



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

**CIVIL SUIT NO. 234 OF 2010**

**M M.....PLAINTIFF**

**VERSUS**

**THE NAIROBI STAR PUBLICATIONS LTD.....DEFENDANT**

**J U D G M E N T**

1. This is a suit for defamation. The Plaintiff's claim against the Defendant is that on 15<sup>th</sup> January, 2010, the Defendant falsely and maliciously wrote, printed and published or caused to be written, printed and published on page 4 of the issue of the Star edition of the day and posted on the websites [www.thenairobian.com](http://www.thenairobian.com) and [www.marsgroupkenya.com](http://www.marsgroupkenya.com) concerning the Plaintiff in an article titled 'LAWYER M DENIES THREAT TO KILL EX WIFE'. It was claimed that his photo appeared next to the article. The article read as follows:

*“A lawyer yesterday denied threatening to kill his former wife J A’ on December 13 2009. But M had to stay in court basement cells before pleading to the charges in the afternoon because an arrest warrant had been issued against him in the morning. When he turned up in court at noon, Chief Magistrate Gilbert Mutembei had already issued a warrant of arrest. So Muriuki had to be remanded until 3 p.m. when his defence lawyer pleaded with court to lift warrant. The magistrate lifted the warrant. M denied the charge and was released on a cash bail of Sh. 30,000. The prosecutor applied to have his pistol confiscated and kept in court custody. The court will on January 19 rule whether to allow the application by the prosecution. M had on Tuesday been ordered to appear before Mutembei yesterday and answer the charges of threatening to kill his former wife. He failed to show up and the prosecution successfully sought an arrest warrant. The court ordered that he forfeits the cash bail of Sh. 30,000 which he had been released on by the police. His case was deferred for a further mention on February 11. But the suspect turned up in court later and the magistrate refused to handle his case file for the second time. He was taken to the basement cells. The magistrate had on Tuesday been informed that M was unwell and was under observation by a doctor. M is further accused of sending text messages using threatening and abusive language to Achieng’. The duo also have a legal dispute of child maintenance pending in the High Court. M runs a law firm M M & Company Advocates in Nairobi. The lawyer could be imprisoned for 10 years with no option of a fine if convicted. The case will be heard on February 8.”*

2. The Plaintiff claimed that the said words in their natural and ordinary meaning meant and were understood to mean that he has a former wife called J A’; that he was ever married to her; that he is capable of threatening his wife; that he made threats to his ex wife; that he refuses to maintain his child; that there is a maintenance suit/dispute pending in the High Court; that he is immoral; that he is of dishonorable conduct; that he is not law abiding; that he is a criminal; that he is not a respecter of person's and in particular women and children; that he is a murderer; that he is unsafe and dangerous person; that he is unfit and improper person to hold a firearm. He claimed that the words were false and malicious since his wife is not J A’ and has never been; he has ever threatened his former wife as he does

not have one; he is not a criminal; he was not charged with threat to kill his ex-wife; there is no child maintenance suit/dispute or pending in the High Court involving him. He claimed that he has as a result of the said article been injured in his credit and reputation and has been brought to public scandal, odium and contempt. He further claimed that the Defendant intends to continue the publication because despite demanding an apology from the Defendant vide a letter dated 25<sup>th</sup> January, 2010, the Defendant wrote back on the same date and asserted that the article was published on a privileged account of court proceedings. The Plaintiff prayed for exemplary and/or aggravated damages, an injunction to restrain the Defendant from publishing the said words or any of them or any similar words concerning the Plaintiff, an injunction to restrain the Defendant from printing and publishing or posting on websites the said words or any of them or any similar words concerning the Plaintiff, an apology published in an article of the same size under the same prominent title and picture and on a Friday in the star newspaper and an order that the Defendant do delete from the websites [www.thenairobian.com](http://www.thenairobian.com) and [www.marsgroupkenya.com](http://www.marsgroupkenya.com) and any other website the article and the Plaintiff's photo forthwith.

