REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAKURU

(CORAM: KWACH, OMOLO & BOSIRE, JJ.A.)

CIVIL APPEAL NO. 233 OF 2000

BETWEEN

GEKONG'A MONG'ARE T/A

GEKONG'A & MOMANYI ADVOCATES…… APPELLANTS AND

THE STANDARD LIMITED……. RESPONDENTS

JUDGMENT OF THE COURT

Two advocates, Gekonga Mongare and Omari Momanyi, filed a suit against the Standard Limited, claiming damages for defamation. The two advocates were trading in the firm name of Gekonga & Momanyi Advocates and they conducted their business in Nakuru. The Standard Ltd is the printer and publisher of a daily newspaper called the East African Standard. Rimita J heard the suit filed in the High Court and by his judgment dated and delivered at Nakuru on 4th February, 2000, the learned Judge dismissed the claim of the two advocates. The two advocates filed a joint notice of appeal on 16th February, 2000, but by the time we heard the appeal in Nakuru, Omari Momanyi had died. Under the proviso to section 2(1) of the Law Reform Act, Cap 26 Laws of Kenya, Omari Momanyi's claim died with him and we need not concern ourselves with it.

That leaves only the claim of Gekonga Mongare who is the only appellant before us. The respondent admitted that it published this story of and concerning the appellant:

> *"Former employees of the liquidated Elliots Bakery Limited have threatened to lynch a Nakuru Lawyer for reportedly refusing to hand over Shs. 1 million awarded to them by a local court as terminal benefits. The workers in a brief press statement further vowed to set on fire an office belonging to Gekonga & Momanyi Advocates of Nakuru if the lawyer fails to give them their money within 14 days. Early this year, a Nakuru Resident Magistrate, Nicholas Ombongi ordered Elliots Bakery, in liquidation, to pay its former workers a total of Shs.20,000/= each as general damages for unlawful lockout. Efforts to get the Lawyer's comments were fruitless as his telephone went unanswered.*
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> *The workers numbering 64 were represented by Gekonga & Momanyi Advocates during the hearing of the suit early this year. They alleged that the lawyer had already received the money from the defendants but had delayed in leasing it".*

As we have said the respondent admitted publishing that story in its issue of 17th November, 1997. It

may well be that sixty four former employees of Elliots Bakery Ltd went to the offices of the respondent in Nakuru and there threatened to lynch the two advocates and set their office on fire if the advocates did not release Shs. 1 million to them. It may also be true that attempts to obtain comments from the two advocates were fruitless as their telephone went unanswered. All that may well have been true.

But it was equally true that at no stage had the two advocates received Shs.1 million or any other sum from Elliots Bakery Ltd, in liquidation, or from anyone else to release to the former employees of that company. True, a judgment had once been entered in favour of the employees, but it was equally true that by the time the respondent published the complaints of the employees, that judgment had long been set aside and there was no decree upon which Elliots Bakery Ltd, in liquidation, could have been obliged to release to the advocates Shs.1 million or any other sum at all. Nor was there any evidence from any side, including the former employees some of whom testified on behalf of the respondent, that before the decree was set aside, Elliots Bakery Ltd had ever released any money at all to the two advocates. So it was absolutely false for anyone to say that the appellant and his late partner had refused to hand over Shs.1 million to the former employees; the appellant had no money at all to hand over. It was equally false to state that there was a court order decreeing the payment of Shs.1 million; there had once been such an order but the same court had set it aside. The respondent could have counter-checked these matters; even if the two advocates had refused to co-operate with the respondent's reporter in Nakuru, the failure to co-operate could not make the facts reported by the respondent true. They were not true and as far as we can see, all that the respondent can say is that it was misled by the sixty-four former employees and did not receive the correct version from the appellant. The latter point is a matter to be taken into account when considering what damages ought to be awarded to the appellant. The respondent could not plead justification as a defence. The basic facts were false and one cannot justify what is false. Even if we were to accept Mr. Majanja's contention that the issue was one of public interest in the sense that the public is entitled to know how advocates deal with their clients, yet it is trite law that comment can only be fair if the basic facts upon which the comment is premised are correct. A comment which is based on lies or falsehood cannot be designated as fair.

Having considered the facts and the law, Rimita, J. concluded that:

"from the foregoing it can be rightly said that the words complained of are defamatory on the face of it".

Having so held the only way the respondent could escape the consequences of that finding was to establish any of the defences known to the law, like justification, or fair comment on a matter of public interest, and such like defences available under the Defamation Act, Cap 36 Laws of Kenya. With the greatest respect to the learned Judge, the respondent totally failed to establish any such defence. That the appellant failed to co-operate with the respondent or that the respondent was merely reporting the complaints of the former employees could not afford the respondent a valid defence in law. If the advocates refused to co-operate the respondent could have gone and read the court file or even checked with Elliots Bakery Ltd, in liquidation, to see if any money had been released to the appellant.

We must allow this appeal. The learned Judge did not say what damages he would have awarded to the appellant, had he found for him. There is no material before us upon which we ourselves can make the assessment and it is unfortunate that we have to remit the matter to the learned Judge, a process which will involve further delay and attendant additional costs. In the circumstances of this case there is no way we can avoid that course.

Accordingly, we allow the appeal, set aside the order of the learned Judge dismissing the appellant's suit with costs and substitute it with an order entering judgment for the appellant as plaintiff with costs thereof. We remit the case to the trial Judge to assess the damages payable to the appellant. We grant to the appellant the costs of this appeal.

Dated and delivered at Nakuru this 18th day of October, 2002.

R. O. KWACH

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JUDGE OF APPEAL

R. S. C. OMOLO

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JUDGE OF APPEAL

S. E. O. BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISRAR