



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT KISUMU**

**CIVIL APPEAL 95 OF 2006**

**KENYA TEA DEVELOPMENT AGENCY LTD.....APPELLANT**

**AND**

**BENSON ONDIMU MASESE T/A B. O. MASESE & CO. ADVOCATES.....RESPONDENT**

*(Being an appeal from the judgment of the High Court of Kenya*

*At Kisumu (Tanui, J) dated 28<sup>th</sup> October 2005*

**in**

**HCCC No. 75 of 2004)**

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**JUDGMENT OF THE COURT**

The respondent filed a suit against the appellant in the superior court at Kisumu and sought both aggravated and exemplary damages for defamation. In a judgment delivered on 28<sup>th</sup> October 2005, the Judge (Barabara Tanui, J.) found that the appellant had indeed defamed the respondent and awarded the latter damages as follows:-

***“General damages   Kshs.7,000,000/=***

***Exemplary damages   Kshs.3,000,000/=***

***Total                   Kshs.10,000,000/=***

The learned Judge also awarded the respondent costs of the suit and interest. Being aggrieved by this decision the appellant appealed to this court through a Memorandum of Appeal dated 14<sup>th</sup> day of April 2006 and lodged at the Court’s sub-Registry in Kisumu on 19<sup>th</sup> day of April 2006. It has 9 grounds of appeal, namely that:-

- 1. That learned trial Judge erred in fact and in law in pronouncing judgment unprocedurally.***
- 2. The learned trial Judge erred in law and in fact in failing to hear the appellant before pronouncing judgment.***
- 3. The learned trial Judge erred in law and in fact in condemning the appellant unheard.***

4. *The learned trial Judge erred in law and in fact in finding the appellant liable in defamation when no defamation was proved.*
5. *The learned trial Judge erred in law and in fact in failing to dismiss the respondent's case.*
6. *The learned trial judge erred in law and in fact in awarding damages which were inordinate by excessive, all circumstances considered.*
7. *The learned trial Judge erred in law and in fact in failing to find that the material alleged to be defamatory was privileged.*
8. *The learned trial Judge erred in law and in fact in disregarding the appellant's defence.*
9. *The learned trial Judge erred in law and in fact in all points of law and facts.*

The facts which gave rise to the dispute between the parties arose from a letter the appellant's Managing Director wrote to The Advocates Complaints Commission and in which the respondent believed he was falsely adversely mentioned. It was dated 10<sup>th</sup> July 2003 and read as follows:-

*"The Advocates Complaints Commission,*

*P.O. Box 48948,*

*Maendeleo House, 7<sup>th</sup> Floor,*

*NAIROBI*

*Attention Mrs. Aduma:*

***RE: COMMON LAW LIABILITY CLAIMS IN KTDA LIMITED'S MANAGED TEA FACTORIES IN KISII, NYAMIRA AND GUCHA DISTRICTS***

*We refer to the above matter and our letter addressed to the Minister for Justice and constitutional Affairs (a copy is enclosed herewith for reference) and wish to lodge complaints as follows:-*

*That further to our said letter a meeting was held between the said Minister Hon. Kiraitu Murungi and the KTDA Board chairman (Mr. S. M. Imanyara) and the director (Mr. Eric Kimani), the Zonal Board Representative (Mr. John Nyangarama) and the Kebirigo Tea Factory Directors to deliberate on the problem of ambulance chasing prevailing in the above districts. The problem has been caused by unscrupulous lawyers, Magistrates, doctors, auctioneers and ambulance chasers whereby advocates appoint agents among factory workers as clients with promises of handsome court awards.*

*The practice is so rampant that it is almost crippling the operations of the various tea factories in the above districts and an attempt to obtain court redress have been frolic. Our complaints are against the firms of Messrs. Khan & Katiku, Sila Munyao & Co. , B. O. Masese who are notorious in soliciting for business in the vicinity of the factories.*

*Investigations commissioned by insurers have revealed that most of these claims are fraudulent in that the causes of action leading to suits never took place. The advocates in collusion with the courts and other beneficiaries of the whole process ensure that outrageous awards are made. Forwarded herewith is a list of the outrageous claims from Kebirigo Tea factory which is the most affected and others can be provided if required. A summary of the investigation report can also be provided if required.*

*As stated in our above referenced letter to the Minister we feel that this problem can only be combated with the intervention of your commission in taking the requisite disciplinary action against the above*

*listed advocates, the Government and the Chief Justice.*

*In the premises we are appealing for thorough investigations of all the advocates involved in the menace and the requisite measures taken to obviate the practice. This will go a long way in saving the small scale tea subsector from imminent collapse as a result of the financial constraints suffered by the affected factories.*

*Yours faithfully,*

*Signed*

*Eric Kimani*

*Managing Director”*

According to the respondent, the words in the letter, given their natural and ordinary meaning, meant and were understood to mean that he, the respondent, was:-

*(a) unprofessional in the manner in which he conducts his business;*

*(b) a corrupt person;*

*(c) a fraudulent person;*

*(d) an unscrupulous person;*

*(e) money minded and can do anything however unlawful to get money;*

The respondent believed that these words in the letter injured his credit and reputation, and brought him into public scandal, odium and contempt and this is what compelled him to file the suit, the subject of the present appeal. Although the appellant filed a defence in which it admitted that it published the words contained in paragraph 4 of the plaint, it however denied doing so falsely or maliciously.

Counsel for the parties agreed that the case be listed for hearing on 9<sup>th</sup> May 2005 but when it was called out for hearing on that day, only the respondent and his counsel were present. Neither the appellant nor its counsel was present. Counsel for the appellant instead sent another advocate (Ouma C.B.G.) to apply for an adjournment because he was in Nairobi to testify in another civil case but that application was refused by the superior court and the case proceeded *ex parte*. Out of that *ex parte* hearing, judgment was delivered which made the award to the respondent as herein stated. The appeal was heard before us on 18<sup>th</sup> June 2008 wherein counsel for the appellant (Mr. Nyachiro leading Mr. Magari) questioned the manner in which the trial was conducted by the superior court or whether a case was made out for defamation against the appellant to warrant the damages awarded. Counsel also stated that it was not proper for the superior court to refuse to grant an adjournment because counsel sent to hold brief for the appellant's counsel was only for the purpose of applying for an adjournment; The appellant also submitted that by writing the letter dated 10<sup>th</sup> July 2003, it was exercising its right to lodge a complaint to the Complaints Commission and that this act did not amount to defamation or libel against the respondent. Counsel submitted further that there was no evidence of circulation of the libellous letter nor was there a list of people to whom the letter was circulated.

On damages, counsel submitted that the superior court should have considered the facts of the case and that the respondent had been in practice for only 8 years the court should have only awarded him nominal damages.

Counsel for the respondent (**Mr. Odunga**) opposed the appeal and submitted that the grant or refusal of adjournment is discretionary. He stated that though after the adjournment the appellant applied for setting aside the proceedings, that application was not prosecuted and that the grounds raised in the defence were

not supported by any evidence.

According to counsel since issues before this Court were never dealt with by the superior court, this Court cannot go through them and that since publication was admitted in the defence, the complaint to the complaints commission was very serious and thus the award of damages made was proper.

There are submissions before this Court that counsel appearing for the appellant herein (*Mr. Wambugu*) did not appear in the superior court on the date listed for the hearing of the case. Neither was the appellant. Counsel instructed to hold brief for the appellants counsel (*Ouma C. B. G.*) applied for adjournment of the case because the latter was testifying in another case in the High Court at Nairobi. This application was opposed by counsel for the respondent (*Ouma*) because Mr. Wambugu did not contact him before hand that he would be seeking an adjournment of the case and that there had been sufficient time for him to exhibit before the court the material or the message requiring him to attend the Nairobi case as a witness, and that the appellant did not have witnesses in court.

The learned Judge refused to adjourn the case and though he did not give reasons for the refusal, he must have accepted the submissions by the respondent's counsel and found grounds advanced for the adjournment untenable. In any case he was exercising his discretionary powers in the matter and we do not find sufficient reason to fault his decision.

We have also heard submissions that after the *ex parte* hearing but before Judgement was delivered the appellant made an application for setting aside the *ex parte* proceedings which was not prosecuted. But even if it was prosecuted and the application allowed, we do not see how this decision would have affected the judgment which was not the subject of that application.

The letter dated 10<sup>th</sup> July 2003 referred to another one addressed to the Minister for Justice and Constitutional Affairs, Hon. Kiraitu Murungi. That letter was dated 30<sup>th</sup> May 2003 and though a copy thereof was included in the record of this appeal, it was not complete and we were not able to tell what its full contents were.

However the letter dated 10<sup>th</sup> July 2003 was fairly in very strong language. It mentioned the respondent as one of unscrupulous lawyers who appoint agents among factory workers and who recruit fellow workers as clients with the promise of handsome court awards. That he was engaged in the practice which was so rampant that it was almost crippling the operations of various tea factories in the districts mentioned in the letter, namely, Kisii, Nyamira and Gucha Districts; that the appellant was notorious in soliciting for business within the vicinity of the factories and was also engaged in fraudulent claims because the causes of action leading to the suits he filed never took place.

Looked at in general terms these allegations were very serious and from which it was very easy to impute malice. Moreover, as the learned Judge put it which we find, through the record of this appeal, to be the correct position:-

***“although the information relating to truth of all the cases handled by the plaintiff was available to the Manager of Kebirigo tea factor who is the defendant's employee and agent but (sic) it recklessly published the offending words without checking the truth of them from him.”***

The record shows those factory claims were settled one way or the other and in some of them, by consent. With that kind of information available, we do not see how the respondent would have been included in the letter to the Advocates' Complaints Commission as one of the advocates or lawyers notorious for soliciting for business within the vicinity of the factories or that he was engaged in fraudulent claims because the causes of action leading to the suits never took place. If this was the case, surely the appellant would not have allowed the settlement of the cases cited to us without any protest. These were clearly libellous allegations which had no justification and since there was an admission of their publication in the defence filed by the appellant there would have been no better finding as to the blame placed on the appellant than what the learned Judge of the superior court found. The letter was defamatory of the respondent and he was entitled to some compensation.