3. The Defendant filed a statement of defence in which it admitted to publishing the said article but denied that the same was actuated by malice. It denied the meaning of the words as construed by the Plaintiff and stated that the same was an accurate report of court proceedings and consisted of fair comment on a matter of public interest. It was particularly alleged that the Plaintiff had been charged with a first count of uttering a threat to kill J A' in Nairobi Chief Magistrate's court Criminal Case No. 42 of 2010. That he was charged with a second count of improper use of licensed telecommunication system contrary to Section 29 (A) of the Kenya Communications Act, that it is a fact that the penalty on conviction for the aforesaid offences according to section 223 (1) of the Penal Code is imprisonment for up to 10 years with no option of a fine if he is convicted, that it is a fact that the Plaintiff failed to turn up in court as scheduled and an arrest warrant was issued against him and the warrants were later lifted and that it is a fact that the Plaintiff was released on a cash bail of KShs. 30,000/=. The Defendant further pleaded privilege as per section 6 of the Defamation Act. The Defendant also admitted to receiving a letter from the Plaintiff and responding to the said letter. The Defendant denied posting the article complained of in the websites as mentioned in paragraph 8 (b) of the plaint.

4. In his testimony the Plaintiff reiterated his claim and produced an extract of the article as P. Exhibit 1. He contended that the person named in the article, J A' has never been his wife. He stated that he did a demand letter to the Defendant before filing this suit and that the Defendant replied to the letter stating that proceedings were correct. That the Defendant was informed that it contained falsehood. He produced letters dated 29<sup>th</sup> January, 2010 and 9<sup>th</sup> February, 2010 as P. Exhibits 2 and 3 respectively. He stated that he had a child with the said J A' but that they were not married. That he was charged with uttering a threat to kill and improper use of telecommunication. He produced a copy of the charge sheet to that effect as P. Exhibit 4. He stated that there is no reference to former wife in the charge sheet and that there is no charge to kill former wife. He contended that though the Defendant pleaded the defence of fair comment and privilege, it is not true. He stated that the article was in reference to the criminal case. He stated that there was a children's case with J but he has never admitted that she was his former wife. He lamented that the article was damaging to his reputation because people would have thought that he was married to her and that he had threatened to kill her. He stated that his wife took it very seriously because somebody would have thought that he was threatening to murder. On cross examination, he stated that the Defendant did not call him to seek clarification. He conceded that there was a custody case between him and Jacqueline and the article was published after those proceedings. He confirmed that he was charged with the offence of threatening to kill but stated that he takes issue with the reference of J A as his ex-wife. Referred to his letter dated 9<sup>th</sup> February, 2010 he confirmed that it did not say that Jacqueline was not his ex-wife and did not particularize what he termed to be falsehood. In re-examination, the Plaintiff stated that there is nowhere in the pleadings in Children's case No. 181 of 2006 where J was referred to as his wife and that she stated that they had a relationship and cohabited. The Defendant's case was closed without calling any witness.

5. In his submissions, the Plaintiff stated that the Defendant has given no evidence to prove that J A was his ex-wife as alleged in the article. That as a result therefore, the article was false and was out to defame him. That the matter was not one of public interest. He cited **C.A. No. 84 of 2009 Kisumu, Ken Odondi and 2 others v. James Okoth Omburah, HCCC No. 420 of 2011, Samuel Ndungu Mukunya v.**

**Nation Media Group Ltd & Another** and HCCC No. 102 of 2000, **Musinga & Co. advocates v. Nation Newspapers Ltd** in reliance with regard to damages.

