



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 1062 of 2005

JOHN WARD.....PLAINTIFF

VERSUS

STANDARD LIMITED.....DEFENDANT

RULING - A

This is an application by way of Chamber of Summons brought under Order VI Rule 13 (1) (B) and Rule 16 of the Civil Procedure Rules in which the plaintiff JOHN WARD seeks orders that paragraphs 6,7,8,9,10,11,12,13,14,15,16,17 and 18 of the Defence dated 26th September 2005 and filed herein be struck out, that judgment on liability be entered for the plaintiff against the Defendant and that the suit be set down for formal proof or assessment of damages. The plaintiff also seeks costs of this application.

The genesis of this application is as a result of an article which was published covering two pages being pages 34 and 35 of the issue of the Standard of 25th May 2005 in which the plaintiffs claim that the defendant published or caused to be published the following words concerning the plaintiffs.

IN THE MATTER OF THE DEATH OF JULIE WARD..... were the body parts found indeed those of Julie Ward, beyond reasonable doubt?.....That after discovery of the vehicle, Mr. John Ward ordered it to be washed “inside and outside” two days after the discovery of the vehicle what significance did this have on the investigations?.....why was the Suzuki vehicle given away so quickly to a Mara based European.....? Why did Mr. Ward in his own words plan to destroy the jeep? “So I planned to destroy it.....”An ensuing investigation, with new/or old evidence, must of necessity be impartial and free from emotion. If the over bearing shadow of Mr. Ward is removed from the equation, some semblance of impartiality may be restored.

To have Mr. Ward as a complainant and then for him to masquerade as a self styled investigator, expert, pathologist, photographer, planner, policeman, interrogator, legal advisor, author, among other specialties is most unfair to the legalities of the trial..... Mr. Ward snatching the records personally, accepting a skull, transmitting evidence to England without police escort, over the years confronting witnesses clandestinely, tape recording conversations, even that of the Commissioner of the Police makes reliance of the evidence dubious Kenyans, too, have been unfairly incarcerated, abused, pained, some for years, without apologies, without compensation and with their lives sin tatters.....

.....Is the Attorney General aware of an alleged meeting between Mr. Ward and Hon. Justice Abdullah in the UK after the Judgment) and when, and in what circumstances did the said meeting take place?.....

.....The fact of the matter is that none other than Mr. Ward has rendered important evidence of many

witness useless himself..... A time has come in the history of the country when the state has to give an explanation by a 17 years old case involving a tourist deserves such a privileged preference. Is it due to the persistence of his wealth? Or is it because the deceased was a Caucasian? The plaintiffs contention is that in their natural and ordinary meaning, the said words meant and were understood to mean that:-

“The plaintiff has obstructed the course of justice in the investigations into the cause of the death of his daughter, Julie Ward by the following actions of the plaintiff:

- i) has instigated and controlled the investigations,**
- ii) has masqueraded as a self-styled investigator, expert, pathologist, photographer, planner, policeman, interrogator, legal advisor, author etc.**
- iii) has snatched records personally, accepted the skull, transmitted evidence to England for examination without police escort,**
- iv) presented false or doubtful body parts which were not Julie Ward’s body parts for post-mortem and forensic examination,**
- v) presented false or fabricated medical and forensic reports purporting to have been carried on Julie Ward’s body parts when the plaintiff knew that it was doubtful whether the said body parts were Julie’s,**
- vi) after the discovery of Julie’s vehicle a Suzuki the plaintiff ordered the vehicle to be washed inside and outside,**
- vii) planned to destroy the vehicle,**
- viii) allegedly met the late Justice Abdullah in London in circumstances which are not clear (the late Abdullah was the presiding Judge in the High Court Criminal Case No.48 of 1991 involving the two accused rangers charged with the murder of Julie. They were acquitted in the proceedings,**
- ix) caused and was party to the arrest and charging of perceived suspects without sufficient evidence to sustain the charges,**
- x) has put forward false theories which have led to innocent Kenyans to suffer,**
- xi) has been part to the past incarceration of Kenyans without apologies and compensation for their suffering,**

(b) The plaintiff was to blame for the past failures to identify the killers of Julie Ward or to resolve the mystery of her murder because the plaintiff had rendered important evidence of many a witness useless himself.

(c) The plaintiff had deliberately and callously caused innocent Kenyans to be arrested over his daughter’s death while assisting her true killers to evade justice.

(d) The plaintiff has used his considerable personal wealth, influence and caucation race in order to cause the Kenya Government to waste, or squander public funds in the said investigations while assisting the true killers of his daughter in evading justice.

The said words were false and deliberately distorted. The publication of the said words complained of has gravely injured and ruined the reputation of the plaintiff, and has exposed the plaintiff to public ridicule, scandal and contempt and caused him tremendous embarrassment and distress. The defendant on being served with summons filed a defence in which he admitted publishing an Advertiser’s Announcement by one Pravin Bowry which contained the words set out in paragraph 11 of the Plaintiff but

further states that the article raised a number of issues with respect to the Julie Ward matter which matters have not been brought out in the excerpts reproduced in paragraph 11 of the Plaintiff.

In paragraph 6 the Defendants deny that the words can be construed either in their natural and ordinary sense or by way of innuendo or any necessary implication in the manner or form stated in paragraph 12 and 13 of the Plaintiff. The plaintiff is put to strict proof. Paragraph 7. In the alternative and without prejudice to the foregoing, the Defendant avers that in so far as the said words in the publication consist of facts that they were true in substance and in fact or were substantially true and in so far as they consist of opinions they were fair comment on a matter of public interest. **Particulars under Order VI Rule 6A of the Civil Procedure Rules.**

Particulars of Facts

(a) The murder of the late Julie Ward has been investigated many times by investigative probe teams/task forces constituted, an inquest has been held and two murder trials conducted in attempts to bring her killers to justice since 1998.

(b)The plaintiff has been deeply involved in the investigations into the death of his daughter since September 1988. He for instance marshalled the search team to look for her and subsequently her remains, discovered her jeep in a gully in Keekorok-Masai Mara, broke into the vehicle and removed the binoculars and map in it, collected the discovered body parts of the deceased and later handed then over to the police.

(c) The plaintiff did give away the deceased's jeep to one Mr. Tham, a Mara Based European and expressed the desire to have it destroyed because of bad memories. The plaintiff also knew and consented to the washing of the jeep inside and outside.

(d)The plaintiff expatriated the body parts of the deceased to the United Kingdom without police escort in order to be examined by Prof. Grasham and Dr. Roger Thorpe.

(e) The plaintiff has over the years met and confronted witnesses in the investigations into his daughter's death, tape recorded conversations and even conducted his own investigations.

(f) The plaintiff and his own daughter are Caucasians.

(g) Since 1988 some Kenyans have been arrested, detained, and charged with the murder of the deceased, with charges ultimately proved unfounded as they were acquitted.

(h)The plaintiff has admitted to putting relentless pressure on the Government to investigate the matter.

Particulars of Opinion:

(i)It is opinion to wonder whether the body parts found were of the deceased

(j)It is fair comment to ask what significance the washing of the car inside and outside had on the investigations

(k)It is a fair comment to ask why the Suzuki Jeep was given away so quickly to a Mara Based European, Mr. Tham.

(l)It is opinion to remark that the presence of the plaintiff in the investigations since 1988 has been overbearing.

(m)It is an opinion to remark that some resemblance of impartiality may be restored in the investigations if the plaintiff's involvement is removed.

(n) It is an opinion to remark that the plaintiff has been acting in many capacities in the investigations and which actions are unfair to the legalities of the trial.

(o) It is a fair comment to state that the actions of the plaintiff have rendered important evidence of any witness useless.

(p) It is an opinion to note that the case of the deceased has received special preference from the state.

(q) It is a comment to ask the state to give an explanation why a 17 years old case deserves special preference.

(r) It is an opinion and legitimate comment to wonder whether it is because of the persistence or wealth of the plaintiff or because the deceased was a Caucasian that the case has been given special preference.

Par.8 The Defendant will rely on Sections 15 of the Defamation Act Cap 36 Laws of Kenya.

Par.9 Paragraphs 14, 15, 16 and 17 of the Plaintiff are denied and the defendant put the plaintiff to strict proof of the allegations therein. In reply thereto, the defendant reiterates paragraphs 7 and 8 herein above.

Par 10 Further and in the alternative, the Defendant avers that the statement complained of is privileged being a statement volunteered in the aid of justice, and which concerns a suspected crime.

Par 11 The Defendant further and in the alternative avers that paragraphs 14-17 of the Plaintiff are matters of evidence and thus improperly pleaded in breach of the order VI of the Civil Procedure Rules. The Defendant will at the earliest opportunity apply to have the said paragraphs struck out.

Par 12 The Defendant denies the allegations of aggravated injury in paragraph 18 and 19 of the Plaintiff and reiterates paragraphs 7 and 8 herein above in reply thereto.

Par 13 The Defendant joins issue with paragraph 20 of the Plaintiff as the allegations contained therein are evidentiary and thus improperly pleaded.

The contents of the paragraphs are otherwise denied and the plaintiff put to strict proof on those allegations.