The principles which should guide the court on the amount of damages to be awarded to a party who suffers libellous correspondence were outlined in the case of **Jones v. Pollard [1997] E MLR 233 at page 243** which was quoted with approval in the case of **Johnson Evan Gicheru v Andrew Morton & Michael O'Mara Books Limited – Nairobi Civil Appeal No. 314 of 2000**. They are:-

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

In Gicheru's case also, a summary of the defamation cases decided in the recent past was listed and they included **George Oraro v Barack Weston Mbaja (HCCC No. 85 of 1992)** where the High Court awarded Kshs.1.5 million for defamation contained in an affidavit sworn in the United States but published in Kenya.

In **Abraham Kiptanui v Francis Mwaniki and 4 Others (HCCC No. 42 of 1997)** (unreported) Juma J. (as he then was) awarded former Comptroller of State House Kshs.3,500,000/= as general damages for libellous statements published by the now defunct "***Target***" Newsletter.

In **Joshua Kulei v Kalamka Limited (HCCC No. 375 of 1997)** (unreported) O'Kubasu J. (as he then was) also in a case involving the former Comptroller of State House awarded him Kshs.10,000,000/= as general damages against "***The People Daily***" newspaper.

In the twin "***Biwott cases***" i.e. **Nicholas Biwott v. Clay Limited & Another** and **Nicholas Biwott v Dr. Ian West & Another (HCCC No. 41068 of 1994)** a sum of Kshs.30,000,000/= was awarded for publication that had clearly international as well as local circulation.

In the case of **Charles Kariuki T/A Charles Kariuki & Company Advocates (HCCC No. 5 of 2000 (Meru))** an award of Kshs.20,000,000/= was made to an advocate for libel.

And on 6<sup>th</sup> May 2005 Khaminwa, J. in Mombasa **HCCC No. 102 of 2000 Daniel Musinga T/A Musinga & Company Advocates** awarded to the then advocate and now puisne Judge for a published libellous statement in a local daily, of Kshs.10,000,000/=

Earlier in January 2004 Lenaola, J. made an award of Kshs.17,000,000/= to the plaintiff in **HCCC No. 956 of 2003 Obure v. Tom Alwaka & Others** who had sued a local tabloid of the sensational type "***The Weekly Citizen***" on libellous publication on its headline titled – "***Ex Minister Obure steals man's wife.***"

Lastly on 28<sup>th</sup> January 2005 Ransley, J. (as he then was) in **HCCC No. 1717 of 1999** made an award of Kshs.2,500,000/= general damages and Kshs.500,000/= exemplary damages to retired Honourable Mr. Justice Akiwumi who had sued the respondent therein for libel the subject matter of the "***Gicheru***" appeal. Justice Akiwumi is a retired Judge of this Court and was one of the three Commissioners in the Judicial Commission of Inquiry in the death of Dr. Ouko.

Apart from the seventh case quoted the rest mostly concerned political elites, senior civil servants and advocates. They also included defendants who would qualify to be called gutter press and who did not defend the suits filed against them and that no appeals have been lodged against the decisions made in those cases or if they have, they have not been heard by this Court.

This appeal is against both the finding of the learned Judge and the quantum of damages awarded to the respondent. The argument is that the damages awarded were too high. As was said by **Windeyer J. in UREN v. John Fair Fax & Sons PTY LIMITED 117 C.L.C 115 at page 150:-**

***“It seems to me that properly speaking, a man defamed does not get compensation for his damaged reputation.***

***He gets damages because he was publicly defamed. For this reason, compensation by damages operates in two ways – as a vindication of the plaintiff to the public and as a consideration to him for a wrong done. Compensation is here a solatium rather than harm measurable in money.”***

In this appeal the respondent had, by the time of the award, been in practice for 8 years and the appellant had only written two letters about him; one to the Minister for Justice & Constitutional Affairs, and the other to the Advocates Complaints Commission. The former was not the subject of the respondent’s complaint before the superior court.

The letter the subject of this appeal was to the Complaints Commission only. No other letter was written. Looked at as a whole and compared to the other cases quoted in the Gicheru Case, the publication herein was not to the world at large. It was limited only to the Complaints Commission.

Looked at in this light and that the last four decisions quoted aforesaid may well end up on appeal, we are of the view that the learned Judge’s award in the case the subject of this appeal was too high in the circumstances and did not reflect the correct estimate on damages.

We would therefore allow this appeal and set aside the awards made by the superior court. Taking into account all the surrounding circumstances, we think that the composite award of Ksh.1,500,000/= would represent a fair and reasonable solatium to the respondent. Having done this we would find no reason for making a separate award as exemplary damages. The award will bear interest at court rates from the date of the superior court judgment, and as the appellant has partially succeeded in this appeal we award him half (½) costs thereof. The respondent shall, however, have costs of the appeal in the superior court.

***Dated and delivered at KISUMU this 11<sup>th</sup> day of July, 2008***

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**

.....

**JUDGE OF APPEAL**

**D. K. S. AGANYANYA**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**