**Karua v Radio Africa Limited t/a Kiss FM Station and others**

**Division:** High Court of Kenya at Nairobi

**Date of judgment:** 21 July 2006

**Case Number:** 3/06

**Before:** Nyamu and Emukule JJ

**Sourced by:** LawAfrica

**Summarised by:** E Ongoya

*[1] Constitutional law* – *Fundamental rights and freedoms – Freedom of Expression – Defamation law*

*– Whether defamation law a violation of the freedom of expression.*

**Editor’s Summary**

The plaintiff filed a defamation suit against Radio Africa Limited t/a Kiss FM station and others. The suit was commenced by way of plaint filed on 25 March 2004. By Chamber Summons of the same date the plaintiff sought and obtained an *ex parte* order temporarily restraining the defendants and/or their agents from airing, broadcasting, or presenting or referring to her in any manner whatsoever adverse to her reputation and standing or which ridicules and portrays her negatively in the eyes of the general public pending the hearing and determination of the suit. On the same day, an interim order was granted. The order was granted until 8 April 2004 when the application was to come up for hearing *inter partes*. On 8 April 2004, the court was informed that the defendants had a Preliminary Objection to raise. The judge adjourned the Chamber Summons for *inter partes* hearing on 21 April 2004. On 21 April 2004, the *inter partes* hearing did not take place because the defendant had filed a Chamber Summons Application a date before the scheduled hearing date reiterating the objections raised earlier. The court stood over the matter to 3 May 2004 as the date for the hearing of the Preliminary Objection. On 3 May 2004, the plaintiff had filed a further application to amend the plaint. The court heard counsel for both parties and rules that the application to further amend the plaint would be heard in priority and before the Preliminary Objection and the application to strike out the plaint. The court further directed that once the plaintiff had argued the application the application for amendment the defendant would be free to elect either to argue its Preliminary Objection or take any other action that they may deem necessary and expedient. On 23 September 2004, the defendants filed a Notice of Motion seeking orders that the refusal by the Honourable Court to hear the Preliminary Objection raised by the defendants contravened section 70(*a*) and section 77(9) of the Constitution thus denying the defendants the secure protection of the law and a fair hearing. The defendants also sought a declaration that the allegations made in the plaint and the prayers sought in the plaint contravened and were likely to contravene section 79(1) of the Constitution.

**Held** – The High Court had jurisdiction to determine a constitutional question challenging an order of another judge of the High Court. *Labhsons Limited v Manula Haulers Limited t/a Tausi Travellers* High Court civil case 204 of 2003 followed. The fundamental rights and freedoms in Kenya, although dearly cherished are not absolute. They are subject to the rights and freedoms of others. The freedoms and rights of others are equally protected by the Constitution and guaranteed to every person. In addition, the rights and freedoms are subject to the public interest *Kenya Bus Service Limited and others v Attorney General and others* [2005] LLR 5939 (HCK) followed. The reason why the fundamental rights and freedoms are subject to the rights of others and the public interest as per the Constitution of Kenya is that they create a mutuality in terms of their enjoyment and responsibility. They are subject to the public interest because it is absolutely necessary to achieve the common good for all. In holding that it had to hear the application for amendment prior to entertaining a Preliminary Objection the trial court correctly exercised its discretion in allowing the amendments so that the real questions in controversy as between the parties can be determined. A court seized of a question of violation of fundamental rights and freedoms has to deal with the question in two stages, first, is to determine whether the right or freedom in question has been infringed. If there is no infringement or contravention the court needs not go into the second stage. The second stage is to consider the conceptual structure of the limitation to the rights and freedoms. In determining the reasonableness of a limitation to fundamental rights and freedoms, the interest underlying the limitation must be of sufficient importance to outweigh the constitutionally protected right and the means must be proportional to the object of the limitation. Since what is at stake is a limitation of fundamental rights that must mean the legislative of the limitation law must be motivated by substantial as opposed to trivial concerns and directed towards goals in harmony with the values underlying a democratic society. The proportionality test to limitations on fundamental rights and freedoms required that any limitation:

(*a*) Must be rationally connected to its objective;

(*b*) Should impair the right or freedom as little as possible, and there is proportionality between its

effects and its objectives.

**Cases referred to in ruling**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*Kenya Bus Service Limited and others v Attorney General and others* [2005] LLR 5939 (HCK) – **F**

*KJ Kinyanjui v Attorney General*

*Labhsons Limited v Manula Haulers Limited T/A Tausi Travellers* High Court civil case 204 of 2003 – **F**

*Maharaj v Attorney General of Trinidad and Tobago* (number 2) 1982 All 670

*Peter Nganga Muiruri v Credit Bank Limited*

***Others***

*In Reference* Re *Public Service Employee Relations Act, Labour Relations Act and Police Officers*

*Collective Bargaining Act* [1987] 38 DLR

*Compulsory Membership in an Association Prescribed By Law For The Practice of Journalism (Article*

*13 ad 29 American Convention on Human Rights), Advisory Opinion OC5/85* of 13 November1985

*Handyside v United Kingdom* 1 EHRR 737

*Lingens v Austria European Court Human Rights case of* judgment of 8 July 1986

*R v Oakes* [1986] 26 DLR

*S v Makwanyane and another* 1995 (6) BCLR 665 (CC)