disparate valuations, the learned Judge observed that:-

> "Given the prevailing financial climate and the conditions at a public auction, it cannot be said 200,000 was inconsiderably low or in any way surprising".

In my humble view, that was a perfectly legitimate observation and does not justify a charge that he made emphatic findings of fact or decided issues of fact on conflicting affidavits.

One fact that must not be lost sight of, is that notwithstanding the parties the appellant jointly sued as defendants, the real issue of "nullification" is being fought between the appellant as mortgagor and the 2nd respondent as a purchaser. If the sale is held invalid, the 1st respondent as mortgagee, is not in the least affected. He is entitled to re-advertise the sale and conduct yet another sale to realize the money it has lent. The only loser is the purchaser. My limited and imperfect knowledge of equitable principles, teach me that they are designed in a large measure, to protect a bona fide purchaser for value. And in my opinion, the 2nd respondent answered that description, Yet, an injunction denied by the Court below, in my view, perfectly properly, was imposed by this Court in June 1986 and its effect was to prevent the transfer of the property to the purchaser. That injunction, resulted in keeping a mortgagor whose equity of redemption has been extinguished, in beneficial enjoyment of the property for 2 solid years. Now that the law on which the mortgagor took his stand has been found to provide him no assistance, it is said the injunction must be re-imposed to keep the purchaser out of enjoyment for probably another 2 years so that a defaulting mortgagor may be able "to defend himself in order to see that the sale is at a true market value."

Although I may be entirely wrong on this, I cannot believe that a Court of Equity would treat its darling, as a bona fide purchaser for value is sometimes called, in that manner. The equitable and beneficient remedy of injunction is said to be a double-edged sword. It is often used to aid rights and to prevent wrongs. It may also be used, albeit unwittingly, as a vehicle of oppression. A reimposition of injunction, at this stage and on the known facts of this case, would be to use this equitable remedy in the latter manner.

I am, for my part, entirely convinced that Schofield J was right to decline the remedy of interim injunction and whatever justification this Court may have for imposing it in June 1986, none in my opinion, now exists.

I would dismiss this appeal and set aside the order of "stay of proceedings" granted by this Court in June 1986 with costs to both respondents.

Republic *v* Mathai & 2 others

High Court, at Nairobi — April 10, 1981

Simpson, Nyarangi & Platt JJ

Criminal Application No 53 of 1981

Contempt of Court *– criminal contempt – scandalizing the court as a species of contempt - jurisdiction of High Court to punish for such contempt – how jurisdiction exercised – magazine publishing comments by interviewee imputing corruption or incompetence on a judge – whether contempt committed – whether interviewee, interviewer and editor of magazine guilty of contempt - Judicature Act (cap 8) section 5.*

Constitutional Law *– fundamental rights – freedom of expression – Constitution section 79(1), (2) – legal limits of this freedom – statute law aimed at maintaining authority and independence of courts by punishing for contempt of court - Judicature Act (cap 8) section 5 – whether such law unconstitutional for interfering with freedom of expression.*

The first respondent was divorced from her husband following a divorce petition presided in the High Court by Chesoni J and dismissed on appeal by the Court of Appeal.

In the February, 1981 issue of *Viva*, a well-known women's magazine, there appeared an article headed "Wangari Mathai Speaks Out, an exclusive interview by Miriam Kiarie".

The article recorded the first respondent as saying that she had been shocked at the court's acceptance of the divorce on the grounds of her adultery, that the charge was never proved and further, it stated:

> "I will say without fear that there can only be two reasons for the court to have said that I committed adultery: corruption or incompetence."

The Attorney-General applied for an order that the first respondent together with the Editor-in-Chief of the magazine (the second respondent) and the person stated to have conducted the interview for the article (the third respondent), be committed to prison for contempt of court.

