



**Chemailelei v Nation Media Group Limited (Civil Suit 215 of 2012)  
[2024] KEELC 5977 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 5977 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL SUIT 215 OF 2012  
JRA WANANDA, J  
SEPTEMBER 20, 2024**

**BETWEEN**

**MARY CHEPNGETICH CHEMAILELELI ..... PLAINTIFF**

**AND**

**NATION MEDIA GROUP LIMITED ..... DEFENDANT**

**JUDGMENT**

1. This defamation suit is one of those very old cases that have overstayed in our Courts. The matter has been protracted and has been handled by a total of 4 different Judges during its pendency. Finally, the onus of concluding the matter now falls on my shoulders.
2. Be that as it may, the background of this matter is that by the Plaint dated 18/10/2012 and filed in Court on the same date through Messrs J.N. Njuguna & Co. Advocates, the Plaintiff pleaded that she is the wife of one Dr. Lectary Kibor Keiyo Lelei, with whom she lives as husband and wife at their matrimonial home situated in Eldoret Town and that they celebrated their marriage on 29/04/1989 and were issued with a Marriage Certificate. She pleaded further that the marriage has been blessed with 4 children, who, as at the material time, were students at the Moi University School of Dentistry, Kabarak University, Moi Girls School, Eldoret and Gulab Lochab Academy, respectively. The Plaintiff pleaded further that on or about 15/05/2012, she read an article published at page 41 of the Defendant's newspaper "Daily Nation" which referred to Dr. Lectary Kibor Keiyo Lelei (Plaintiff's husband) whose import and purport was to notify him of the filing and existence of a Divorce Petition No. 12 of 2012 at the High Court of Uganda at Kampala filed by one Alice Nash Naluma (as the Petitioner) against the said Dr. Lectary Kibor Lelei (as the Respondent). The Notice was then reproduced verbatim in the Plaint.
3. The Plaintiff pleaded further that she was terribly shocked and greatly disturbed upon reading the notice which, in their natural and ordinary meaning, and in the context in which the words were published therein meant that the Plaintiff's husband is polygamous, adulterous, unfaithful, immoral,



unchristian, irresponsible, unprincipled, a social misfit, guilty of the offence of bigamy and a fugitive who was running away from obstructing or frustrating the service of the legal process. She contended that the notice left her psychologically traumatized and emotionally disturbed because she did not know that her husband had another wife for the entire period that she was married to him. She claimed that she also received several telephone calls from colleagues, friends, clients, fellow church members and her former students at Moi Girls Eldoret where she has taught for many years inquiring whether she had read the article and whether it was true that her husband was indeed married to another wife. She averred that as a result, she was extremely embarrassed and humiliated in the eyes of her peers, colleagues, students, family, church members, neighbours and other right-thinking members of the public.

4. The Plaintiff pleaded further that she has since established that there is no Divorce Petition pending at the High Court of Uganda or anywhere else that involves or relates to on her husband and that she further established that the alleged Divorce Cause involves different parties, namely, Ann Charlotte Hecken (Petitioner) -versus- John Alia & Tumusiine Annet (Respondents). According to her therefore, her husband is neither a party nor a witness in the purported Divorce Cause and as such, the purported notice of service published by the Defendant in its said newspaper was false, fictitious, fabricated and a blatant lie. She pleaded further that it is therefore patently clear that the Defendant's media house published the words in the notice without undertaking any investigation to establish the veracity or existence of the purported Divorce Petition and that the publication was therefore unprofessional, unethical, unsavoury, unreasonable, offensive, harmful and unwarranted. She further contended that the publication was malicious, false and was calculated to injure the Plaintiff's husband, herself, their children, and family and cause her and her family pecuniary, professional, social and moral damage and to sabotage, rock and prejudice the Plaintiff's relationship with her husband and children and to undermine and destroy her employment as a teacher. She alleged further that by reason of the publication, she has been exposed to defamation, libel, assassination of character and ridicule, has become the butt of very unkind jokes, among others, and has also suffered mental anguish and psychological torture.
5. By reason of the foregoing, the Plaintiff prayed for Judgment against the Defendant for (a) general, exemplary and punitive damages, (b) an order directing the Defendant to forthwith publish a public apology to the Plaintiff and a correction or retraction of the notice in equal or more prominent nature, (c) costs, and (d) any other relief the Court may deem fit to grant.

### **Statement of Defence**

6. The Defendant, through Messrs Archer & Wilcock Advocates, filed its Statement of Defence on 17/12/2012. The import of the Defence is that the Defendant admitted publishing the notice but denied that in their natural and/or ordinary meaning, the words contained therein, in their proper context, were or were capable of any defamatory meaning. The Defendant also denied that the notice was actuated by ill-will, falsehood or malice or calculated to injure the Plaintiff, her husband, children, family or cause her damage. It was also denied that as a result of the publication, the Plaintiff has suffered injury to her reputation in the estimation of the people alleged in the Plaint. It was further contended that insofar as the words complained of were concerned and in their natural and ordinary meaning or otherwise, were published in the normal course of business and in the honest belief that they were true in fact and in substance upon the representations of the Petitioner in the suit. It was further pleaded that, in the alternative, the said words in their natural and ordinary meaning were published under a sense of public duty and without malice towards the Plaintiff and in the honest belief and that they were further published as a judicial/legal justification for service upon the Plaintiff to be informed of the proceedings in which the Plaintiff's husband was to participate in. Further, the



Defendant averred that it was not the author of the notice, that it took all reasonable care before the publication and did not know and/or have any reason to believe that the same caused or contributed to the publication of any defamatory statements (which in any event is denied).