6. In its submissions the Defendant relied on Section 6 of the Defamation Act and argued that this case does not fall under the purview of the exceptions provided for under the said Section. On malice, the Defendant argued that from the contents of their letter asking the Plaintiff's advocates to clarify which bit of the article was not correct so that they could consider correcting the article was an indication that there was no malice. It was further argued that the Plaintiff had failed to establish the essence of a suit for defamation being damage. That the Plaintiff did not establish that his reputation was injured. The Defendant on this aspect cited **Simeon Nyachae v. Lazarus Ratemo Musa & Another (2007) eKLR**. The Defendant further contended that the amount of damages of KShs. 30,000,000/- sought by the Plaintiff is not only unreasonable but that it is also unjustified in the peculiar circumstances of this case.

7. The Court of Appeal in the case of **Wycliffe A. Swanya v. Toyota East Africa Ltd & Another Civil Appeal 70 of 2008 [2009] eKLR** stated:

*“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*

*(iv) In slander, subject to certain exceptions, that the Plaintiff has suffered special damage.”*

8. From the evidence on record and the submissions tendered, what is in contention is whether or not J was the Plaintiff's ex-wife considering that the Plaintiff conceded that he was charged for the offences as stated in the article. The Plaintiff took the angle of argument that although he had a child with J, he was not married to her and was therefore not his ex-wife. The Defendant on the other hand leaned toward the argument that they relied on court proceedings including the custody case where the two are stated to have cohabited as husband and wife a fact that was never rebutted by the Plaintiff. Further, in response to the Plaintiff's letter seeking an apology, the Defendant sought clarification of what part of the article was untrue for purposes of considering tendering an apology and correcting the article to no avail. It is also worth noting that the article was published after the filing of the custody case and the court proceedings therein were a public document. Although the Plaintiff argue that the issue was not of public interest, it must be noted that the said was a criminal charge which is of concern to the state thereby falls within the purview of a matter of public interest.

9. The publication referred to J as the Plaintiff's ex wife. In **GATLEY ON LIBEL AND SLANDER** 6<sup>th</sup> Edition at pg 6 the learned author stated that –

*“A defamatory statement must be false and it must also be defamatory to the Plaintiff, that it is to say, the statement must contain, whether expressly or by implication, a statement of fact or expression of opinion which would lower the Plaintiff in the estimation of a reasonable reader who had knowledge of such other facts not contained in the statement, as the reader must reasonably be expected to possess.”*

In my view the publication was not defamatory for the reason that the Defendant were guided by the proceedings in the maintenance case as to the relationship of the Plaintiff and J and further the Defendant made an attempt of seeking to know which part of the article the Plaintiff stated to be untrue so that it could correct the article. I in view of that do not find malice and thereby no case for defamation has been

established. See **Phineas Nyagah v Gitobu Imanyara Civil suit no. 697 OF 2009[2013] eKLR**, Odunga J observed that:

***“Thirdly, the words must be malicious. Malice here does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice. 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 but the law does not weigh in a fair balance and it does not follow merely because the words are excessive, there is therefore malice. Malice may also be inferred from the relations between the parties before or after publication or in the conduct of the Defendant in the course of the proceedings. Malice can be founded in the publication itself if the language used is utterly beyond the facts. The failure to inquire into the facts is a fact from which inference of malice may properly be drawn. Any evidence, which shows that the Defendant knows the statement was false or did not care whether it be true or false will be evidence of malice.”***(Emphasis mine)

I have carefully considered the pleadings herein, the oral and documentary evidence adduced by the Plaintiff and the rival submissions by both parties supported by the list of authorities relied on. Having set out the back ground of this matter, I now set out to identify the issues for determination which in my view are as follows: -

- a) Whether the article published in the Nairobi Star Publications Limited on the 15<sup>th</sup> January, 2010 was libelous and malicious of the Plaintiff.
- b) Whether the article was defamatory of the Plaintiff.
- c) Whether the demand was made by the Plaintiff for an apology.
- d) Whether the article and the words are privileged.
- e) Whether the Plaintiff has suffered injury to his reputation as a result of the article and the words published therein.
- f) What is the quantum of damages if any, payable to the Plaintiff?
- g) Who is liable to pay the costs of the suit?