Held:

1. Under the Judicature Act (cap 8) section 5, the High Court and Court of

Appeal are given the same power to punish for contempt of court as is for the time being possessed by the High Court of justice in England. From English authorities, the law in respect to criminal contempt in Kenya, as opposed to contempt *in facie curiae* for which provision is made in the Penal Code (cap 63) section 121, was as follows:

a) Scandalizing the court does exist as a category of contempt. Any act done or writing published which is calculated to bring a court or a judge into contempt, or to lower his authority, or to interfere with the due course of justice or the lawful process of the court, is a contempt of court.

b) Such acts or writing need not affect pending proceedings. Scurrilous abuse of a judge or a court, or attacks on the personal character of a judge – particularly attacks alleging lack of impartiality or improper motives, is a punishable contempt even where an alternative remedy such as an action for defamation may be open to the judge.

c) The punishment is inflicted not to protect the court as a whole or the individual judges, but to protect the public, especially those who are under the jurisdiction of the court, from the mischief they will incur if the authority of the tribunal is undermined or impaired.

d) Criticism of a judge's conduct or of the conduct of a court, even if strongly worded, is not a contempt provided that the criticism is fair, temperate and made in good faith and is not directed to the personal character of a judge or to the impartiality of a judge or court.

e) The offence must be proved beyond reasonable doubt and it is a jurisdiction to be exercised only in the clearest of cases of necessity in the interests of the administration of justice and the protection of the public from the result of undermining the authority of the court.

f) There being no prescribed procedure, the appropriate procedure is that provided in the Rules of the Supreme Court of England order 52.

2. The Constitution section 79(1) provided for the protection of a person's freedom of expression. However, subsection (2) of that section allowed for a law to be made for maintaining the authority as well as the independence of the courts without that law being inconsistent with or in contravention of the subsection 1. It followed that the Judicature Act section 5 and the relevant law of England was not inconsistent with the Constitution.
3. The relevant passage meant that the judge was capable of corruption since he found the first respondent guilty of adultery. The passage was a calculated scurrilous abuse of the judge, which the first respondent knew or must have known would bring him into contempt and lower his authority. The first respondent aggravated her contempt by renewing her attack of the judge in open court.
4. This was a clear case where the jurisdiction of this Court to punish for contempt had to be exercised in the interests of the administration of justice in Kenya. Having regard to he gravity of the contempt, the aggravation and the absence of a proper apology, this Court had no alternative but to make an order for committal.
5. The Court accepted the prompt, full, unconditional and unreserved apology of the second respondent. Nevertheless, as editor and producer of the article, he ought to have been aware of the law of contempt and libel and he had to bear the responsibility of publication.
6. Though the third respondent had taken a negligible part having been present at the recording of the interview and taken some notes but left the editing entirely to the second respondent, she could not entirely escape responsibility as the article appeared in her name without her dissent. That she was complying with instructions could afford no defence in such a case.

First Respondent committed to prison for six months, Second Respondent committed to prison for three months but committal warrant to be discharged on payment of a fine of Shs 10,000, Third Respondent given unconditional discharge.

Cases

1. *Roach v Hall* 2 Atk 471
2. *R v Almon* 97 ER 94
3. *McLeod v St Auby* [1899] AC 549
4. *R v Editor of the New Statesman* (1928) 44 TLR 301
5. *R v Gray* [1900] 2 QB 36
6. *Ambard v AG of Trinidad & Tobago* [1936] All ER 704; AC 322
7. *R v Commissioner of Police of the Metropolis ex parte Blackburn No 2* [1968] 2 QB 150
8. *AG v Leveller Magazine Ltd* [1979] 1 All ER 745
9. *AG v New Statesman and Nation Publishing Co Ltd* [1980] 1 All ER 644
10. *AG v BBC* [1980] 3 All ER 161
11. *Borrie v Lowe* (1969) CJNB

Texts

1. Hailsham, Lord *et al* (Eds) (1973-87) *Halsbury's Laws of England* London: Butterworths 4th Edn Vol IX p 21
2. Borrie, G., Lowe, N *The Law of Contempt* London: Butterworths
3. Hughes, AE "Contempt of Court and the Press" *Law Quarterly Review 1900* Vol XVI p 292

Statutes

1. Judicature Act (cap 8) sections 3,5
2. Constitution of Kenya section 79, 79(1)

3. Penal Code (cap 63) section 121 1
4. Rules of the Supreme Court [UK] order 52

Advocates

S Rao & A Rebello for the Attorney-General
P Muite & L Muthoga for the First Respondent 5
S Gautama for the Second Respondent
B Patel for the Third Respondent

April 10, 1981, **Simpson, Nyarangi & Platt JJ** delivered the following 10
Judgment.

