



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO 242 OF 2012

JANE NJERI ONYANGO.....PLAINTIFF

VERSUS

ERICK OCHIENG.....1ST DEFENDANT

JOE KARANJA.....2ND DEFENDANT

THE STANDARD LIMITED.....3RD DEFENDANT

R U L I N G

The Plaintiff herein filed proceedings before this court seeking damages for defamation against the Defendants on 23rd May 2012. The Plaintiff's case is that the Defendants published on 2nd June, 2011, in the Standard News Paper an article titled "**KLTA *FACING CRISIS AFTER AFFILIATES PULL OUT***". The 1ST and 3rd Defendants filed their statement of defence dated 14th December 2012 in which while admitting it published the article, denied that the words were libelous of the Plaintiff. The Defendant further pleaded that the article and the statement complained of were fair comment made on matters of public interest. In paragraph 2 of the statement of defence the Defendants averred that this honorable court lacks jurisdiction to hear this suit by virtue of **Article 34(2) of the Constitution**. By a Notice of preliminary objection dated 13th August 2012 the Defendants contended that this court has no jurisdiction to hear this suit. It is this preliminary objection that is before the court for determination.

The Defendant submitted that this court is an office and the judiciary is an organ comprising of the government of the republic of Kenya under the Constitution. They stated that **Article 34(2) of the Constitution** gives specific rights of freedom to the media barring any control of state over or interference with any person engaged in broadcasting, production or circulation of any publication or the dissemination of information by any medium. The Defendant further submitted that the state is also restrained from penalizing any person for any opinion or view or the contents of any broadcast, publication or dissemination.

The Defendants also submitted that **Article 33(2)** limits that right by outlining instances when the freedom does not apply; where exercise of that freedom would be such as to result in the destabilization of social order and commission of crime of discrimination. The Defendant further stated that breach of the qualification under the article 33(2) of the Constitution in the exercise of the right of expression, amounts to a crime while breach of qualification under article 33(3) of the Constitution amounts to a tort.

The Defendants urged the court to craft precedent that will put an end to interference of the state with

media freedom by applying its mind to the letter and spirit of the Article 34(2). The court was referred to the case of **Kwacha Group of Companies Vs The Standard Limited & Others (Civil Suits No. 319 of 2005)**. The Defendant further submitted that Article 34 has imposed a limit on the court authority in terms of the kind and nature of action, a matter of which the court can take cognizance and the area to which its jurisdiction extends. The Defendant relied on the case of **Boniface Waweru Mbiyu vs Mary Njeri and Another Misc Application 639 of 2005**.

The Defendant further argued that a publication which is in breach of **Article 33(3)** is what amounts to a tort of defamation and by not including it as a limitation to freedom of media, the people of Kenya spoke in no uncertain terms that any publication in the media could not be challenged before a court of law on the ground that it is defamatory because what it published or broadcast, is beyond the control of state.

The Defendant submitted that there exists an alternative forum for redress in the event a person is aggrieved. The sixth schedule of the current Constitution deals with the transitional consequential provisions. In this case parliament has not enacted any new legislation and the Media Act 2007 remains in force in light of the Section 7 of part 2 of the Transitional and Consequential Provisions. The Media Council of Kenya established under the Act, remains with the mandate of the regulation of the media and the conduct and discipline of journalists. The Defendant submitted that other professional and groups are given an option of having disputes solved by different forums other than the court. The Defendant relied on the case of **University of Nairobi Vs N.K Brothers Limited (2009) eKLR**. They contended that a person aggrieved by the acts of the media publications, broadcast or dissemination do not have the option of having their complaints addressed by different forums and in particular by the courts.

In response, the Plaintiff submitted on two issues: -

- 1) whether this court lacks jurisdiction to determine a defamation suit by virtue of Article 34(2) of the Constitution,*
- 2) what is the role of the court in defamation suit.*

On the issue of jurisdiction, the Plaintiff referred the court to the case of **Boniface Waweru Mbiyu Vs Mary Njeri & Another (supra)**. The Plaintiff submitted that in the interpretation of **Article 34 of the Constitution** the court must be guided by the provisions of **Article 259** which provides on the manner of interpretation of the Constitution and also article 2(3) of the Constitution. The court must under the rule of harmony recognize that the entire Constitution has to be read as an integrated whole with no particular one provision destroying the other but each sustaining the other.

