made and are complained of are true infact or substantially so. He cannot be allowed to set out a version of a statement which differs materially from that complained of and justify that version. For him to rely on justification he must accept the plaintiff’s version of the statement, or a statement which is in substance identical with the plaintiff’s version: Brembridge v Latimer [1864] 12 W R 878, at 879, per Byles, J; Rassam v Budge [1893] 1 Q B 571, at 574, CA, (where the defence was struck out as embarrassing and tending to prejudice the fair trial of the action, or to delay the fair trial); and Watkin v Hall [1868] LR 3QB 396 at 402. You have only to look at the defence in the instant case to be convince that it falls far below this requirement. Terminologically, “justification” as used in the law of defarmation, means “truth”. The defence calls for the defendant demonstrating that the defamatory imputation is true. He cannot get away with it by saying that he believed that the matter complained of was true. In the instant case the defendants are simply seeking to go to the trial to tell the court that they believed that what they saw along the court corridors was a punch-up, and that the people they saw near there constituted the entire High Court work force and therefore court proceedings everywhere at the High Court must have come to a standstill. Do we need to go to the trial to see the falsehood of these things? No, we do not have to. It is already glaring at us in the face. There is not even substantial justification likely to be proved. I do not find any pleaded allegation by the defendants which if proved will meet the sting and charge.

It is also a waste of time and an abuse of the process of the court, and a matter calculated only to delay the just dues of the plaintiff to drag this case to the trial on the basis of an alleged defence of fair comment. What is complained of are not comment but statements of alleged facts; nor are they inferences of fact from other facts referred to. Again, there was no factual basis for a comment. A comment must be objectively fair in the sense that an honest or fair-minded person could hold that view. Comment must be based on true facts which warrant the comment.

Neither of the particulars set out in paragraph 5 of the amended defence to the amended plaint, can be the foundation of any of the defences of truth and fair comment, in the circumstances of this case.

The matter complained of contains an allegation of an engagement in a “legal tussle”. The ordinary meaning in its context was that one party took a certain stand on a legal issue and the other took a different position on the same issue, and there ensued an argument between them on the legal question. The amended defence does not plead what that issue was and what each party’s proposition and counter proposition was thereby creating a legal tussle between a lawyer and a lay person. In the absence of the particulars thereof, evidence will be unavailable to justify the allegation in question, published by the

plaintiffs.

For these reasons the amended defence to the amended plaint, is not a defence worthy going for a trial. Apart from these reasons, the case of *J P Machira v Wangethi Mwangi and Nation Newspapers* , CA Civ Appeal 179 of 1997, puts this defence outside any chances of consideration. In that case the Court of Appeal has already found and held in very similar (almost identical) circumstances, that the defendants therein who had published similar matter as those complained of herein, were liable for the libels published of the concerning this very plaintiff. The story in that case was about this very incident. Even though each case depends on its own facts and peculiar aspects, this court does not find any material difference between the earlier case involving the Nation Newspapers and the instant case involving the East Africa Standard, Ltd., writing about the same incident in similar fashion.

Accordingly, the amended defence, and therefore the defences relied upon by the defendants cannot stand. The said defence is struck out. Judgment is hereby entered against the defendants jointly and severally, on the issue of liability for defamation published.

The issue of damages may be determined after the assessment of general damages for the published defamation.

There is liberty to fix a date in due course for the assessment of damages.

The general rule as to costs will be followed as there is no good reason for deviating from it. In the circumstances, the defendant shall pay the costs of the suit and of the application. Orders accordingly.

This judgment is signed and dated by me at Nairobi, this 15th day of November, 2001.

R KULOBA

JUDGE

15.11.2001