In the issue of *Viva* (Vol 7 No 1) published in Nairobi in February, 1981, there appeared an article under the heading "*Wangari Mathai Speaks out, an exclusive Viva interview by Miriam Kiarie*" in which the following passage occurs:- 15

> "What shocked me most of all was the court's acceptance of the divorce on the grounds of adultery. That charge was never proved in court, and I will say without fear that there can only be two reasons for the court to have said that I committed adultery: corruption 20 or incompetence."

Wangari Mathai is a professor at the University of Nairobi. She had recently been divorced by her husband on the grounds of her adultery. The petition was heard by Chesoni J and an appeal by Professor Wangari Mathai to 25 the Court of Appeal was dismissed. The editor-in-chief of *Viva*, a well-known and reputable women's magazine, is Mohamed Salim Lone.

The Attorney-General, having obtained the requisite leave of the Court, has applied by Notice of Motion for an order that Wangari Mathai, 30 Mohamed Salim Lone and Miriam Kiarie be committed to prison "and for such further or other orders as may seem just to the Court, for their several contempts" of the Court in publishing the article in question.

Section 5 of the Judicature Act (Cap 8 of the Laws of Kenya) gives this 35 court and the Court of Appeal the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England.

The head of contempt with which we are concerned in this instance is 40 generally known as scandalizing the court, a type of criminal contempt for which no specific provision has yet been made in the Laws of Kenya, no doubt because of the rarity of the offence. This is the first case of its

kind since Independence. 1

The following passage in *Halsbury's Laws of England,* 4th Edition, Vol 9 at p 21 sets out the law in relation to scandalizing the court:-

> "27. Scandalising the court. Any act done or writing 5 published which is calculated to bring a court or a judge into contempt or to lower his authority, or to interfere with the due course of justice or the lawful process of the court, is a contempt of court.
>
> 10
>
> Thus scurrilous abuse of a judge or a court, or attacks on the personal character of a judge, are punishable contempts. The punishment is inflicted, not for the purpose of protecting either the court as a whole or the individual judges of the court from a repetition of the 15 attack, but of protecting the public, especially those who either voluntarily or by compulsion are subject to the jurisdiction of the court, from the mischief they will incur if the authority of the tribunal is undermined or impaired. In consequence, the court has regarded with 20 particular seriousness allegations of partiality or bias on the part of a judge or a court.
>
> On the other hand, criticism of a judge's conduct or of the conduct of a court, even if strongly worded, is not a 25 contempt provided that the criticism is fair, temperate and made in good faith and is not directed to the personal character of a judge or to the impartiality of a judge or court."

30

Mr Muite who appeared with Mr Lee Muthoga for the 1st Respondent, Professor Wangari Maathai, submitted that this statement represents the law as understood by the learned writers, but that for a proper understanding we need to examine the decisions of the courts. In particular he contended that the object of the jurisdiction of the court to punish for 35 contempt is to prevent interference with or obstruction to the administration of justice. The offending words must affect a pending case. Once a case is concluded the judge is given over to public criticism. We will therefore consider the history of this type of contempt in the cases.

40

It was L Hardwicks L (in *Roach v Hall* 2 Atk 471) who said "one kind of contempt is scandalizing the Court itself." In 1765 Wilmot CJ wrote a learned opinion on the law of contempt reported in *Reg v Almon* 97 ER

1794. No judgment was delivered, the prosecution having been dro d.

> "The arraignment of the justice of the judges", he wrote, "is arraigning the King's justice; it is an impeachment of his wisdom and goodness in his choice of his Judges, and excites in the minds of his people a general dissatisfaction with all judicial determination, and indisposes their minds to obey them; and whenever men's allegiance to the law is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever .... To be impartial and to be universally thought so are both absolutely necessary for ....justice ...."

As the learned authors (Borrie & Lowe) of *The Law of Contempt* remark this opinion "sounds rather picturesque today, but it does embody the basic underlying principle."

From 1765 we move to 1899.

The case of *McLeod v St Auby* [1899] AC 549 was an appeal to the Judicial Committee of the Privy Council from a decision of the Supreme Court of St Vincent. McLeod had been committed for publication of an article and a letter vilifying the Acting Chief Justice. The Lordships advised Her Majesty that the appeal be allowed on the ground that the appellant was not responsible for publication.