Par 14 Further and in the alternative the Defendant denies that the article was false and maliciously published as alleged, in reply it avers that the article complained of is clearly an advertiser's Announcement published on behalf of a disclosed Third Party.

Par 15 The Defendant joins issue with the allegations in paragraphs 21 and 22 of the Plaintiff that it published the article to deter the plaintiff, the Government and potential witnesses from investigating the matter or for sordid purposes. The allegations are clearly scandalous and oppressive and the Defendant will apply to have the same struck out.

Par 16 Paragraphs 23, 24, 25 and 26 of the Plaintiff are admitted save to add that the Defendant did not breach any obligations in view of the fact that the Advertiser's Announcement complained of is not defamatory of the plaintiff and in view of the averments contained in paragraph 8 therein above. The Defendant particularly denies the allegations of loss and damage and puts the plaintiff to strict proof thereof.

Par 17 The Defendants admit paragraphs 28 and 29 of the Plaintiff save to add that the same is of no consequence in view of the foregoing.

Par 18 The Defendant further avers that the plaintiff is not entitled to and this Honourable Court should not grant the orders prayed for in the Plaintiff.

The plaintiffs' application for orders to strike out the above stated paragraphs of the Defence is based on the ground that the defence pleaded in the above paragraphs of the Defence are unsustainable; that the words complained of are plainly defamatory, that a defence of justification without particulars is unsustainable, that repetition is no defence in defamation unless the words are true; that on admission made by the defence, the Defence of privilege as pleaded cannot stand; that in any event, the defendant's Defence does not come within the provisions of Section 6 and Section 7 of the Defamation Act Cap 36 Laws of Kenya; that the defence of fair comment is unsustainable because the words complained of are not comment. In any event there are no facts to support the alleged comments; alternatively the admissions of facts made in the defence render false and destroy the factual basis of the said comments; the findings of fact made by this Honourable Court in previous proceedings also render false and destroy the factual basis of the said comments; the comments are plainly not fair or honest and that the said Defence is scandalous frivolous and vexatious.

A statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule, or contempt or which causes him to be shunned or avoided or which has a tendency to injure him in his office, profession or calling.

The ingredients of defamation are:

- (i) the statement must be defamatory
- (ii) the statement must refer to the plaintiff
- (iii) the statement must be published by the defendant
- (iv) the statement must be false.

The defendant concedes to have published the words complained of, but submits that they were true in substance and fact. Since the law presumes that every person is of good repute until the contrary is proved, it is the defendant to prove affirmatively that the defamatory words are true or substantially true. The defence of justification asserts that the sting of the defamatory statement in its proper context is true in substance and in fact.

The law presumes that the defamatory words are false and it is upon the defendant to satisfy the court that the statement which is justified is true in substance and in fact.

If the statement complained of imputes the commission by the plaintiff of a criminal offence, to succeed in his plea of justification, the defendant must prove the commission of the offence charged but it seems that as for the civil action the standard of proof is proof on a balance of probabilities, although the more serious the charge the higher the degree of probability required.

The defendant further submitted that since at the stage of striking out a pleading, the court has no information on merits of the case through discovery and oral evidence, that power should be exercised very sparingly and cautiously. This is a drastic remedy and it is incumbent upon a judge to give reason for doing so. The Court of Appeal in the Case of **WARURU VS. OYATSI [2002] EA 664 (CAK)** had this to state:

"We quote with approval what L. WILMER J said in the case of WATERS VS. SUNDAY PICTORIAL NEWS PAPERS LIMITED [1961] 2 ALL ER 158 at 761:

It is well established that the drastic remedy of striking out a pleading or part of a pleading cannot be resorted to unless it is quite clear that the pleading objected to discloses no arguable case. Indeed it has been conceded before us that the rule is applicable only in plain and obvious cases.

For the purposes of this appeal, we are not in any way concerned with whether any of the defences raised is likely to be successful. The sole question in relation to each of the four hearings is whether the

case sought to be set up is so unarguable that it ought to be struck out limine.

We have come to the conclusion in relation to each of the four headings that it is quite impossible for us to take this drastic course.”

The defendant has pleaded and relies on the following four alternative grounds of Defence to the plaintiffs claim namely fair comment, justification, privilege and publication as agent of a disclosed party.

The defendant having conceded that he published the defamatory words complained of and having pleaded that the said words were true in substance and in fact, he ought to be given opportunity to satisfy the court the statement which is justified is true in substance and in fact and that the defences of opinion and fair comment are available to him.

The defence raises several triable issues that can only be determined at the full trial of the suit upon adducing evidence.

The plaintiff's application is therefore dismissed with costs.

DATED and delivered at Nairobi this 5th day of May 2006.

J.L.A. OSIEMO

JUDGE