



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO 291 OF 2015**

**GLADWELL OTIENO (suing on her  
own behalf and as the Administrator of  
the estate of the Late Wambui Otieno (deceased).....1<sup>ST</sup> PLAINTIFF**

**ROSELYN OTIENO (suing on her  
own behalf and as the Administrator of  
the estate of the Late Wambui Otieno (deceased).....2<sup>ND</sup> PLAINTIFF**

**WAIYAKI KUMALE FRANCESCO OTIENO.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**THE STANDARD GROUP LIMITED.....1<sup>ST</sup> DEFENDANT**

**HUDSON GIMBUHL.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. In their Complaint dated 24<sup>th</sup> August 2015 and filed on 25<sup>th</sup> August 2015, the Plaintiffs sought the following reliefs against the Defendants herein jointly and severally for :-

**a. General damages.**

**b. Exemplary damages.**

**c. A mandatory injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants by themselves, their servants or agents or otherwise howsoever from further publishing or causing to be published defamatory words of the 1<sup>st</sup> and 3<sup>rd</sup> Plaintiffs and the Estate of the Late Wambui Otieno.**

**d. An order for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to print and publish an apology in the Nairobi newspaper and on its website.**

**e. An order for the 1<sup>st</sup> Defendant to permanently remove all the electronic links to the false and malicious words from its website.**

**f. An order for the 1<sup>st</sup> Defendant to permanently remove all the electronic links to the false and malicious words from the World Wide Web.**

**g. Costs of the suit.**

**h. Interest on (a), (b) and (d) above at court rates from the date of judgment until payment in full.**

**i. Any other or such further relief as may to this Honourable Court appear fit and just to grant in the circumstances.**

2. They had filed a List and Bundle of Documents and List of Witnesses and the 1<sup>st</sup> Plaintiff's Witness Statement together with their Pleat. Their Supplementary Bundle of Documents was dated and filed 6<sup>th</sup> December 2015. On 2<sup>nd</sup> October 2015, they filed their Amended Pleat of even date.

3. On their part, the Defendants entered appearance on 21<sup>st</sup> September 2015. Their Defence dated 16<sup>th</sup> October 2015 was filed on 28<sup>th</sup> October 2015. Their List of Witnesses and Witness Statements were filed on 16<sup>th</sup> August 2016. They did not file any documents in support of their case.

4. The Plaintiffs' Written Submissions and List of Bundle of Authorities were both dated and filed on 8<sup>th</sup> July 2019 while the Defendant's Written Submissions and List and Bundle of Documents dated 19<sup>th</sup> July 2019 were filed on 22<sup>nd</sup> July 2019.

### **THE PLAINTIFFS' CASE**

5. The 1<sup>st</sup> Plaintiff adopted her Witness Statement dated 24<sup>th</sup> August 2015 and filed on 25<sup>th</sup> August 2015 as her evidence-in-chief. She testified on her own behalf and on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs.

6. Her evidence was that the 2<sup>nd</sup> Defendant wrote and the 1<sup>st</sup> Defendant caused to be published malicious and defamatory words of and of concerning them in the front page of Nairobi Star, a weekly newspaper owned by the 1<sup>st</sup> Defendant, which story continued on page 7 therein. The title of the Article was **"Wambui Otieno grandson charged with rape."** Underneath the headline was a picture of the Wambui Otieno (hereinafter referred to as "the deceased").

7. It was the Plaintiffs' contention that the words contained in the Article therein were malicious and false and were published in a sensational manner to increase the sales of the said weekly publication. They averred that the natural and ordinary meaning, imputation and innuendo meant that the 1<sup>st</sup> and 3<sup>rd</sup> Plaintiffs were sexual deviants, paedophiles, criminals, immoral and of ill-repute. In addition, they averred that the words meant that the 3<sup>rd</sup> Plaintiff was a regular consumer of child and other pornography and that the 1<sup>st</sup> Plaintiff and the deceased had poor parental skills by exposing him to pornography.

8. The 1<sup>st</sup> Plaintiff was emphatic that on the day of the alleged incident which was on 29<sup>th</sup> August 2014, she and 3<sup>rd</sup> Plaintiff were in the United States of America and that he left for Germany on 28<sup>th</sup> August 2019.

9. It was her further averment that on 2<sup>nd</sup> September 2014, she wrote to the OCS Hardy Police Station, Inspector General and the Director Criminal Investigations and that she subsequently visited the Hardy Police Station where she inspected the records which revealed that the young man who had been suspected of defiling the minor was not the 3<sup>rd</sup> Plaintiff herein. It was her assertion that she only had one child, a son and hence, the Article could only have meant that the suspect was the 3<sup>rd</sup> Plaintiff herein.