The Plaintiff stated that freedom of expression is one of the fundamental freedoms pertaining to the citizens as a human being and the freedom of the press is special freedom within the scope of freedom of expression. What is generally accepted as to constitute freedom of expression is the freedom to hold opinion and seek, receive and impart information and ideas of all kind, either orally, in writing, in print, in the form of art or through other chosen media without interference by a public authority and regardless of frontiers. And in expressing such opinion, even if false, the person doing so does or should not prejudice the rights and freedom of others. The Plaintiff argues that the protection of right of freedom of expression is of great significance to democracy and it is the bedrock of democratic governance. The Plaintiff submitted that section 34(2) is reflection of the international standards expected of a democratic society as enunciated in the case of **Ramesh Thapar Vs State of Madras (1959)SCR and Express Newspaper & Others Vs Union of India (1958) SC 578**

The Plaintiff further submitted that the enactment of Article 34 was meant to ensure that the State does not feign ignorance of its obligations to the media by resorting to outmoded tactic in its attempt to silence the media. The Plaintiff believes that article 34 cannot be considered in isolation but must be looked at in the light of the historical perspective and misdemeanors on the part of the State Agencies, the legislature, the Executive and the Judiciary included. The Plaintiff submitted that the nothing limits this court power to entertain a defamation suit as this court is vested with jurisdiction on the same.

On what is the role of the court in defamation cases, the Plaintiff submitted that in defamation suits and in all other civil suits the role of the court is that of an independent arbiter between two disputant and in doing so the court is empowered under article 23(3) to grant appropriate relief. The Plaintiff argued that to say that in doing so the court is controlling or interfering with or punishing one of the parties is to miss the point as such remedies as an award of exemplary and aggravated damages may have to be looked at a fresh in light of the current constitutional provisions. The Plaintiff relied on the case of **Eso Standard Ltd Vs Semu Amanu Opio Scca No. 343 of 1987**

Under **Article 28** every person has inherent dignity and the right to have that dignity respected and protected while **Article 31** deals the right to privacy. The Plaintiff submitted that the two provisions of law recognize the right of a person to be respected and where such is not protected, a person is entitled to ask the court for an appropriate remedy under **Article 23**. The Plaintiff argued that **Article 34** cannot be divorced with the media houses in form of censorship and night raids that led to the need to have in place the said provision. It was the need to tame the runaway wards from the courts that gave birth to **Article 34**. It was not the desire of the people of Kenya to give the media a free hand in publishing offending materials that conceived **Article 34**.

The Plaintiffs contended that **Article 34(2)** does not leave the freedom of the media unlimited since there are adequate provisions under the Media Act to deal with complaints against the media. The Plaintiff submitted that the said Act is no provision for an award of damages. The remedies under the Act to Section 29 of the media, are aimed towards reprimand, apology and punishment of the media house rather than compensating a victim. The Plaintiff argued that in omitting to provide for damages for compensation, Parliament must have been aware of the potential conflict that would have been caused. It was, therefore, a wise decision to omit that remedy from the options available to the Media Commission.

I have carefully considered the submission above. I am of the view that the only issue for determination is **whether on the facts and circumstances of this case the court has jurisdiction to hear and determine matters of defamation.**

Jurisdiction is everything and without it, a court has no power to make any step as was stated in the celebrated case of **The Owners of the Motor Vessel "Lillian S" Vs Caltex Oil (Kenya) Ltd (1989) KLR 1**. Jurisdiction is specified either by the Constitution or Statute. The Supreme Court of Kenya in the case of **Samuel Kamau Macharia Vs KCB & 2 Others, Civil Application No.2 of 2011** stated this:

"A Court's jurisdiction flows from either the Constitution or Legislation or both. Thus a Court of Law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by Law"

The jurisdiction of this court is fortified by **Article 165(3)** which grants jurisdiction to this Court in the following terms:-

"(3) Subject to clause (5), the High Court shall have:

(a) Unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) Jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to Constitutional powers of State organs in respect of county governments and any matter relating to the Constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

The jurisdiction of the high court is limited under **Article 165(5)** in the following terms:-

5) The high court shall not have jurisdiction in respect of matters-

a) Reserved for the exclusive jurisdiction of the Supreme Court under this Constitution;

b) Falling within the jurisdiction of the courts contemplated in Article 162 (2)

Also Under **Article 162(2)** the jurisdiction of this court is limited in the following terms:-

2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to:-

(a) Employment and labour relations; and

(b) The environment and the use and occupation of, and title to, land.

From the foregoing, it is my view that the court has jurisdiction to entertain civil suits of which defamation cases are part. The Plaintiff claims the article published was defamatory and she has been injured in character, credit and reputation in her profession and occupational sports administrator. Is it the Media Commission or this court which should consider her case and if proved award compensation under Article 23 of the Constitution?