The word defamation is defined in the English case of **Scott Vs Sampson (1882) QBD 491** at page 503, Dave J defined the word **‘defamation’** as

***“A false statement about a man to his discredit”***

The leading English monograph of Gatley on the subject of defamation defines it as thus: -

***“Any imputation which may tend to lower the Plaintiff in the estimation of right thinking members of the society generally.”***

The tort of defamation was well described in the 1979 British Columbia Court of Appeal Decision of **Murphy Vs Ha March (13DLR 3d 484)** where a Member of Parliament Judy Ha March wrote about the Plaintiff as follows: -

***“A brash young radio reporter, named Ed Murphy (heartily detested by most of the press gallery and the members had somehow learnt that Maurice Lamontagne (then Secretary of State) and a long-time friend and adviser of the Prime Minister had purchased furniture but had not paid for it”.***

In finding that there was actionable libel, the British Columbia Supreme Court in dismissing the appeal

wrote: -

***“Defamation is where a shameful action is attributed to a man (he stole my purse) a shameful character (he is dishonest) a shameful course of action (he lives on avails of prostitution) or a shameful condition (he has small pox). Such words are considered defamatory because they tend to bring the man named into hatred, contempt or ridicule. The more modern definition of defamation is words tending to lower the Plaintiff in the estimation of right thinking members of the society generally.”***

The common law of defamation protects every person from harm to their reputation by false and derogatory remarks about their person known as defamation. The same protection is also anchored in the Constitution under Article 33 (1) (a) as read together with Clause (3) thereof both of which provides as follows: -

***“33(1) (a) Every person has a right to freedom of expression, which include freedom to seek, receive or impart information or idea.***

***Clause 3 provides “in exercise of the right to freedom of expression every person shall respect the rights and reputation of others.”***

What then are the elements of the tort of defamation?

The elements of the tort of defamation were well laid out in the case of **John Edward Vs Standard Limited** as follows: -

- 1) The statement must be defamatory.
- 2) The statement must refer to the Plaintiff.
- 3) The statement must have been published by the Defendant.
- 4) The statement must be false.

The same elements were also articulated in the case of **Wycliffe A. Swanya Vs Toyota East Africa Limited and Another**, Civil Appeal No. 70/2008 (2009) eKLR.

In the case herein and from the evidence on record and the submissions tendered by the parties, it is not in dispute that the article was published by the Defendant and that it refers to the Plaintiff. In fact, in cross-examination, the Plaintiff is on record as having stated that the only challenge he has with the article is that J A was described as his former wife. It is also not in issue that the Plaintiff was charged in court with the offence of threatening to kill the said J A contrary to Section 223(1) of the Penal Code and was also charged with the offence of improper use of licenced Telecommunication System contrary to Section 33(A) of the Kenya Communication Act 1998.

The Plaintiff is aggrieved by the fact that the article was featured on half a page, was prominent bearing his photo and a big heading. He stated that they have a child with the said J but she is not his ex-wife as alleged by the Defendant in the article and for those reasons, he averred that the article was damaging to his reputation because people would have thought that he is married to her. It was also his testimony that anyone reading the article would have thought that he is an immoral person and a murderer capable of threatening to kill his wife.

The Defendant on the other hand, leaned towards the argument that in publishing the article complained of, they relied on the court proceedings in Criminal Case No. 42 of 2010 (**R V M M**) and Children’s Case NO. 181 of 2007, **J A O (suing as the mother and next friend to the minor) Vs M M**). The Defendant averred that in the Children’s case aforesaid, the Plaintiff in this case is said to have cohabited with J A as a husband and wife whereas in the Criminal Case, the Plaintiff herein was charged with the offence of

threatening to kill contrary to Section 223(1) of the Penal Code. The person he is alleged to have threatened is J A. The Plaintiff herein has not denied that he was charged with the offence aforesaid and he has not denied that there was a Children's matter between him and J A. In fact, and it is on record, the only issue the Plaintiff has with the article, is that J A has been referred to as his ex-wife.