10. The Plaintiffs therefore denied that the 3<sup>rd</sup> Plaintiff had committed the alleged offence and that even as at the date of filing their Written Submissions herein, he had not been summoned by the police or arrested or requested to record a statement with the police or charged with the offence of defilement. It was their contention that the 2<sup>nd</sup> Defendant wrote and the 1<sup>st</sup> Defendant published an article they both knew was libellous.

11. They thus urged this court to order that the Defendants permanently remove all electronic links to the false and malicious words from its website and the World Wide Web and publish an equally conspicuous apology on its website.

### **THE DEFENDANTS' CASE**

12. The 2<sup>nd</sup> Defendant also adopted his Witness Statement dated 11<sup>th</sup> August 2016 and filed on 16<sup>th</sup> August 2016 as his evidence-in-chief. He testified on his own behalf and on behalf of the 1<sup>st</sup> Defendant herein.

13. He stated that the 1<sup>st</sup> Defendant's editor informed him that the 3<sup>rd</sup> Plaintiff had defiled a four (4) year old minor at Hay Barrack for horses at Mukinduri Road. He visited Hardy Police Station and verified from the Officer in Charge of Station (OCS) Victor Kemboi that indeed such an incident occurred. The following day, he went back to interview the said OCS with the 1<sup>st</sup> Defendant's photographer, Collins Kweyu and he read out to them, the 3<sup>rd</sup> Plaintiff's name and informed them that he had been arrested overnight but that the 1<sup>st</sup> Plaintiff had camped at the police station demanding for his release.

14. He added that he called the Lang'ata OCPD Elijah Mwangi who gave him the telephone contact of the mother of the child who had been said to have been defiled and on being interviewed, she confirmed the incident. He stated that he tried to get the 1<sup>st</sup> Plaintiff's comments before he published the Article but she declined to respond.

15. The Defendants therefore denied that the Article was defamatory to the Plaintiffs or that it was accentuated by malice or ill will or that it was calculated to ridicule, injure or bring them to disrepute but averred that the same was a fair and accurate report which was made from investigations by the 2<sup>nd</sup> Defendant. Consequently, they urged this court to dismiss the Plaintiffs case for being unmeritorious and lacking factual and legal basis with costs to them.

### **LEGAL ANALYSIS**

16. It was not in dispute that the 2<sup>nd</sup> Defendant wrote and the 1<sup>st</sup> Defendant published, in its weekly newspaper, an Article alleging that the 3<sup>rd</sup> Plaintiff who was a minor at the time aged fifteen (15) years had raped a four (4) year child. The Plaintiffs were categorical that the report that had been made regarding that incident did not involve the 3<sup>rd</sup> Plaintiff because he was out of the country at the material time of the incident. On the other hand, the Defendants were emphatic that the publication was factual as the facts of the case had been sourced from Hardy Police Station.

17. Before the court could delve into the merits or otherwise of the Plaintiff's case, it noted that the Defendants had submitted that the suit as filed was incompetent for several reasons. The first reason they gave for incompetency was that the 1<sup>st</sup> Plaintiff had proceeded to represent the 3<sup>rd</sup> Plaintiff without having obtained and filed his authority to enable her act for him in the matter herein.

18. On the other hand, the Plaintiffs averred that Order 1 Rule 13 of the Civil Procedure Rules, 2010 provides that where there is more than one plaintiff, any of them may authorise any of them to plead and to act for the others in such proceedings. They added that Order 3 Rule 5(1) of the Civil Procedure Rules provides that where plaintiffs had the same cause of action, they could institute the one suit and that Order 4 Rule 3 of the Civil Procedure Rules further stipulates that where there are many plaintiffs, one of them may swear the verifying affidavit on his own behalf and on behalf of the other plaintiffs.

19. On 2<sup>nd</sup> November 2018, the 1<sup>st</sup> Plaintiff filed an Authority to file suit on behalf the 3<sup>rd</sup> Plaintiff herein. The said Authority was duly executed by the 3<sup>rd</sup> Plaintiff herein. The same had authorised the 1<sup>st</sup> Plaintiff to swear any affidavits, depositions and/or giving evidence on his behalf. To avoid the matter being adjourned on 21<sup>st</sup> May 2019, the Plaintiffs withdrew the said Authority after the Defendants objected to the same on the ground that the same had been filed after the close of their case and in response to their line of cross-examination. The matter the proceeded for the defence hearing.