7. After a long hiatus, the suit finally proceeded to trial.

#### **Plaintiff's evidence at the trial**

8. The Plaintiff testified as PW1 on 2/04/2014 before Hon. F.A. Ochieng (as he then was). Led in her evidence-in-chief by her Counsel, Mr. Njuguna, she basically echoed the matters already set out above and testified further that she has been a teacher for 30 years at Moi Girls Eldoret, that she is a choir leader at A.I.C Kao la Amani, Eldoret, that at Moi Girls Eldoret, she has been a head of Department and in-charge of the Staff Choir. She stated that on 15/05/2012, she was driving to school in the morning when one Mr. Sabila, a family friend, called and asked whether she had seen the publication about her family in the Daily Nation of that date. She stated that she then purchased the newspaper and at page 41 thereof, she read about the Divorce Cause referred to above, that after she read it she was shocked and embarrassed as she had been legally married to her husband for over 23 years so if he was being divorced, it meant that he had kept another marriage behind her back, that given her position in society, she felt betrayed and wondered how many other skeletons were in her husband's cupboard. She added that all along she had assumed her husband to be a provider, a loving father and a faithful husband but that her position now changed after reading the publication. She testified further that she received many calls from friends, former students, and family members, all inquiring about the publication.
9. She testified further that her husband is a leading consultant surgeon in Eldoret and many people know him, that he works at the Moi Teaching & Referral Hospital and is also a lecturer at Moi University. She stated that she was livid because before she could recover from one call, another would come in, and that although she proceeded to school and went to the staff room, her state of mind made it impossible for her to go to class. She stated that in the staff room, there was heightened tension and people were talking in whispers as they looked at her, that some of the teachers had earlier called her and that the matter had spread in the staff room and she felt sweaty and nervous and felt like crying. She testified further that she later spoke to her husband seeking to know the truth but he tried to play innocent pretending not to know anything about the publication, that she lost her cool and told him off, that he tried to persuade her but she did not "buy his story", and that he undertook to consult and instruct his Lawyer to get to the truth of the matter. It was her further testimony that the publication affected her relationship with her husband, that she did not feel like going home and that their children were equally affected and one of them, came to her crying about the issue. She stated that her husband's Lawyers subsequently obtained the said documents from the High Court of Uganda and pointed out, as earlier stated, that the parties therein are different and do not include her husband and who is also not even listed as a witness.
10. At this juncture, the Plaintiff was stood down to give her time to obtain and produce certified copies of the Uganda High Court documents filed in the said Divorce case.
11. On 28/05/2019, the Plaintiff returned to Court, this time before Hon. Lady Justice O. Sewe who had now taken over conduct of the matter from Hon. F. Ochieng J (as he then was). In her further evidence-in-chief, she stated that she is a Director of St. Lukes Hospital, Eldoret. She then adopted her Witness Statement and also produced copies of the uncontested exhibits indicated in the Plaintiff's List of documents, namely, her Certificate of Marriage, the Newspaper publication, a demand letter and a Certificate of Postage. She however did not still produce the certified copies of the pleadings from the Uganda High Court Divorce Case for which she had been stood down to return to produce.



12. Under cross-examination by Counsel for the Defendant, Ms. Kemunto, the Plaintiff stated that she took early retirement from her teaching job to plunge into business, namely, the said St. Lukes Hospital which she joined in 2013. She agreed that she is still married to her husband and conceded that the publication did not therefore cause their divorce or separation. She agreed that the notice did not mention her name and also that no photograph of hers appeared thereon. She also conceded that she never called the Defendant to ask for an apology. In re-examination, she stated that she did not go to work for 2 days after learning of the publication and that the Defendant never responded to her Advocates' demand letter.
13. PW2 was one Leah Chepkoech Bungei who also testified on 28/05/2019 and stated that she is a teacher. She then adopted her Witness Statement as her evidence-in-chief. Under cross-examination, she testified that she had known the Plaintiff for many years as they were colleagues as teachers at Moi Girls High School, Eldoret. She however conceded that the publication did not mention the Plaintiff's name and neither was the Plaintiff's photograph published therein. She stated that she saw the Newspaper notice while she was in the staff room, that she called the Plaintiff and asked her whether she had seen it upon which the Plaintiff responded that she had indeed seen it. She testified further that the notice did not change her relationship with the Plaintiff as she still respects her, her husband and her family. She stated further that the Plaintiff later showed her Court documents which showed that the parties in the Divorce suit had no relationship with the Plaintiff's husband. She however conceded that her relationship with the Plaintiff did not change even after the publication.
14. In re-examination, she stated that she knew the Plaintiff's husband, Dr. Lelei, and that they used to call the Plaintiff, Mrs Lelei. She stated that upon reading the publication, she got shocked to learn that the Plaintiff's husband had another wife but that upon being shown the Court papers she confirmed that the story was not true. According to her, the Plaintiff was humiliated and that other staff members were discussing the matter in low tones.
15. PW3 was one Naomi Chelagat who testified on 16/07/2019. She stated that the Plaintiff is her aunt, that on 15/05/2012, the Plaintiff came back home looking distressed, that when she asked her what the problem was, the Plaintiff showed her the notice published in both the Standard and the Daily Nation Newspapers indicating that the Plaintiff's husband, Dr. Lelei, had a divorce case in Uganda. She testified that to her knowledge, the Plaintiff's marriage with Dr. Lelei was monogamous, and that the couple's relationship became strained for a while as a result of the notice. In cross-examination, she conceded that the notice did not mention the Plaintiff and also agreed that even after the notice, her view of the Plaintiff never changed as she knew the Plaintiff as a virtuous and morally upright woman and that the couple remained faithful to each other even after the notice.

### **Close of the trial**

16. The Plaintiff then closed its case on that on 16/07/2019. The Defendant having opted not to call any witness, the trial was closed and the parties directed to file written Submission

### **Recall of the Plaintiff to testify**

17. Before the parties could file Submissions, the Plaintiff, on 21/08/2019, filed an Application seeking orders that the Plaintiff be recalled to produce certified copies of the Court documents filed in the Divorce Case filed at the High Court in Uganda. No response having been filed to the Application, the same was granted and allowed on 20/09/2022 by Hon. E. Ogola J who had since taken over the conduct of the matter from Hon. Lady Justice O. Sewe. The Application therefore stalled the suit for more than 3 years. Pursuant thereto, the Plaintiff filed a Supplementary List of documents and I,



having now taken over conduct of the case, she returned before me on 24/08/2023 and produced the said documents.