Their Lordships had no doubt that contempt was not restricted to comments on cases pending in the courts. Lord Morris had this to say:-

> "NOW, what are the considerations applicable to the case? Committals for contempt of Court are ordinarily in cases where some contempt ex facie of the Court has been committed, or for comments on cases pending in the Court. However, there can be no doubt that there is a third head of contempt of Court by the publication of scandalous matter of the Court itself. Lord Hardwicke so lays down without doubt in the case of *In re Read and Huggonson*. He says, "One kind of contempt is scandalising the Court itself". The power summarily to commit for contempt of Court is considered necessary for the proper administration of justice. It is not to be used for the vindication of the judge as a person. He must resort to action for libel or criminal information. Committal for contempt of Court is a weapon to be used sparingly, and always with reference to the interest of the administration of justice. Hence, when a trial has taken place the case is over, the judge or the jury are given over to criticism."

He went on to add that while committal for contempt for scandalizing the court might still be necessary in small colonies to preserve the dignity of and respect for the court it had become obsolete in England. This is the authority upon which Mr Muite relies most strongly.

The following year, however, the Queen's Bench Division in *Reg v Gray* [1900] 2 QB 36 committed Gray for contempt for publishing in England an article containing scurrilous personal abuse of a judge, after proceedings had ended.

Lord Russell of Killowen, delivering the judgment of the court said (at p 40):-

> "Any act done or writing published calculated to bring a Court or judge of the Court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court. The former class belongs to the category which Lord Hardwicke L.C characterised as Scandalising a Court or a judge. That description of that class of contempt is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticize adversely what under such circumstances and with such an object is published; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen."

This decision was criticised in a contemporary article in the *Law Quarterly Review* (No LXIII p 292) which Mr Muite read in support of his submission that proceedings must be pending.

Since then, however, the rule as stated by Lord Russell of Killowen has been generally accepted.

For example Lord Hewart CJ, who delivered the judgment of the court in *R v Editor of the New Statesman* (44 T.L.R 301) said before quoting the foregoing passage that the principle "applicable to those fortunately very rare cases was stated in *Reg v Gray*:-

> "Applying those canons, he said, and all of them, to the present matter, the Court had no doubt that the article complained of did constitute a contempt. It imputed unfairness and lack of impartiality to a Judge in the discharge of his duties. The gravemen of the offence was that by lowering his authority it interfered with the performance of his judicial duties."

The matter before the court was an article containing the following passage:-

> "The serious point in this case, however, is that an individual owning to such views as those of Dr Stopes cannot apparently hope for a fair hearing in a Court presided over by Mr Justice Avory – and there are so many Avorys."

In *Ambard v A.G of Trinidad & Tobago* [1936] All E.R 704 the Privy Council reviewed *McLeod v St Aubyn* & *Reg v Gray*. Lord Atkin delivering the opinion of the Board in a case where a newspaper article was published critically reviewing the inequality of sentences passed in criminal cases, held that no contempt had been committed. In reaching this conclusion he expressly applied the law as laid down in *R v Gray*, noting that although Lord Morris had said that committals for contempt of Court by scandalising the Court itself had become obsolete, that observation had been sadly disapproved the next year by *Reg v Gray*. This illustrates that by 1936, the view contended for by Mr Muite had been firmly rejected by both High Court and the Privy Council in England. Lord Atkin then set out his view of law, which shows the increasing concern that the jurisdiction of the court should not detract from the right of public criticism:-

> "But whether the authority and position of an individual judge or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticizing in good faith in private or public the public act done in the seat of justice. The path of criticism is a public way: the

> wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men."

Lord Atkin also made the following comments (at page 701) which are worth quoting:-

> "......in one aspect it [the case] concerns the liberty of the press which is no more than the liberty of any member of the public to criticize temperately and fairly but freely any episode in the administration of justice.

In 1968 Lord Denning, M.R was afforded an opportunity of considering the question when a motion was brought for an order for contempt of the Court of Appeal. (*Reg v Commissioner of Police of the Metropolis ex parte Blackburn No 2* [1968] 2 Q.B 150).

