



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**HIGH COURT CIVIL CASE NO. 87 OF 2016**

**NELSON HAVI.....PLAINTIFF**

**VERSUS**

**HEADLINK PUBLISHERS LIMITED.....DEFENDANT**

**JUDGMENT**

1. Vide a plaint dated 23<sup>rd</sup> March, 2016, the Plaintiff sued the Defendant, a Limited liability company carrying out the business of newspaper publishing in Kenya and East Africa in the name and style of **Weekly Citizen**.

2. The Plaintiff, an Advocate of the High Court of Kenya practicing in the name and style of Havi & Co. Advocates claims that the Defendant published a libelous article concerning him. The Plaintiff prays for judgment against the Defendant as follows:

a) **General damages for libel.**

b) **Damages on the footing of aggravated or exemplary damages.**

c) **A permanent injunction restraining the Defendants whether by themselves, agents, servants or otherwise howsoever from further publishing or causing to be published in any way whatsoever, any news items, statements, articles, words, images, pictures, cartoons and caricatures on Internet, Newspapers, Facebook, Twitter, YouTube and Whatsapp or any medium whatsoever, linking or associating the Plaintiff with and/or imputing impropriety, corruption, bribery and gross misconduct in his personal, social life and/or his professional career, or any similar or related words defamatory of the Plaintiff.**

d) **A permanent injunction restraining the Defendants whether by themselves, agents, servants or otherwise howsoever from further publishing or causing to be published in any way whatsoever, any news items, statements, articles, words, images, pictures, cartoons and caricatures on Internet, Newspapers, Facebook, Twitter, YouTube and Whatsapp or any medium whatsoever, suggesting that the Plaintiff has applied and lobbied for appointment as a High Court Judge, linking or associating the Plaintiff with and/or imputing impropriety, corruption, bribery and gross misconduct in the judiciary.**

e) **A permanent mandatory injunction directing the Defendants whether by themselves, agents, servants to remove from the 1<sup>st</sup> Defendant's website [www.theweeklycitizen.co.ke](http://www.theweeklycitizen.co.ke), the internet, Facebook, Twitter, YouTube and Whatsapp any publications of any defamatory information concerning the Plaintiff.**

f) **The Defendants be ordered to pay the Plaintiff costs of this suit together with interest thereon at Court rates from the date of filing of suit until payment in full.**

g) **Interest on a., b., c., and e., above.**

h) **Any such other or further relief as this Honourable Court may deem appropriate.**

3. It is averred that on 21<sup>st</sup> March, 2016 the Defendant published an article on page 1 and 2 of vol. 19 No. 2 of March 21<sup>st</sup>-27, 2016 of the **Weekly Citizen** titled "**Lobbying for High Court Judges intensifies – an injured Judiciary now attracts faces for new judges**" which contained defamatory words and statements concerning the Plaintiff as follows:

**"When you think of the Judiciary anywhere in the world, you naturally conjure the image of a hallowed place draped in solemn distinction and thoughtfulness; a station where integrity and the highest regard for probity are second to nature.**

It would be pretentious to claim that Kenya's Judiciary has been the embodiment of these virtues lately. Even worse, if the tales of woes and stench of decay wafting from the Judiciary are anything to go by, then Kenya is headed in the wrong direction in matters that concern the conduct of the rule of law and legal redress thereof.

But if you thought that is where the story ends, then you are totally mistaken. Accounts and accusations of rot in the corridors of justice now seem to have emboldened a breed of lawyers of questionable conduct, dirty past and content of character to lobby to become High Court judges. In attempts to woo those who hold sway for such appointments, some lawyers are committing tonnes of nocturnal time to serious lobbying. Some of these busybodies, if admitted as judges, would most certainly drive the Judiciary to the extreme end of degradation and despair.

Take for instance, the Eldoret-based advocate Godfrey Kitiwa, a suave *Don Juan*, to whom, it is alleged every ransom skirt-wearer is instant bedroom prey, anytime, anywhere. Though the LSK upcountry representative for the Rift Valley, the man is allegedly dogged by a litany of sex-for –marks cases at Moi University where he lectures. Yet, the fellow is brazen enough to as much as imagine he would qualify to become a High Court judge!

On the list of those who wish to become High Court judges is also lawyer Nelson Havi who has allegedly spent a fortune to land a judge's position.

Known to his peers as an exceptionally sharp mind, Havi is also acknowledged as an effective litigator who has managed to elbow his way to Kenya's elite legal circles where he hobnobs with who-is-who. Havi's associations and social networks have paid-off handsomely over time. He owes several high end properties in Nairobi and elsewhere.