### Submissions

18. The parties then filed written Submissions. The Plaintiff filed her Submissions on 3/11/2023 while the Defendant filed on 20/02/2024.

### Plaintiff's Submissions

19. On whether the publication was defamatory, Counsel for the Plaintiff cited the definition set out in Halsbury's Laws of England, 4<sup>th</sup> Edition, Vol. 28 and also in *Black's Law Dictionary*, 9<sup>th</sup> Edition, and submitted that the test for whether a statement is defamatory was an objective one. He submitted that in its natural and ordinary meaning, the publication was understood to refer to the Plaintiff's husband as being adulterous and having another wife in Uganda. He referred to the case of *J. Kudwoli & another v Eureka Educational and Training Consultants & 2 others* [1983] eKLR in which, he submitted, it was stated that that the publication must be about the Plaintiff, must be a false statement, must be to the Plaintiff's discredit, and must tend to lower the Plaintiff in the estimation of right thinking members of the society, or the statement should tend to expose the Plaintiff to hatred, contempt or ridicule and that to be defamatory, the statement does not depend upon the intention of the Defendant but upon the natural tendency of the publication and the surrounding circumstances. He also cited Gatley on *Libel and Slander*, 6<sup>th</sup> Edition and pointed out that the Defendant did not tender any evidence to rebut what the Plaintiff stated.
20. On whether the publication was true, Counsel pointed out that the Defendant raised the defence of "justification" and that the Defendant averred that it did not know or had no reason to believe that the publication caused or contributed to the publication of any defamatory statements. He cited the case of *Phineas Nyagah v Gitobu Imanyara*, Civil Suit No. 697 of 2009 [2013] eKLR and submitted that the Defendant did not tender any evidence to show the steps taken to check the veracity of the information published. He submitted further that the publication was an unconfirmed lie and which is evidence of malice, that the same cannot have been justified and that in any event, no evidence was adduced to prove the alleged "justification". He further contended that the publication was neither a fair comment or made on a privileged occasion as no attempt was made to provide particulars of such alleged fair comment or privileged occasion. On the consequences of the Defendant not calling any witness, Counsel submitted that the Defendant's allegations remain just that, mere allegations emerging from the thicket, far-fetched and unsupported. He submitted further that Section 107 of the *Evidence Act* the burden of proof lies on he who asserts and that in this case therefore, the burden of proving that the publication was not defamatory lay on the Defendant. He also cited the case of *Jeniffer Nyambura Kamau v Humphrey Mbaka Nandi*, Civil Appeal No. 342 of 2010 [2013] eKLR and also the case of *John Wainaina Kagwe v Hussein Dairy Ltd*, Mombasa Civil Appeal No. 215 of 2010.
21. On whether the Plaintiff is entitled to the reliefs sought, Counsel submitted that an award of damages in defamation cases is discretionary. He cited the case of *C A M v Royal Media Services*, Civil Appeal No. 283 of 2005 [2013] eKLR, the case of *Ken Odondi & 2 Others v James Okoth Omburah t/a Okoth Omburah & Company Advocates* [2013] eKLR and also the case of *John v MG Ltd* [1996] 1 ALL ER 35. According to him therefore, all essential elements for award of general, exemplary and punitive damages exist in this case.
22. On quantum of damages, Counsel proposed an award of Kshs 4,000,000/-. He cited the case of *Joseph Elon Jollebo v Standard Group Limited & 3 others* [2020] eKLR in which, he submitted, the awards made were Kshs 4,000,000/- for general damages for libel and Kshs 500,000/- for aggravated damages.



He also cited the case of *Mwangi Kiunjuri v Wangethi Mwangi & 2 others* [2016] eKLR in which, he submitted, the Court affirmed the award of general damages of Kshs 4,000,000/- and aggravated damages of Kshs 1,000,000/-.

### Defendant's Submissions

23. On her part, Counsel for the Defendant submitted that the Plaintiff, in her testimony, confirmed that the notice did not mention her name anywhere, and that it did not identify her in any way possible, and that there was no separation and/or divorce by the couple as a result of the notice. He argued further that the Plaintiff did not exercise her right to reply but rather preferred to file the suit herein and that PW2 and PW3 also confirmed that their relationship with the Plaintiff remained intact, the publication notwithstanding.
24. On whether the words complained of were defamatory of the Plaintiff, Counsel, too, cited the definition set out in *Halsbury's Laws of England*, 4<sup>th</sup> Edition, Vol 28, and on the duty of the Court in a defamation case, she cited the case of *Wycliffe A. Swanya v Toyota East Africa Ltd & another* [2009] eKLR. She then submitted that the publication was not defamatory since the words complained of, in the natural and ordinary meaning, were published in the normal course of business and in the honest belief that they were true in fact and in substance upon the representations of the Petitioner in the notice. She submitted that it is crystal clear that the publication was in respect to a "Notice to Appear" which was a paid advertisement, that the Defendant did not generate and/or author the words contained therein, and that the words were issued by M/S Tom Kalumula & Company Advocates, P.O. Box 411 Mukono.
25. She contended further that the publication was a privileged statement which did not require any explanation or contradiction as per the provisions of section 7 of the *Defamation Act*. Counsel also argued that additionally, Part 1 of the Schedule to the *Act* provides for statement privileged without explanation or contradiction to include "a fair and accurate report of any proceedings before a Court" and that to this end, the Defendant published the notice innocently and with the honest belief that the information contained therein was true and that it was further published as a judicial/legal justification for service to Dr. Lectary Kibor Lelei to be informed of the Divorce proceedings in Uganda. She submitted further that it is of germane importance that a statement is said to be defamatory if it tends to lower a person in the estimation of right-thinking members of the society or if a statement causes him/her to be shunned or avoided, and that without proof of damage to an aggrieved party's reputation or any proof that as a result of a publication, the aggrieved party was shunned or avoided then an action for defamation cannot stand. According to her therefore, the publication was not defamatory of the Plaintiff for the reason that it was not addressed to the Plaintiff and neither did it make any reference to the Plaintiff.
26. Counsel contended further that defamation is in person touching on the reputation of a specific individual and that there can never be defamation by association such as marriage, that to succeed in an action of defamation, the Plaintiff is not only required to prove that the Defendant published the words complained of and that they are defamatory, but is also incumbent upon the Plaintiff to identify herself as the person defamed as an essential element in a cause of action in defamation to succeed and that the Plaintiff concedes that the words as published referred "to her husband and not her". She submitted that the "Notice to Appear" was undisputedly addressed to Dr. Lectary Kibor Lelei, the Plaintiff's husband, and it thus follows that a claim in defamation can only be sustained by the said Dr. Lectary Kibor Lelei and not the Plaintiff. She urged the Court to take judicial notice that there is a pending case instituted by the said Dr. Lectary Kibor Lelei against the Defendant on the same subject