The court has taken the liberty to peruse the pleadings in the Children's case No. 181/2006. Paragraph 3 of the same reads: -

***“that between December, 1997 to January, 2004, the Plaintiff and the Defendant had a relationship and cohabited as a husband and wife where upon a child was born of the relationship namely J N M on the 30<sup>th</sup> November, 1999.”***

I have also meticulously perused through the defence and the counterclaim that the Plaintiff herein filed in the above quoted case and it is noted that nowhere in that defence has he denied that they cohabited as a husband and wife with the said J. It is trite law that parties to a suit are bound by their pleadings and when a fact is pleaded by one party and its not expressly denied by the other, it is taken to have been admitted.

The Defendant has pleaded the defence of privilege in that, the publication complained of is a fair and accurate reporting of the court proceedings. It is important for this court to point out that the Defendant did not call any evidence in support of its case but submissions were filed on its behalf. Am alive to the fact that a party cannot prove its case by way of submissions without having to call evidence but I also appreciate that a party can raise any points of law in the submissions even when no witnesses were called to testify on its behalf. This argument is based on the fact that a party is at liberty to raise a point of law at anytime during the proceedings and it is on that basis that I hereby proceed to consider the Defendant's defence of privilege which is provided for under Section 6 of the Defamation Act which states as follows:

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***“A fair and accurate report in any newspaper of proceedings heard before any court exercising judicial authority within Kenya shall be absolutely privileged provided that nothing in this Section shall authorize the publication of any blasphemous, seditious or indecent matter.”***

The proviso to this Section provides only three exceptions to the general rule and it is evident that the case herein does not fall within the purview of the exceptions envisaged under this Section. As such the newspaper article is privileged and protected under Section 6 of the Defamation Act as long as it is a fair and accurate report.

On whether the article was malicious, the court has looked at the article complained of with the heading: -

***“Lawyer M denies threat to kill ex-wife.”***

From the evidence on record and in particular Plaintiff's Exhibit 4, it confirms that indeed the Plaintiff was charged in a court of law with threat to kill. He, however, took issue with the heading arguing that J A whom he is alleged to have threatened is not his ex-wife. As I have already observed elsewhere in this judgment the Plaintiff did not deny in his defence in the Children's case that, she is his ex-wife. In my view and going by the pleadings filed in the Children's case, the facts as reported by the Defendant referring to J as the Plaintiff's ex-wife is factual and an accurate reporting of the court proceedings. It is noted that the article herein was published after the Children's case had been filed.

On the issue of malice, Odunga J, in the case of **Phineas Nyagah Vs Gitobu Imanyara Civil suit No. 697 OF 2009[2013] eKLR**, Odunga J observed that:

***“Thirdly, the words must be malicious. Malice here does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice. 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 but the law does not weigh in a fair balance and it does not***

***follow merely because the words are excessive, there is therefore malice. Malice may also be inferred from the relations between the parties before or after publication or in the conduct of the Defendant in the course of the proceedings. Malice can be founded in the publication itself if the language used is utterly beyond the facts. The failure to inquire into the facts is a fact from which inference of malice may properly be drawn. Any evidence, which shows that the Defendant knows the statement was false or did not care whether it be true or false will be evidence of malice.***

In the case before the court, there is no evidence that the Defendant was reckless in reporting the facts of the case or that the words used are utterly beyond or disproportionate to the facts which may lead to an inference of malice. There is also no evidence that there was bad blood between the Plaintiff and the Defendant. The Defendant was merely reporting court proceedings.