The Constitution has provided situations or matters where this court has no jurisdiction under **Article 165(5) and 162 (2)**. It has done so with deliberation. It has named those matters in respect of which special courts, with jurisdiction similar to that given to the High Court, shall be established. It has not named a special or separate court to handle libel and slander. If the promulgators of the Constitution wanted to take away the jurisdiction of the High court to entertain defamation cases, it would have specifically done so as it indeed did with matters concerning employment and labour as well as matters of environment. That arose from the fact that matters related to the reputation and dignity of a person and those of employment and environment were in Kenya, handled by the High Court from the time our legal system came into being. To have them handled differently as the Constitution contemplated, it required a special specific effort by the promulgators. That came out in the expression of Article 162(2). Indeed even in such exercise, the Constitution had to specifically restate in Article 165(5) that the High Court remained with the unlimited original jurisdiction in criminal and civil matters subject to the provisions giving the new courts special jurisdiction to those other matters therein specified.

The Defendants submissions that **Article 34(2)**, ousts the jurisdiction of this court has therefore, no basis. The Article states: -

“The state shall not: -

- a. ***Exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium: or***
- b. ***Penalize a person for any opinion or view or the content of any broadcast, publication or dissemination.”***

This article as I understand it, cannot be read in isolation. It must be read together with other articles of the Constitution, which in this case, is **Article 33** which provides for freedom of expression and information and also limits the same freedom. **Article 33** provides:-

“Freedom of Expression.

1. ***Every person has the right to freedom of expression which, includes;-***
 - a. ***Freedom to seek, receive or impart information or ideas.***
 - b. ***Freedom, of artistic creativity; and***
 - c. ***Academic freedom and freedom of scientific research.***
2. ***The right to freedom of expression does not extend to: -***
 - a. ***Propaganda for war***
 - b. ***Incitement to violence***
 - c. ***Hate speech; or***
 - d. ***Advocacy of hatred that –***
 - i. ***Constitutes ethnic incitement, vilification of others or incitement to cause harm; or***
 - ii. ***Is based on any ground of discrimination specified or contemplated in Article 27(4).***
3. ***In exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.”***

From the above provision, the freedom of expression and information by the media is regulated to the extent that they do not violate the other rights of other people. The article also requires the media or persons in the media to respect the reputation of other citizens. The rights governed by the media should be equally governed like all other rights under the Constitution.

The court is also alive to the provisions of **Article 20** which guides the courts to interpret the provisions of the Constitution and how to apply the provisions of the Bill of Rights. Article 20 provides:-

(1) The Bill of Rights applies to all law and binds all State Organs and all persons.

(2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

(3) In applying a provision of the Bill of Rights, a court shall –

(a) Develop the law to the extent that it does give effect to a right or fundamental freedom; and

(b) Adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

(4) In interpreting the Bill of Rights, a court, tribunal or other authority shall

promote –

(a) The value that underlie an open and democratic society based on human dignity, equality, equity and freedom; and

(b) The spirit, purport and objects of the Bill of Rights.(emphasis mine)

Article 259 also requires the court to interpret the Constitution in a manner that, among other things, promotes its purposes, values and principles and advances the Rule of Law, and the human rights and fundamental freedoms in the Bill of Rights. The court has to interpret several provisions of the Constitution while giving effect or purport to other provisions of the same Constitution and any freedom cannot be interpreted in isolation from other freedoms enshrined in the Constitution.

The Defendants in their submissions believe that **Article 34(5)** provides for an alternative forum for redress in the event a person is aggrieved by media publication, broadcast or dissemination. They believe such alternative forum to the Media Council of Kenya established under the Media Act, 2007. The existence of the Media Council however, does not in my view oust the jurisdiction of this court. The Media Act provides for the establishment of the Media Council of Kenya which looks at the guards the discipline of journalists and the media. The damages sought by the Plaintiff in this case cannot be adjudicated by the said Tribunal found under the Media Act 2007. After hearing of the complaints the commission can only make the decisions provided under Section 29 which provides thus:

1. **Without prejudice to the generality of Section 27 (2), the Complaints Commission or any of its panels may, after hearing the parties to a complaint—**
 - a. **and being of the opinion that the complaint is devoid of merit or substance, dismiss such complaint;**
 - b. **order an offending party to publish an apology and correction in such manner as the Council may specify;**
 - c. **Issue a public reprimand of the journalist or media enterprise involved.**
2. **The Complaints Commission or any of its panels may make any or a combination of the orders set out in Sub Section (1)**

The Plaintiff herein is claiming General and exemplary damages for defamation which can only be granted by court of law after considering the evidence before it, a process and exercise of power or jurisdiction not in purview of the Media Commission.