There again an article in a magazine had been published after proceedings had ended, which was partially wrong in fact, and certainly critical of the Court of Appeal.

Lord Denning declared that the Court had jurisdiction to deal with this type of contempt, which would come under the heading of scandalizing the Court. But he observed the limitations that would be imposed. His views will be found at page 154 as follows:-

> "This is the first case, so far as I know, where this court has been called on to consider an allegation of contempt againt itself. It is a jurisdiction which undoubtedly belongs to us but which we will most sparingly exercise: more particularly as we ourselves have an interest in the matter.
>
> Let me say at once that we will never use this jurisidiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself.

> It is the right of every man, in Parliament or out of it, in the Press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticize us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication."

It was held that the article in question was not contempt of court and Salmon LJ (P 155) said:-

> ".....no criticism of a judgment, however vigorous, can amount to contempt of court, providing it keeps within the limits of reasonable courtesy and good faith. The criticism here complained of, however rumbustious, however wide of the mark, whether expressed in good taste, or in bad taste, seems to me to be well within those limits."

There have been several more recent cases still, which have dealt with different aspects of contempt of court. They were not referred to by Counsel, but we have considered them to ascertain whether the climate of reform in England has affected the situation. There is nothing to suggest in *A.G. v Leveller Magazine Ltd.* (where Lord Diplock explained that the common characteristic in criminal contempts, was that they involve an interference with the due administration of justice, either in a particular case, or more generally as continuing process, whereby justice itself is flouted: see p 749 [1979] 1 All E.R 745; or in *A.G v New Statesman* [1980] 1 All E.R 644, that the English law has changed. It seems that despite the plea for reform by Lord Salmon in several cases, and by Lord Scarman in *A.G. v B.B.C* [1980] 3 All E.R 161, where the latter suggests obiter that a scandalizing of the court should be the subject of criminal proceedings after the event (see p 184), the approach is clearly that the concept of administration of justice, may include pending proceedings or the future continuing process.

From the foregoing it is apparent that the statement contained in *Halsbury's*

Laws of England (4th Edition) Vol 9 is, so far as it goes, an adequate and uptodate summary of the law with respect to the power of the High Court of Justice in England to punish for criminal contempt.

Mr Muite however went on to submit that there was a fundamental difference between the position in England and that in Kenya since Kenya has a written constitution. Freedom of speech is not a matter of precedent. It is a constitutional matter, he said, and under section 3 of the Judicature Act the constitution prevails.

Section 79 of the Constitution provides as follows:-

> "79 (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –
>
> (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;
> (b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts or regulating the technical administration or the technical operation of telegraphy, posts, wireless broadcasting or television; or
> (c) that imposes restrictions upon public officers or upon persons in the service of the East African Community or of a local government authority, and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

A law may therefore without being inconsistent with or in contravention of the provisions of sub-section (1) provide for maintaining the authority as well as the independence of the courts. Hence section 5 of the Judicature Act and the relevant law of England as set out in the foregoing authorities is not inconsistent with the Constitution. Mr Muite invited our attention to a number of American decisions referred to in 159 ALR 1379 under the heading "Freedom of speech and press as limitation on power to punish for contempt." He did not however refer us to the appropriate provisions of law in the Federal Constitution or the Constitutions of the various states and it is in any case difficult to see what assistance American authorities can provide in the face of the provisions of section 5 of the Judicature Act enjoining us to follow the law of England. Be that as it may, Mr Rao, who appeared with Mr Rebello for the Attorney-General, pointed to a passage at p 1391 indicating that in America also abuse of the right of free speech is not permitted to destroy or impair the efficiency of the courts or the public respect therefore and confidence therein.

It may be of interest to note that in Canada, where there is a written constitution Lord Morris' view was expressly rejected in favour of *Reg v Gray* (see *Borrie v Lowe*, p 167. Per Bridges C.J N.B in 1969). It appears therefore to be a contempt accepted in the Common wealth. It is not merely an idiosyncrasy nor an anachronism from England. We have noted the conclusions and suggested reform of scandalizing the court set out in *Borrie and Lowe* to which we have already referred, where the authors agreed that scrurrilous abuse of a judge should amount to a contempt. It appears to be still accepted as a reasonable limitation on freedom of expression and of the press by the courts. We note however that the law in England may soon be regulated by statute, as the Phillimore Report and the House of Lords have suggested. But having studied the report and the Contempt of Court Bill (H.L) which does not entirely follow the Report, we consider we are bound to follow the case law as it stands.