publication herein, namely, Eldoret CMCC No. 17 of 2017 formerly known as HCCC No. 118 of 2012; Dr. Lectary Kibor Keiyo Lelei versus Nation Media Group Ltd.

27. On the aspect of “malice”, she submitted that the Plaintiff has the onus to prove actual malice, ill-will or spite or any direct or improper motive in the mind of the publisher at the time of the publication and that in this case, there was no deliberate attempt or ulterior motive by the Defendant to attack the Plaintiff’s reputation as no reference was specifically made to the Plaintiff. She contended further that the article does not demonstrate spite or ill will or even the recklessness complained of. Regarding the Plaintiff’s faulting of the Defendant for failing to take steps to verify the information contained in the Notice, she submitted that the Notice was a substituted service by way of advertisement and it therefore becomes impractical to demand that the Defendant ought to have verified the contents thereof. According to Counsel, the Notice being a paid advert, it was not within the ambits of the Defendant to establish the authenticity or genuineness thereof. He cited the case of James Kimeu Mulinge v. Nation Media Group, Nairobi Civil Appeal No. 85 of 2017.
28. Counsel contended further that as the Defendant averred that it did not act maliciously in the publication and raised the defence of fair comment, the burden automatically shifted to the Plaintiff to prove that the Defendant acted maliciously, that the Plaintiff therefore ought to have given particulars of proof of malice in its Reply to Defence, that no particulars of malice were however so pleaded and that this therefore leaves the Plaintiff’s averment that the article herein was published maliciously unsubstantiated and with no basis. She cited Order 2 Rule 7(3) of the [Civil Procedure Rules](#) which provide that where in an action for libel or slander, the defendant pleads that the matters complained of are “fair comment on a matter of public interest or were published upon a privileged occasion and the plaintiff intends to allege that the defendant was actuated by express malice”, then the Plaintiff is required “to file a reply giving particulars of the facts and matters from which the malice is to be inferred”.
29. She also cited the case of [KL v. Standard Limited](#) (2014) eKLR in which it was also held that where the defence of “qualified privilege” is raised, then it is for the Plaintiff to prove “express malice” once such “privilege” has been made out, but not for the Defendant to disprove it. She also cited the case of [Simeon Nyachae -v- Lazarus Ratemo Musa & another](#) (2007) eKLR where it was held that the Plaintiff must give particulars of the facts and matters from which the malice is to be inferred and that he must show that the Defendant acted maliciously. According to Counsel therefore, no malice has been proved and as such, the Plaintiff’s claim must fail since the Notice was published on a “privileged occasion”.
30. On the aspect of “reputation”, Counsel submitted that since the notice did not in any way refer to the Plaintiff, her reputation, character and/or credit was not capable of being brought into public hatred, scandal odium or contempt. She contended that the most important ingredient in a defamation case is the effect of the spoken or written words in the mind of right-thinking members of the society about the aggrieved party, that in other words, those right-thinking members of the society generally who know and esteem the Plaintiff as a reputable person must be called to testify and satisfy the Court that indeed the publication cause the Plaintiff to be shunned, ridiculed, or avoided or viewed differently. She pointed out that the Plaintiff’s character witnesses confirmed that notwithstanding the publication, their relationship with the Plaintiff has remained intact. He cited the case of Hezekiel Oira v Standard Limited & another, Civil Suit No. 64 of 2011 and also submitted that the Plaintiff has failed to discharge the burden of proving how her reputation was disparaged as a result of the publication.
31. Regarding quantum of damages, Counsel submitted that the suit should be dismissed but that had the Plaintiff proved her case, then damages in defamation should not be an enrichment scheme but should only be awarded as an apology, that the award ought to be fair and a restrained hand is desirable as the Court has a duty to maintain a stable bearing. She submitted further that in making an award for



compensatory damages in a claim for defamation, the Court must take into consideration the damage the article had on the Plaintiff's reputation but that in this case, the publication never in any way caused reputational damage to the Plaintiff. She cited the case of *John v MGN Limited* [1966] 1 All ER 35 and also the case of *Jones v Pollard* [1997] EMLR as quoted in the case of Margaret Wanjiku Kariuki v Nairobi Star Publication Limited where a checklist of compensable factors in libel actions were enumerated. Counsel also pointed out that during her testimony, the Plaintiff stated that she did not exercise her right of reply as provided under Section 7 of the *Defamation Act* and that the Plaintiff's failure to invoke this right is crucial in the assessment of damages awardable, if any. She then submitted that in awarding damages, the Court ought to give due consideration to comparable authorities. She cited the case of *Jacob Kipngetchi Katonon v Nation Media Group Limited* [2017] and also the case of *Kennedy Bitange Mageto & 4 others v Macloud Malonza & another* [2011] eKLR where in both cases, she submitted, the Court awarded respective sums of Kshs. 200,000/- as general damages.