At some point or other in the course of his practice, Havi has found the going not easy. For instance, in a 2007 case (Misc. Case 1561) involving downstream oil marketing firms, Havi was accused of a conflict of interest and asked to withdraw from the proceedings. This happened because he had previously been involved in an arbitration matter with the same clients at Muriu Mungai and Co. In a related matter, Havi was accused of failing to disclose that he had received money in a property dispute in which he became the subject of litigation.

In Civil suit 602 of 2008, Havi was a defendant in a matter where White Horse Investments was the plaintiff. In this matter Havi was accused of holding onto sh.25 million that had been transferred in two tranches from White Horse Investments to Coroget Investments Ltd in a property purchase transaction. Havi tried to pass the blame to a third party but on July, 3 2009, Justice Lesiit rejected his plea and ruled that he had a case to answer.

In another matter (Case 1561 of 2007) involving Century Oil trading as an applicant and Kenya Shell Co. Ltd as the respondent, the former contended that there was a conflict of interest regarding Havi's appearance on behalf of Kenya Shell Co. Ltd alongside Philip Nyachoti of Philip Nyachoti and Advocates. As an associate of Muriu Mungai and Co. Advocates, Havi had previously appeared twice for Century Oil in the same dispute. Naturally Century Oil, at this point, a sheep could not have expected justice from a wolf. On this account, Justice M A Warsame upheld the conflict of interest allegation and barred Havi from any future involvement in that case.

Perhaps, in is the acrimonious and much-publicized case involving Esther Muthoni Passaris (applicant) and Magnate Ventures and Nairobi City Council where Havi's character were best exemplified. The Nairobi City lighting project that won Passaris both acclaim and notoriety in equal measure had Havi as the attorney for Magnate Ventures. Passaris who lost the case described Havi acerbically as 'that lawyer who always wins cases' - lost. The manner in which Magnate Ventures won the matter was of hitherto unknown in Kenya's corridors of justice.

With a Judiciary discharging unparalleled absurdities and outright grime from every pore, we are likely to see more and more unacceptable characters bidding to superintend over our Justice system – sigh!"

4. The Defendant did not enter appearance or file a defence. The case proceeded *ex parte*.
5. The Plaintiff testified (PW1) and adopted his witness statement as his evidence. He described himself as an advocate of good standing and reputation and a member of the Law Society of Kenya with no disciplinary or criminal record. That he has had an illustrious and successful career spanning over 13 years with a good clientele acquired through years of hard work and rendering good services.
6. The Plaintiff further stated that the impugned article claimed that his attendance in Misc Case No. 1561 of 2007 with Mr. Philip Nyachoti Advocate was intended to prejudice Century Oil Trading Company Limited, when in actual fact, his attendance was on the instructions of the said Century Oil Trading Company Limited who could not possibly be described as **“Naturally Century Oil could not have expected justice from a wolf.”**
7. The article further claimed that in HCCC No. 602 of 2008, the Plaintiff received Ksh.25,000,000/= and tried to pass on the blame to a third party, when in actual fact, he had only received ksh.10,000,000/= on behalf of a client and remitted the entire sum to the client or dealt with the said money as instructed by the client against whom a decree was made thereby absolving him from any liability in the matter.
8. In regard to the matters concerning Adopt-A-Light Limited, the Plaintiff's evidence is that the case was won on the merits and there was no impropriety, corruption, bribery or misconduct on my part on the decisions made therein.”
9. The Plaintiff's contention is that the impugned article in it's ordinary meaning reflected him as an advocate of questionable character who was lobbying for appointment as a judge; is corrupt; has attained high status in the legal profession and amassed wealth through dubious means; is unethical; a common criminal, has grossly misconducted himself as an advocate and is not fit to be an advocate or a judge of the

High Court.

10. The Plaintiff stated that he did not apply for appointment as a judge of the High Court nor lobbied to secure such an appointment, is not corrupt, unscrupulous nor amassed wealth through dubious means. The Plaintiff further stated that he has no civil, criminal or disciplinary complaint. The article in question was described by the Plaintiff as false and defamatory aimed at causing injury to his reputation and business while increasing profits for the Defendant.

11. The Plaintiff further testified that the article was published maliciously and in bad faith at the instigation of advocates with whom they were dueling over the litigation relating to Tatu City Ltd, Kofinaf & Co Ltd and Purple Saturn Properties Ltd.

12. It is the Plaintiff's evidence that following the publication of the article, he received numerous calls from concerned family, friends, colleagues and clients. That he suffered emotional distress which interfered with his performance at work and social life.

13. The Plaintiff pointed out in his evidence that the article has been published on the Defendant's website with the intention of attracting discussions and debate by the public in the internet, other newspapers, Facebook, Twitter, YouTube and WhatsApp. The Plaintiff expressed his apprehension that the Defendant if not restrained is likely to repeat and continue publishing defamatory statements against him.