The law in respect to criminal contempt in Kenya (other than contempt in *facie curiae* for which provision is made in section 121 of the Penal Code) may thus we think be briefly stated as follows:

Scandalising the court does exist as a category of contempt. Any act done or writing published which is calculated to bring a court or a judge into contempt or to lower his authority or to interfere with the due course of justice or the lawful process of the court, is a contempt of court.

It is not necessary that such acts or writing should affect pending proceedings. Scurrilous abuse of a Judge in his capacity as a judge or a

court – particularly attacks alleging lack of impartiality or imputing improper motives – is a punishable contempt. This is so even where another remedy such as an action for libel or slander may be open to the judge. But the jurisdiction is not to be used for the vindication of the judge as a person, it is always to be used with reference to the interest of the administration of justice. Such abuse must be distinguished from healthy comment and criticism, and the court must scrupulously balance the need to maintain its authority with the right to freedom of speech. The offence must be proved beyond reasonable doubt and it is a jurisdiction to be exercised only in the clearest cases of necessity in the interests of the administration of justice and the protection of the public from the result of undermining the authority of the court.

There being no prescribed procedure the appropriate procedure is that provided by Order 52 of the Rules of the Supreme Court of England.

Turning now, to the facts of the instant case it is admitted by the 2nd and 3rd respondents that the articles containing the passage complained of was published in the February issue of *Viva*. In a sworn statement the 1st respondent states:-

> "Indeed I did not see the edited version of the interview until after the article was published. I hasten, however, to add that I could have, and on reflection I think I did, use the words complained of."

If there could be any doubt as to the unequivocal nature of this admission it is satisfactorily removed by the tape recording of the interview, the relevant part of which was played back to the court with the consent of all parties. The 1st respondent more than once said:-

> "If it is not incompetence it is corruption"

and she added

> "You can say I said that."

Is the passage complained of a scurrilous abuse of the judge who heard the divorce petition in his capacity as a judge and is it calculated to bring the judge into contempt or to lower his authority?

Mr Muthoga pointed out that the offending passage amounted to no more than 1% of the whole article in which a number of topics were discussed. It was not as in most reported cases an article entirely devoted to scandalizing the court.

It matters not how brief may be the passage in question so long as it

clearly and unequivocally impugns the impartiality of the judge. Infact however the passage in question forms part of the section in the article on the Professor's divorce, a subject she was anxious to explain.

In her statement the 1st respondent said:-

> "I wish to emphasize that I did not at any time say that the judge was corrupt."

It is true she did not say so in those words.

She said:-

> "....there can only be two reasons for the court to have said that I committed adultery: corruption or incompetence."

The meaning is clear. The judge is capable of corruption since he found her guilty of adultery. There can be no greater abuse of a judge than to call him or suggest him to be corrupt in the discharge of his duties. That would lower his authority and interfere with the performance of his duties. Nor was it an ill-considered remark carelessly thrown out in the course of a lengthy interview. The tape shows that it was repeated and fully considered. Even the possible consequences were considered. "Am I not brave in saving?" she asked the editor. It was a calculated scurrilous abuse of the judge, which the 1st respondent knew or must have known would bring him into contempt and lower his authority. We are therefore in no doubt whatsoever that this is a clear case where our jurisdiction to punish for contempt must be exercised in the interests of the administration of justice in Kenya.

In her statement she reiterated that there never was any intention on her part to scandalize the Court, or to bring its reputation to public ridicule. But this must be read in the context of the whole statement which we now consider in relation to the appropriate sentence to be imposed. Her advocates refer to it as a full and unqualified apology. That it certainly is not.

The portion of the statement claimed to be an unqualified apology is as follows:-

> "On advice particularly of my counsel, I now appreciate the words "incompetent and corrupt" are capable of scandalizing the court and or lowering its authority and respect. For this I wish to tender my deepest regrets and apologies to this Honourable Court."