20. Notably, Order 1 Rule 13 of the Civil Procedure Rules provides that:-

**1. Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.**

**2. The authority shall be in writing signed by the party giving it and shall be filed in the case.**

21. It is evident from Order 1 Rule 13(2) of the Civil Procedure Rules that there is no time limit given within which the authority should be filed. However, it is reasonable to infer that such authority ought to be filed at the time of filing suit for the reason that the plaintiff who has been authorised so to act must have the authority of the other plaintiffs to file a verifying affidavit which is the first affidavit attached to a plaint.

22. The courts position that this authority ought to be filed together with the pliant is fortified by the provisions of Order 4 Rule 1 of the Civil Procedure Rules that provides that:-

**1. The plaint shall contain the following particulars—**

**a. the name of the court in which the suit is brought;**

**b. the name, description and place of residence of the plaintiff, and an address for service;**

**c. the name, description and place of residence of the defendant, so far as they can be ascertained;**

**d. the place where the cause of action arose;**

**e. where the plaintiff or defendant is a minor or person of unsound mind, a statement to that effect; and**

**f. an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaint.**

**2. The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1)(f) above.**

**3. Where there are several plaintiffs, one of them, with written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of the others (emphasis court).**

**4. Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.**

**5. The provisions of sub-rule (3) and (4) shall apply *mutatis mutandis* to counterclaims.**

**6. The court may of its own motion or on the application by the plaintiff or the defendant order to be struck out any plaint or counterclaim which does not comply with sub-rule (2) (3), (4) and (5) of this rule.**

23. Order 4 Rule 4(2) of the Civil Procedure Rules is very explicit that the authority must be filed at the time of filing the plaint. The key word is “**shall.**” The same means mandatory. In fact, the seriousness with which the said authority is taken can be discerned by the fact that the court has power to strike out a plaint which does not comply with Order 4 Rule 1 (2), (3), (4) and (5) of the Civil Procedure Rules either on its own motion or on the application of a defendant.

24. Notably, the Defendants herein did not apply to have the suit struck out. Courts that previously handled this matter did not also strike the 3rd Plaintiff’s case against the Defendants herein on their own motion and the suit proceeded to trial.

25. Bearing in mind that the said authority to act was mandatory, this court determined that the 3<sup>rd</sup> Plaintiff’s case against the Defendants herein was fatally defective and incompetent as had been submitted by the Defendants herein.

26. This court further determined that the 3<sup>rd</sup> Plaintiff’s cause of action was also rendered incompetent by virtue of the fact that the suit was not instituted in accordance with Order 32 Rule 1 of the Civil Procedure Rules. There was no authority by a person who would have instituted the suit in his name as he was a minor at the time the suit herein was filed.

27. Indeed, Order 32 Rule 1 of the Civil Procedure Rules stipulates that:-

**1. Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor.**

**2. Before the name of any person shall be used in any action as next friend of any infant where the suit is instituted by an advocate, such person shall sign a written authority to the advocate for that purpose, and the authority shall be filed.**

28. Order 31 Rule 2 of the Civil Procedure Rules further states that:-

**1. Where a suit is instituted by or on behalf of a minor without a next friend the defendant may apply to have the suit dismissed with costs to be paid by the advocate or other person by whom it was presented.**

**2. Notice of such application shall be given to such person, and the court, after hearing his objections (if any), may make such order in the matter as it thinks fit.**

29. Again, although the Defendants herein did not also seek to have the 3<sup>rd</sup> Plaintiff’s suit against them be struck out, in the absence of the authority of the person who was to institute the suit in his name, this court found itself in difficulty as far as his case was concerned. A perusal of the Article that was complained of showed that he was a minor aged fifteen (15) years. He could not therefore have instituted the suit in his name as a 3<sup>rd</sup> Plaintiff. The pleadings ought to have appeared as “xxx suing as the next friend of Waiyaki Kumale Francesco Otieno” as the third Plaintiff and not “Waiyaki Kumale Francesco Otieno” as the third Plaintiff herein.

30. This was not a procedural technicality that could be excused and/or cured by Article 159 (2)(d) of the Constitution of Kenya, 2010. It was a substantive flaw that could not save his suit herein against the Defendants herein. The 1<sup>st</sup> Plaintiff hence had no *locus standi* to represent him. The absence of the legal capacity of the 1<sup>st</sup> Plaintiff to represent him meant that although he may have had a valid cause of action for determination by the court, that cause of action could not be sustained and had to fail.

31. Turning to the second reason the Defendants had advanced rendered the suit herein incompetent, the Plaintiffs had submitted that under Section 80 of the Law of Succession, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs obtained the legal right to administer the deceased’s estate once they obtained a grant to administer her estate and they could therefore sue for defamation against her estate.