14. The Plaintiff called one witness, PW2 Damarus Wanjiku Manjari, a Senior Executive Secretary at the Court of Appeal. Her evidence is that she knew the Plaintiff as an advocate and family friend, a person of high integrity and as a morally upright person. PW1 described the Plaintiff an advocate who also handles high profile cases which are in the public domain. She expressed her shock at the impugned article and was taken aback at what kind of friends she was keeping and therefore asked the plaintiff about the publication. That the Plaintiff explained the article was not a reflection of the truth. Her further evidence is that she believed that the article injured the Plaintiff's reputation. She also stated that she did not believe the article.

15. Defamation is defined in Winfield in J.A. Jolowicz and T. Ellis Lewis – Winfield on Tort 8<sup>th</sup> Edition, thus:

**“Defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of the society generally, or which tends to make them shun or avoid that person.”**

**A defamatory statement, according to Gately on Libel and Slander 8<sup>th</sup> Edition by Phillips Lewis paragraph 4 page 5 discredits a man or tends to lower him in the estimation of others or to expose him to hatred, contempt or ridicule or to injure his reputation in his office, trade or profession or to injure his financial credit.”**

16. The elements of defamation were outlined by the Court of Appeal in case of **Wycliffe A Swanya v Toyota East Africa Limited & another Nbi CA No. 70 of 2008** as follows:

**“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 the 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.**

**(iv) In slander subject to certain exceptions that the plaintiff has suffered special damages.”**

17. The Plaintiff's evidence and that of his witness is uncontroverted by any other evidence. The evidence establishes that the contents of the article in question concern him and were untrue. The Plaintiff's further evidence is that no clarification was sought from him and that there was no evidence of verification before the publication. There was therefore malice on the Defendants side (See for example **Hon. Uhuru Muigai Kenyatta v Baraza Limited [2011] eKLR; Phineas Nyagah v Gitobu Imanyara 2013 eKLR**).

18. The Plaintiff submitted for an award of Ksh.15,000,000/= general damages, Ksh.3,500,000/= aggravated damages and Ksh.1,500,000 in lieu of an apology. The Plaintiff relied on the following authorities:

· **Alnashir Visram v Standard Ltd 2016 eKLR** where an award of Ksh.18,000,000/= was made to a judge as general damages for defamation and Ksh.8,000,000/= as aggravated damages.

· **Samuel Ndung'u Mukunya v Nation Media group Ltd & another [2015] eKLR** where an award of Ksh.15,000,000/= was made as general damages and Ksh3,500,000/= as aggravated damages to an advocate.

· **Kipyator Nicholas Kiprono Biwott v Clays Ltd & 5 others [2000] eKLR** where an award of Ksh.15,000,000/= general damages and 15,000,000/= exemplary damages was awarded.

19. The cases relied on by the Plaintiff are persuasive decisions of the High Court. I have looked further afield on the decisions from the Court of Appeal in the following authorities:

- **Miguna Miguna v Standard Group Ltd & 4 others [2017] eKLR** where an award of ksh.5,000,000/= was made as general damages and Ksh.1,000,000/= aggravated damages.
- **Kenya Tea Development Agency Ltd v Benson Ondimu Masese [2008] eKLR** where an award of Ksh.7,000,000/= general damages and ksh.3,000,000/= exemplary damages were reduced by the court of Appeal to a composite figure of Ksh.1.500,000/=.
- **Johnson Evans Gicheru v Andrew Morton & another Civil Appeal No. 314 of 2000** where a sum of Ksh.6,000,000/= was made to the then Chief Justice.

20. In the case at hand, the view of this court is that an award of Ksh.5,000,000/= as general damages is reasonable.

21. As stated by the Court of Appeal in the **Miguna Miguna (Supra)** case while referring to the case of **John v MG Limited [1997] QB 586**

**“The 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.”**

22. Exemplary damages go beyond compensation. They are meant to punish the wrongdoer and act as a deterrent from similar conduct in future (See for example **Ken Odondi & 2 others v James Okoth Omburah T/a Omburah & Co. advocates [2013] eKLR** and **Standard Ltd v G. N. Kagia T/a Kagia & Co. Advocates [2010] eKLR**).

23. As observed above, there was recklessness and malice on the Defendant’s side. The article was calculated to increase profits. I award the sum of Ksh.1,000,000/= as aggravated/exemplary damages.

24. In the upshot, judgment is hereby entered for the Plaintiff against the Defendant for the sum of Ksh.6,000,000/=; injunctive orders as prayed in prayer (c)(d) &(e) of the plaint, costs and interest.

**Date, signed and delivered at Nairobi this 18<sup>th</sup> day of July, 2018**

**B. THURANIRA JADEN**

**JUDGE**