32. On the prayer for "aggravated damages", Counsel cited the explanation given out in Halsbury's Laws of England on Libel and Slander, 4<sup>th</sup> Edition and Reissue Vol. 28, and argued that the Plaintiff has not adduced any evidence to demonstrate that the Defendant's conduct increased or aggravated the Plaintiff's alleged reputational injury suffered for instance by way of a republication. She added that it was not also proved that the Defendant expressed any manner of hostility or malice to the Plaintiff before or in the course of the trial. According to her therefore, the Plaintiff did not lay out solid basis for the award of aggravated damages.
33. Regarding "exemplary damages", she cited the explanations given in Gatley on *Libel and Slander* Tenth Edition and also the case of *Michael O. Weche v Fredric N. Mvumbi O.P & 3 others* [2015] eKLR in which, she submitted, the English case of *Manson v Associates Newspapers Ltd* [1965] 2ALL E.R 945 was cited. She then contended that for an award of "exemplary damages" to be made, the Court must be certain that firstly, the article complained of was made with cynical disregard of the consequences that would flow therefrom and with the belief that the contents of the article were not true, and secondly, that the publication was made with a contemptuous calculation of profiting from the same. According to her, the publication was neither made with an intention of making profit or hurting or disparaging the Plaintiff's name and further, that the Plaintiff has prayed for an award of exemplary damages but has not in her written submissions provided a justification for such award to be made.

## Determination

34. Reproduced verbatim, the impugned notice the subject of this suit was crafted as follows:



Republic Of Uganda

In The High Court Of Uganda, Kampala

Civil Division

Divorce Cause No.12 Of 2012

Alice Nash Naluma .....Petitioner

Versus

Dr. Lectary Kibor Lelei.....Respondent

Substituted Service By Advertisement

Notice To Appear

1. Dr. Lectary Kibor Lelei

Eldoret, Kenya

Take Notice that you are required within 15 days after service hereof upon you, inclusive of the day of such service to enter an appearance either in person or by your advocate at the divorce registry of the High Court of Uganda at Kampala should you think fit to do so and thereafter to make answer to this Petition and that in default of your doing the Court will proceed to hear the Petition and pronounce judgment your absence notwithstanding.

The Petition is filed and this notice issued by M/S Tom Kalumula & Company Advocates, P.O BOX 411 Mukono.

Further Take Notice a copy of the Petition may be obtained from the High Court of Uganda at Kampala or from the Petitioner's advocates M/S Tom Kalumula & Company Advocates, P.O BOX 411 Mukono

Dated at Kampala on this 23<sup>rd</sup> day of April 2012

Chief Magistrates At High Court Of Uganda At Kampala

NOTE any person entering an appearance must at the same time furnish an address of service.

35. I find the 2 broad issues that arise for determination in this suit to be the following:
- i. Whether the publication by the Defendant of the notice the subject of this suit in its newspaper was defamatory to the Plaintiff.
  - ii. What reliefs would the Plaintiff be entitled to for defamation if she proves her case.
36. I now proceed to determine the said issues.

**i. Whether the publication by the Defendant was defamatory to the Plaintiff.**

37. To succeed in a suit based on the tort of defamation by way of libel as is in this case, the Plaintiff must prove 5 elements, namely, (i) the libel must be published and so published by the Defendant, (ii) the published words must refer to the Plaintiff so as to identify him, (iii) the statement as published must be false and defamatory of the Plaintiff, (iv) the same must be published so as to be communicated to at least one person other than the Plaintiff, and lastly, (v) the publication be malicious.



38. In view of the above, it is therefore said that the law gives effect to the biblical 9<sup>th</sup> commandment that “a man shall not speak evil falsely of his neighbour”. It is also agreed that in order to be actionable, the defamatory words alleged must be understood to be published of and concerning the Plaintiff. In the case of *Wycliffe A. Swanya v Toyota East Africa Ltd & another* [2009] eKLR, the Court of Appeal paraphrased the above elements as follows:

“For the purpose of deciding a case of defamation, the Court is called upon to consider the essentials of the tort generally and to see whether these essentials have been established or proved. It is common ground that in a suit founded on defamation the plaintiff must prove:-

- “(i) That the matter of which the plaintiff complains is defamatory in character.
- (ii) That defamatory statement or utterance was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.
- (iii) That it was published maliciously.”

39. The law of defamation (libel and slander) is therefore concerned with the protection of reputation. It protects a person's reputation which is the estimation in which he is held by others, not a person's opinion of himself nor his character. In regard to this, the Court of Appeal in the case of *SMW v ZWM* [2015] eKLR, the Court of Appeal held as follows:

“A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided”

40. In determining whether a publication is defamatory, the test is an objective one. This, the Court of Appeal restated in the case of *Miguna Miguna v. Standard Group ltd & 4 others* [2017] eKLR, as follows:

“... the test whether a statement is defamatory is an objective one and is not dependent on the intention of the publisher but is dependent on what a reasonable person reading the statement would perceive of it.

41. Whether therefore a statement is defamatory depends on the consideration of the meaning the words would convey to the ordinary man. This was restated in the text book, Winfield & Jolowicz on *Tort*, 8<sup>th</sup> Edition, at P. 255 in the following manner:

“The answer is the reasonable man. This rules out on the one hand persons who are so lax or so cynical that they would think none is worse of a man whatever was imputed to him, and on the other hand those who are so censorious as to regard even trivial accusations (if they were true) as lowering another's reputation or who are so hasty as to infer the worst meaning from any ambiguous statement. It is not these, but the ordinary citizen, whose judgment must be taken as the standard”

42. Regarding “malice”, Odunga J (as he then was) in the case of *Phineas Nyagah v Gitobu Imanyara* [2013] eKLR held as follows:

“Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice. ....



Malice may also be inferred from the relations between the parties ..... The failure to inquire in the facts is a fact from which inference of malice may properly be drawn.”