The issue raised by the Defendants is not new in our courts In **Christopher Ndarathi Murungaru Vs Standard Limited & 2 others** (supra) **Odunga J** faced with the same argument by the same Defendants as in this case, held: -

In conclusion, whereas I agree that the Court's authority to control, interfere with or penalise the media for any opinion or view or the content of any broadcast, publication or dissemination has to be viewed in light of the current Constitutional dispensation, the Court is not barred from investigating and adjudicating over any dispute where a person alleges that his rights or fundamental freedoms under Article 28 of the Constitution have been infringed and award appropriate remedy. To equate the powers of the Court with that of the Complaints Commission flies in the face of the express Constitutional provisions in Article 165(3)(b) which confers on the High Court the jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. Such reasoning will also go contrary to the powers of the High Court under Article 165(6) to supervise the subordinate courts and any person, body or authority exercising a judicial or quasi-judicial function. In the

Defendants' own submission it is admitted that there is a right of appeal to the High Court from a decision arising from the process under the Media Act, a recognition that even in cases where the Complaints Commission is clothed with jurisdiction the appellate jurisdiction of the High Court is not ousted. In fact even if there was no avenue for appealing to the High Court and even if the said Act had purported that its decision was final that would not oust the High Court's supervisory jurisdiction under Article 165(6) aforesaid.

Recently, this specific court was also faced with a similar Preliminary Objection in **John Ritho Kanogo & 2 Others Vs Joseph Ngugi & another** Civil Suit Number 589 of 2012 [2015] eKLR, I therein stated thus: -

“I similarly, find that while in cases of defamation this court has to strike a balance between the right to the freedom of expression on the one hand and the right of protection of the reputation of a person on the other hand, nevertheless, the proposition that the High Court with its Original jurisdiction in all civil matters, has no jurisdiction to entertain and decide defamation cases, is very bold but totally without legal basis. The courts' original jurisdiction to hear civil cases of which defamation matters are part, was confirmed by Article 165(3). To that end I find the Preliminary Objection to be unmerited and is hereby dismissed with costs to the Plaintiffs in any event. Orders accordingly.”

Again in April 2015 Aburili J In **John Kamau Mbugua Versus The Standard Limited & KTN-Baraza Limited**, Civil Suit No. 270 of 2011 (unreported) also held that: -

“Further, it is the view of this court that allowing the preliminary objection will be ousting the Plaintiff from the seat of justice, which would also impede his right to access to justice under Article 48 of the Constitution. The policy for the court, I believe, is to apply the principle of the rule of law and exercise latitude in its interpretation of the Constitution and other enabling laws so as to facilitate fair and just determination of disputes on merit and thus facilitate access to justice.

This court also appreciates that the freedom of expression and of the media as espoused in the Constitution is a tool of self governance in a democratic society and enables people to obtain and access information from a diversity of sources, making decisions and communicate those decisions to the government.

Freedom of the press, in my humble view, does indeed protect the right to obtain and publish information or opinions without government censorship or fear of punishment or reprisals. That freedom in my understanding includes freedom from the government examining or purporting to examine publications and productions by the media and prohibiting the use of material it considers or finds offensive. Therefore, the Constitution had to provide for the media freedom necessary to the establishment of a strong, independent media to provide citizens with a wide array of information and opinions on matters of public importance. The media no doubt plays the role of surrogate for the public in gathering and disseminating information on its behalf and for its benefit. Absolute freedom of the media, like all other freedoms, in my view, would turn out to destroy itself. When such freedom of the media, however, collides with other rights guaranteed and protected by the Constitution, there must be checks, hence, the limitation provided under Article 34(1) and 33(2) and (3) of the Constitution. For example, Article 35(2) of the Constitution on access to information provides that:

“every person has the right to the correction or deletion of untrue or misleading information that affects the person.”

The above provision presupposes that sometimes false information of a public concern

or about people or persons, may be published in a variety of contexts, in reckless disregard for the truth and in the dissemination of a calculated falsehood in total violation of a fault based standard of care hence the need to have the same corrected.”

From the foregoing decision, the Defendant’s approach in all the Preliminary Objections in the three cases cited above is a wild fishing expedition whose purpose is not transparent except probably to obstruct or delay the prosecution of this case. The claim by Mr. Kitonga that the Odunga, J decision is being appealed is wrong neither here nor there. If the Defendants are aggrieved by the decision of this court they can always appeal. I similarly, find that while in cases of defamation this court has to strike a balance between the right to the freedom of expression on the one hand and the right of protection of the reputation of a person on the other hand, nevertheless, the proposition that the High Court with its Original jurisdiction in all civil matters has no jurisdiction to entertain and decide defamation cases, is very bold but totally without legal basis. The courts’ original jurisdiction to hear civil cases of which defamation matters are part was confirmed by Article 165(3). To that end I find the Preliminary Objection to be unmerited and is hereby dismissed with costs to the Plaintiffs in any event. Orders are made accordingly.

Dated and delivered at Nairobi this 7th day of July 2015.

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D A ONYANCHA

JUDGE