32. This court found this not to have been the correct position of the law and instead wholly concurred with the Defendants that no suit for defamation could be brought in the case of a deceased person for the reason that such cause of action did not survive a deceased person.

33. It is trite law that the dead cannot be defamed and defamation being a personal action cannot be assigned to another. In the case of **Kiagi Peter Mochama & Another vs The Standard Chartered Bank of Kenya Limited [2016] eKLR**, it was held that:-

**“...A reputation is as perishable as the person who earned it. The dead have no rights of reputation and can suffer no wrong...”**

34. Evidently, Section 2 of the Law Reform Act Cap 26 (Laws of Kenya) stipulates that:-

**1. Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate:**

**Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery.”**

35. As the suit herein had been filed on behalf of the deceased’s estate who died on 30<sup>th</sup> August 2011 and the alleged defamation was said to have been published on 29<sup>th</sup> August 2014, the deceased could not have been defamed. In any event, even if the defamatory proceedings had commenced before she died, her rights could not have been assigned to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein. In the circumstances foregoing, the

1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs' suit on behalf of her estate was defective *ab initio* and could not be sustained against the Defendants herein.

36. Turning to the 1<sup>st</sup> Plaintiff's cause of action against the Defendants herein, this court noted that the Article was about her son and the grandson to the deceased. Indeed, the title of the Article was "Wambui Otieno grandson defiled child in horse store." She did not tell the court what was defamatory about her being described as an activist and former director of Transparency International, Kenya Chapter and Director of the African Centre for Open Governance (Africog). The son was the one whom the Article was about and he could not assign his rights merely because his mother and grandmother had been mentioned in the Article.

37. The fact that the 1<sup>st</sup> Plaintiff was described leaving no doubt that she was the mother to the teenage boy referred to in the Article did not make the Article defamatory against her. As she had stated in her evidence, the reference to her and the deceased was to make the Article salacious and invite wide readership to the Article as they were public persons.

38. In the Halsbury's Laws of England 4<sup>th</sup> Edition Volume 28, a defamatory statement is defined as:-

**"...a statement which tends to lower a person in the estimation of the right thinking members of the society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt ridicule to convey any imputation on him disparaging or injuries to him in office, profession, calling, trade or business."**

39. Having considered the evidence that was adduced in court and bearing in mind that the Defendants did not call the police officers from Hardy Police Station and the mother of the girl who was alleged to have been defiled, this court found and held that the Article had been recklessly made, negligent and in their ordinary and natural meaning, the words complained of were understood to mean as the Plaintiffs had complained about in their Pleint.

40. There was no doubt that their image was lowered in the estimation of people who knew them and others who read the Article. This court came to the conclusion that the defamatory statement was published maliciously as no witnesses were called to corroborate the 2<sup>nd</sup> Defendant's evidence, the Plaintiffs having denied that an incident involving the 3<sup>rd</sup> Defendant was

41. In view of the aforesaid, this court was not persuaded that the Defendants were entitled to the defence of justification or to the defence of qualified privilege on a matter of general interest for the reason that they had not adduced evidence to demonstrate that it was indeed true that the 3<sup>rd</sup> Plaintiff had been arrested for defiling a four (4) years old child in a horse barn as had been reported in the Article.

42. Be that as it may, this court had found that the Plaintiffs' suit could not succeed against the Defendants for lack of requisite authorities in respect of the 3<sup>rd</sup> Plaintiff's case and lack of legal basis to institute a defamatory suit for Wambui Otieno (deceased) as aforesaid.

43. The court found it necessary to address the merits or otherwise of the case to a small extent as the Defendants had submitted in great detail on the issue of costs. Indeed, it is trite law that costs follow the event and in this case where the Plaintiffs had failed to prove their case against them, costs ought to have been awarded to them.

44. However, there are exceptional circumstances where the court can depart from that rule. One such instance is when a plaintiff's suit fails on technicalities but the court can see that he had an arguable case like in the instant case. It is unfortunate that the court could not find in favour of the 3<sup>rd</sup> Plaintiff who had been defamed due to the reasons aforementioned.

#### **DISPOSITION**

45. Accordingly, this court came to the firm conclusion that the Plaintiffs' case was not merited and in the circumstances herein, the same is hereby dismissed. In view of the fact that this court was satisfied that there was indeed defamation of the 3<sup>rd</sup> Plaintiff but that the same could not be sustained on account of lack of requisite authorities, each party will bear its own costs of this case.

46. It is so ordered.

**DATED and DELIVERED at NAIROBI this 7<sup>th</sup> day of May 2020**

**J. KAMAU**

**JUDGE**