43. Applying the above principles to the facts of this suit, I find this case to be on almost all fours with the Court of Appeal case of James Kimeu Mulinge v Nation Media Group [2018] eKLR. That Appeal arose from the decision of Chitembwe J in which he dismissed a defamation suit similar to the one herein against the same Defendant herein. In that case, as herein, the Defendant had published a notification which was headed “Notice to Appear”. The publication was purportedly notifying the Plaintiff to file an “Answer to a Divorce Petition” that was purportedly filed before the Chief Magistrate’s Court at Malindi and in which he was named as a co-Respondent. The Divorce Petition was purportedly filed by an alleged “Stephen Mwinzi Muinde” but it however turned out there was no such Divorce Petition and that the notice was therefore fictitious. The Plaintiff was a retired Major General of the Kenya Defence Forces and at the time of the publication, he was serving as the Kenya’ Ambassador to Somalia.
44. At the hearing of that suit, the Plaintiff, as herein, narrated how he suffered distress on reading the publication in the Defendant’s newspaper, and how he was called by his former colleagues in the military and also friends and family inquiring out about the matter. As herein, he stated that upon his instructions, his Lawyer made enquiries from the Court and established that there was no such Divorce case but that despite this fact, the Despondent declined to publish an apology. As herein, he also relied on the evidence of his former colleague in the military who testified that when he read the advertised notice, he called the Plaintiff as he was surprised that the Plaintiff was being associated with immoral behaviour. Again, as herein, the Defendant did not call any witness.
45. After the trial, in his Judgment dismissing the suit, Chitembwe J found that as the notice was purportedly issued by the Chief Magistrate’s Court in Malindi and it was a paid for advertisement, it would not have been possible for newspapers to verify the correctness of every information brought by an advertiser. The Judge also found that the publication fell within the exception permitted under Section 7 of the Defamation Act. Dissatisfied by the decision, the Plaintiff filed an Appeal. In upholding the High Court Judgment and dismissing the Appeal, the Court of Appeal stated as follows:
  - “(19) A careful consideration of the above provisions of the law examined against the evidence in this matter leaves clear doubts as to whether the notice was defamatory in itself; whether it was indeed capable of lowering the estimation of the appellant in the eyes of the right thinking reasonable members of the society or whether the respondent was entitled to the statutory defence. We also need to mention that by virtue of Section 7(4) of the Defamation Act, the defence as recognized and developed in common law also applies. In common law, the privilege was recognized where it was deemed that the maker of the statement in question has a legitimate interest in making the statement and the recipient(s) of the statement have a legitimate duty or interest in receiving it. As Lord Atkinson in *Adam v. Ward* [1917] A.C 309 at page 334 best put it:  
  
“A qualified occasion is an occasion where the person who makes a communication has an interest, or duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it. This reciprocity is essential.”
  - (20) another matter of key concern to us is the fact that this was an advertiser’s notice, the identity of the person(s) who placed and paid for it remains unknown. A crucial question was posed by counsel for the respondent as to



who was to benefit from this fictitious notice. The person who was to benefit from the notice is the one who paid for it. The two questions were nonetheless not answered but what is clear to us and perhaps was to the trial Judge, was the fact that the notice was published by the respondent as a paid advertisement and in the circumstances, it was not within their remit to establish whether it was genuine or not. At least that is clear from the evidence as no burden was placed upon the respondent to prove otherwise. To that extent we agree with the learned Judge that the respondent published the notice innocently, believing it was a bona fide one and therefore cannot be said to have been driven by malice.

(21) It is also obvious to us that if the appellant was truly seeking to unravel the mystery about this fictitious person, he would have joined the purported ‘petitioner’ in the suit, the one named as Stephen Mwinzi Muindi. That way, perhaps the motive or the truth behind this strange publication would have been revealed. The court would have been able to establish whether the said ‘petitioner’ placed the notice to defame the appellant for his own gain or as the respondents postulated, the appellant could have done it so as to be awarded damages as he sued nearly all the media houses. We say this because these fictitious notices were spread out in almost 5 different media houses. This in itself depicted a worrisome tread by a faceless, and unknown person(s) a matter, in our considered view, that would have entailed serious investigations perhaps even of a criminal nature to nail the culprit. The appellant was also less than candid when he filed this suit; he did not disclose there were 5 other suits that were filed all over the country thereby lending credence to the allegations by counsel for the appellant that the whole saga could have been contrived to abuse the court process.

(22) We also find the contents of the said notice cannot as a matter of fact convey a message that could easily associate the appellant with immorality because the co-respondent was not named. The test for whether a statement is defamatory is an objective one. It is not dependent on the intention of the publisher but on what a reasonable person reading the statement would perceive. In *Halsbury’s Laws of England* 4th Edition Vol. 28 at page 23 the authors opined:

“In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand them in a defamatory sense.”

(23) When one examines the said notice, it is incomplete because the co-respondent is not named and again the person who would read between the lines and figure out that the appellant was being associated with immorality with an unknown woman would be a learned person perhaps in law who does not happen to be



the reasonable man in the streets. As succinctly put by this Court in *S M W v Z W M* [2015] eKLR:-

“A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided.”

The above being our findings, we agree with the learned Judge the claim for defamation had to fail and so does this appeal and for the reasons we enumerated hereabove we order it dismissed with costs to the respondent.”

46. It is therefore evident that in reaching the finding that the “Notice to Appear” the subject of the James Kimeu Mulinge case (supra) was not defamatory, and consequently dismissing the claim, the Court of Appeal took into account the following facts:
- a. That the publication was an advertiser’s notice, and the identity of the person(s) who placed and paid for it remained unknown.
  - b. That the person who was to benefit from the notice is the one who paid for it, and not the Defendant.
  - c. That the publication being a paid advertisement, it was not within the Defendant’s remit to establish whether it was genuine or not
  - d. That the Defendant therefore published the notice innocently, believing it was a bona fide one and therefore cannot be said to have been driven by malice.
  - e. That if the Plaintiff was truly seeking to unravel the mystery about the fictitious person, then he would have joined the purported “petitioner” in the suit,
  - f. That the contents of the notice cannot as a matter of fact convey a message that could easily associate the appellant with immorality because the co-respondent was not named.
47. The above scenarios are all also evidently in existence in the instant suit in the same manner and the two suits bearing almost similar facts, I am bound to by the principle of precedents and/or stare decisis, to follow the reasoning and holding of the Court of Appeal. In light of the guidelines made in the James Mulinge case (supra) therefore, this suit cannot succeed.
48. Further, regarding the identity of the person who paid for or commissioned the advertisement, the situation is even worse for the Plaintiff in this instant suit, since in this instant case, unlike in the case of James Kimeu Mulinge case (supra) where whoever paid for the advert remained undisclosed and unknown, in this instant case, the entity that is said to have placed the advert is explicitly mentioned in the notice as the Ugandan law firm of “M/S Tom Kalumula & Company Advocates, P.O Box 411 Mukono”. Despite all this, the Plaintiff did not explain why she did not join that law firm as a co-Defendant herein and did not also allege that she carried out investigations which caused her to exonerate the said law firm from liability. From the ratio decidendi in the case of James Kimeu Mulinge case (supra), the primary liability for publication of the notice would, unless proved otherwise, lie with the said law firm and/or the client(s) upon whose instructions the law firm was acting, and not the Defendant. This therefore is a further reason why this suit cannot succeed.