Having found that there was no malice and that the article was true in substance, I would on the same breath find that it was not defamatory in the circumstances in which it was published. In **GATLEY ON LIBEL AND SLANDER** 6<sup>th</sup> Edition at pg 6 the learned author stated that –

***“A defamatory statement must be false and it must also be defamatory to the Plaintiff, that is to say, the statement must contain, whether expressly or by implication, a statement of fact or expression of opinion which would lower the Plaintiff in the estimation of a reasonable reader who had knowledge of such other facts not contained in the statement, as the reader must reasonably be expected to possess.”***

The court was told that a demand letter dated 15<sup>th</sup> January, 2010 was done to the Defendant who replied vide it's dated 29<sup>th</sup> January, 2010. The letter dated 29<sup>th</sup> January, 2010 was produced as exhibit 2. In the said letter, the Defendant asked the Plaintiff to advise what aspect of the court proceedings were incorrectly reported so that the Defendant could consider whether a correction or an apology is in order. In the same letter the Defendant wrote: -

***“As a matter of principle, the star is always willing to correct errors that appear in the paper.”***

In response to the Defendant's letter aforesaid, the Plaintiff's Advocate wrote a letter dated 9<sup>th</sup> February, 2010 a copy of which was sent in advance via email which is marked as exhibit 3. I have looked at that letter and nowhere in it did the Plaintiff's Advocate point out the aspects of the court proceedings that were not correctly reported. It was just a general letter informing the Defendant that the article is not privileged and that the defence of privileged is not available to it.

Though the Plaintiff testified that his reputation was maligned, he did not tender evidence to the effect.

In view of the foregoing, this court finds that the Plaintiff has not proved his case on a balance of probability and I have no option but to dismiss the claim. But in the event that I am found to be wrong in my finding, the law obliges me to assess the damages that the court could have awarded the Plaintiff had I entered judgment in his favour.

I have considered the submissions by both learned counsels on quantum of damages and the authorities relied on by the parties. In this regard, the case of **Johnson Evans Gicheru Vs Andrew Morton & Another [2005] eKLR**, is very helpful where Hon Tunoi JA (as he then was) had this to say: -

***“In an action of libel the trial court in assessing damages is entitled to look at whole conduct of the Defendant from the time the libel was published down to the time the verdict was given. It may consider what the conduct has been before action and in court during the trial.”***

On the same subject of damages, I find it imperative to quote the following passage in the case of **Vein Vs John Rairax & Son Pty Limited**.

***“It seems to me, properly speaking, a man defamed does not get compensation for his reputation that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways – as vindication of the Plaintiff to the public and as a consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money.”***

From the evidence, the Plaintiff is an advocate of the High Court of Kenya and a businessman though the court was not told the kind of business that he is engaged in. He testified that the publication affected his reputation in that it is implied that he is a murderer capable of threatening his wife. That his in-laws took it very negatively and that people could not largely believe him.

In his submissions, he has suggested a sum of Ksh.30 Million for general damages. Three authorities were quoted being Civil Appeal No. 84 of 2009, **Ken Odoni & Others Vs James Okoth Omburah, Samuel Ndung’u Mukunya Vs Nation Media Group Ltd & Another**, HCCC No. 420 of 2011 and that of **Musinga & Co. Advocates Vs Nation Newspapers Ltd**, HCCC No. 102 of 2000 in which sums of Ksh.4 Million, 20 Million and 10 Million were awarded respectively.

On the part of the Defendant, no suggestion was made on this aspect but it urged the court to dismiss the case.

Applying the principle in **John Vs MGN Ltd (1996) 2 ALL E.R. 35** and taking into account all the surrounding circumstances of this case, a figure of Ksh.5,000,000/- would have sufficed as general damages. **On** aggravated damages, this court does not find any aggravating circumstances that would have persuaded it to award the same as there is no evidence that the Defendant conducted itself in a malicious manner.

In fact, the Defendant had offered to apologize if there was misreporting of the court proceedings but since the Plaintiff did not proof his case, its unfortunate that the court has to dismiss the same but with no orders as to costs.

Dated, signed and delivered at Nairobi this 2<sup>nd</sup> day of February, 2017.

.....

**L NJUGUNA**

**JUDGE**

***In the presence of***

..... ***For the Plaintiff***

..... ***For the Defendants***