49. I am also persuaded by the Defendant’s Counsel’s argument that the tort of defamation is a claim in persona relating to the reputation of a specific individual and that there can never be defamation by association such as marriage. I agree that to succeed in a claim for defamation, the Plaintiff is not only required to prove that the Defendant published the words complained of and that they are defamatory, but is also required to identify himself/herself as the person defamed. In this case, the primary person who may have been defamed, if at all, would be the Plaintiff’s husband and in my view, the Plaintiff did not demonstrate to this Court’s satisfaction, that she, too, was by extension, a victim of defamation by the same publication. This general rule as to who can sue in a claim of defamation was discussed in *Gatley & Lindsell on Slander and Libel* (supra) at page 197 in the following terms:

“An action for defamation is a purely personal action. The proper person to sue as a claimant is the person defamed, and the proper person to be sued as defendant is the person who published the defamatory words or caused them to be published (though this may include a person vicariously liable for another). A cannot bring an action of libel or slander against B for words defamatory of C, even though C has purported to assign to him his right of action; a right for damages for libel or slander cannot be assigned. If A suffers damages as a result of a defamatory statement maliciously made about C, who is associated with A’s business, A may have an action for malicious falsehood, but that is not the same thing as an action for defamation.”

50. The above principle was also apparent in the Court of Appeal case of *Musikari Kombo v Royal Media Services Ltd* [2018] eKLR where it held as follows;

“We also agree that the offending words referred to the appellant’s wife who we were informed filed a separate claim and succeeded. However, we unlike the learned Judge, find that the broadcasts were also concerning the appellant to a certain extent. We say so because his name and his status were clearly mentioned in both broadcasts. The respondent’s witness, Janet was categorical that the use of the appellant’s name was to sensationalize the story and attract a wide audience. Therefore, unlike the learned Judge, we are not persuaded that the appellant’s cause of action was based purely on his relationship to his wife. In our opinion, the appellant was entitled to file suit on his own right because the broadcasts referred to him and more importantly the woman named therein was not his wife”.

51. It is therefore clear that although the Court of Appeal in the Musikari Kombo case (supra), in the end, overturned the final verdict of Odunga J (as he then was) whereof he had dismissed the suit, this, the Court of Appeal only did so because it found that although the impugned broadcast basically related to a person erroneously named as the Plaintiff’s wife, and that although therefore, the Plaintiff’s genuine wife was the primary person who could sue for defamation, the Plaintiff, too, could successfully sue because it was clear that “the broadcasts were also concerning the Plaintiff to a certain extent”, “his name and his status were clearly mentioned in both broadcasts” and owing to his political status, his name was included and used to “sensationalize the story and attract a wide audience”

52. The Court of Appeal did not therefore fault the following general restatements of the law made by Odunga J (as he then was) and which I associate myself:

“64. My understanding of the foregoing is that a relative of a person cannot, as a general rule, successfully sustain a claim in defamation unless the publication of the defamatory material also necessarily imputes that the claimant is in some way connected to the defamatory matter. Therefore, *Gatley on Libel* and



Slander is clear that even where the person defamed is said to keep a brothel, it is only the spouse who lives or resides with him who can sustain an action in defamation. Whereas, it is true that people who are related to a defamed person may have their reputation affected by that fact, it would in my view amount to overstretching the tort of defamation to permit all the people related to the defamed person to successfully maintain an action for defamation. They can only do so where the publication is meant to impute that the claimant is in some way connected to the defamatory matter in question such as by contributing to it and not by the mere fact that he/she is related to the person defamed. Where for example it is published that a person is a brothel keeper, the imputation would be that the spouse living with him is a prostitute and that would reflect directly on the reputation of the claimant/spouse.

65. .... Clearly this was not a case where there was any imputation on the reputation of the plaintiff. Whereas certain people may have arrived at the conclusion that the plaintiff, a crusader against corruption was not after all without blemish based on the alleged conduct of his wife, that alone in my view would not meet the threshold of the defamation in order to attach liability on the Defendant for injury caused to the plaintiff. As stated hereinabove, defamation is not about publication of falsehoods against a person hence it is necessary to show that the published falsehood disparaged the reputation of the plaintiff or tended to lower the person in the estimation of right thinking members of society generally. Therefore, an injurious falsehood, though actionable may not necessarily be an attack on the plaintiff's reputation so as to elevate it to the tort of defamation. To do so would in my view open floodgates for other members of the family and relatives of the defamed person to similarly lodge claims for damages in respect of the same defamation."

53. Generally, therefore, there would be no cause of action available to a Claimant if the words are defamatory of the Claimant's relatives, unless they are proved to also reflect on the Claimant in his own respect. Indeed, the Court has been urged by the Defendant to take judicial notice that there is a separate pending case instituted by the Plaintiff's husband against the Defendant based on the same facts as herein. Applying the guidelines by the Court of Appeal to the facts of this case, and considering that in this case, the words as published referred "to the Plaintiff's husband and not the Plaintiff" and that the "Notice to Appear" was addressed to the Plaintiff's husband, my view is that only the husband can sustain a claim for defamation on the basis of the notice. The Plaintiff, in my assessment, did not demonstrate that the publication was "also concerning" her "to a certain extent" within the meaning contemplated in the Musikari Kombo case (*supra*).
54. Under section 107 of the *Evidence Act*, the burden of proof lies on he who asserts, and in this case, the burden of proving that the published notice was defamatory lay on the Plaintiff. Unfortunately for the Plaintiff, my finding is that she has failed to discharge that burden. I therefore dismiss the suit.

**ii. What reliefs would the Plaintiff have been entitled to had she proved her case?**

55. Notwithstanding that I have dismissed this suit, good practice demands that I nevertheless give a reasoned decision on the reliefs that I would have awarded had the Plaintiff succeeded. On this practice,



I echo the following statement made by Mabeja J in the case of [Lei Masaku v Kalpama Builders Ltd](#) [2014] eKLR:

“There is the issue of failure to assess damages. It has been held time and again by the Court of Appeal that the court of first instance must assess damages even if it finds that liability has not been established. To have casually dismissed the suit and fail to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court needs to know the view taken by the court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behoves this court to assess quantum.”

56. In this case, the Plaintiff has sought general damages, aggravated damages and also exemplary damages. The Court of Appeal, in case of [Johnson Evan Gicheru v Andrew Morton & another](#) [2005] eKLR, in setting out the factors to be taken into account when determining or assessing fair and reasonable damages in cases of defamation, restated the principles listed in the case of [Jones v Pollard](#) [1997] EMLR 233, 243 as follows:

- a. The objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published, and any repetition;
- b. The subjective effect on the plaintiff's image and feelings not only from the prominence itself but from the defendant's conduct thereafter both up to and including the trial itself;
- c. Matters tending to mitigate damages, such as the publication of an apology;
- d. Matters tending to reduce damages; and
- e. Vindication of the plaintiff's reputation past and future.

57. It is therefore said that in assessing the appropriate damages for injury to reputation. the most important factor is the gravity of the libel; that the more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributed of his personality, the more serious it is likely to be. The extent of publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to handful of people. (see [John v MGN Limited](#) [1966] 2 All 35)

58. It was further stated in the House of Lords case of [Broom v Cassel & Co.](#) [1972] A.C. 1027, quoted with approval in the case of Johnson Evan Gicheru case (supra) that

“in actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of restitution in integrum has necessarily an even more highly subjective element, such actions involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, but in case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a by-stander of the baselessness of the charges”.



59. Regarding “aggravated damages”, the Court of Appeal in the case of *Miguna Miguna v The Standard Group Ltd & 4 Others* [2017] eKLR, while quoting the case of *John v GM Limited* [1993] QB 586, restated the following:
- “Aggravated damages will be ordered against a defendant who acts out of improper motive e.g. where it is attracted by malice; insistence on a flurry defence of justification or failure to apologize.”
60. “Exemplary damages” on the other hand, goes beyond compensation. It is generally meant to punish the wrongdoer and act as a deterrent from similar conduct in future (see *Ken Odondi & 2 others* (supra).
61. In considering comparable cases, I have picked, inter alia, the following:
- a. *Ken Odondi & 3 Others v James Okoth Omburah t/a Okoth Ombura & Co. Advocates* [2013] eKLR where an award of Kshs 7,000,000/- made by Musinga J (as he then was) in general damages, was reduced by the Court of Appeal to Kshs 4,000,000/-, but an award of Kshs 500,000/= awarded as aggravated damages upheld.
  - b. *Mwangi Kiunjuri v Wangethi Mwangi & 2 Others* [2016] eKLR , where an award of Kshs 4,000,000/- in general damages and Kshs 1,000,000/- as aggravated damages made by Ojwang J (as he then was) was affirmed by the Court of Appeal.
  - c. *Eric Gor Sungu v George Oraro Odinga* [2014] eKLR, where an award of Kshs 3,000,000/- in general damages made by Rawal J (as she then was), was enhanced to Kshs 5,000,000/- and additionally, the Court of Appeal made a further award of Kshs 4,000,000/-.
  - d. *Miguna Miguna v The Standard Newspapers Ltd & 4 Others*, where the Court of Appeal upheld an award of Kshs 5,000,000/- general damages made by Aburili J, and additionally, made a further award of Kshs 1,000,000/- as aggravated damages.
62. Assuming that the matters complained of were defamatory of the Plaintiff and were published of and concerning her, they would no doubt have lowered her in the eyes of the right thinking members of the society generally. However, the Plaintiffs in the above cases were evidently nationally prominent persons of the society, mostly politicians. In this case, it has not been demonstrated that the Plaintiff was as prominent. I also consider that the Plaintiff would only be the secondary claimant, her husband, to whom the false Notice was addressed and who is the one who was named therein, being the primary claimant.
63. Considering all the above principles and facts, I would, in the circumstances of this case, have awarded the Plaintiff a sum of Kshs 1,500,000/- as general damages for defamation of character to vindicate her to the public and as a consolation.
64. Further, in this case, a demand letter was served requiring the Defendant to apologize, retract the publication and pay damages for defamation. There is no evidence that the letter was responded to. I would therefore have also awarded aggravated damages of Kshs 500,000/-.
65. I would not however award punitive or exemplary damages since in my view, no justification has been given to support such award. It has also not been demonstrated that the Defendant’s conduct was actuated by the desire, or was calculated, to make a profit which may well exceed the compensation payable to the Plaintiff.



66. Regarding the prayers for an order directing the Defendant to publish a public apology to the Plaintiff and a correction or retraction of the notice in equal or more prominent nature, I would not have granted the same not think granting the same would serve any meaningful purpose considering that the publication was made 12 years ago.

**Final Orders**

67. In the premises, I order as follows:

i. This suit is dismissed.

ii. Regarding costs, I do not award any considering that the Defendant did not bother to respond to the demand letter which I believe, was a substantial reason why the Plaintiff, left with no choice, proceeded to file this suit.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 20TH DAY OF SEPTEMBER 2024**

.....

**WANANDA J. R. ANURO**

**JUDGE**

**Delivered in the presence of:**