She continues:-

> "I pray for an acquittal not merely because I feel I deserve one but especially because I am convinced that there is an inalienable right in each one of us to hold views, even mistaken views on any matter. All I did and do now is to hold the views which the magazine in its deliberate wisdom, or inadverterly (sic) in the conviction that they were, as I mentioned they are, harmless chose to publish."

Earlier in her statement she said:-

> "It has been suggested to me that I should in the face of the confusion which has ensued apologise even if I think I am right. In my school days they taught me, to some effect think, that honesty is the best policy. I would be being dishonest if I were to say that my divorce case was handled competently and honestly. Of that dishonestly (sic) I am capable."

The following passage is also highly relevant:-

> "I cannot, with the greatest respect, take such findings as clear evidence of competence on the part of the judge. I need not say that I am not a lawyer, I was therefore willing to concede that if competence did in fact exist then there must have been corruption. I wish to emphasize that I did not at anytime say that the judge WAS CORRUPT. I merely explained the verdict by the existence of either total incompetence or corruption. Unless called upon I do not wish to elaborate on the grounds of my mind-wondering on the possibility of corruption existing. But I do wish to state that the judge who heard my case is, like Mwangi, a renowned businessman in this city with extensive business interests permeating every sector of commercial life which include Tawai Ltd. Lorco Ltd.
> C & N Ltd, Peston Ltd, Checka Investments and Home Developments Ltd.
> My Lords, it is not as if I set out to mount a scathing attack on the intergrity (sic) of this court. I believe and I wish to affirm that belief, here, that in the main, people administering justice in this country are, by and large, competent and of impeccable character and reputation

> Of that I have never had any doubt. I must, however, say that it would be fool-hardy to suggest that this is the one basket in which no rotten fruit can be found or for that matter to argue that judges, unlike other mortals, are incapable of error."

Her contempt is thus aggravated by renewing her attack in open court. The only reasonable inference to be drawn is that Chesoni J is outside the category of people of impeccable character and reputation. As she herself says she is not a lawyer. On the other hand she is not an uneducated person. She is an academic trained to rational thought and clarity of expression. She must be taken to mean exactly what she has said. Looking at the matter broadly for a moment, to use the Professor's own words, people are entitled to hold their own view, even mistaken views. We agree with her entirely. She is entitled to hold her own views, and express her criticism. But two results follow from that position. She must allow to others the same right to disagree with her, including a court, and accordingly her criticism must be couched in reasonable terms. She must not vilify those who disagree with her. A moment's reflection will show that the Professor is not being asked to believe or accept anything impossible or unpalatable to her, but simply to conduct her dissent in sensible terms, as indeed all parties and witnesses who lose a legal battle are required to do, for the sake of the continuing process of the administration of justice. Having regard to the gravity of the contempt, the aggravation contained in her statement, and the absence of a proper apology we have no alternative but to make an order of committal.

While the graveman of the abuse in the present case is the allegation of corruption it should not be thought that an allegation of incompetence in a judge can never amount to contempt. In a temperate reasoned criticism of a judge's decision the word "incompetent" might fairly be used (although it would be lacking in courtesy and respect). But where a disgruntled litigant (or witness) without giving reasons such as for example the judge's disregard of corroborative documentary evidence calls a judge incompetent merely because he has disbelieved his (or her) evidence this could amount to contempt.

The second respondent has made a prompt, full, unconditional and unreserved apology which we accept. Mr Satish Gautama who appeared for him disassociated himself from the submissions and arguments of the advocates for the 1st respondent. The contempt he said was unwitting and unintentional, The editor he submitted had insufficient time to ponder the consequences. The offending passage was an incidental chance remark in the course of a lengthy interview with one of Kenya's most distinguished women.

We accept that the 2nd respondent was reporting the views of the 1st respondent, but as the editor and producer of the article he must bear the responsibility of publication. As an editor of a reputable magazine he ought to be aware of the law relating to contempt and libel, at least to the extent of seeking legal advise in doubtful cases. In the present case his attention was drawn to the dubious nature of the 1st respondent's words by her repetition of the expression "You can say I said that" and her question "Am I not brave?". We shall make an order of committal but shall offer the alternative of a substantial fine.

The Attorney-General concedes that the 3rd respondent who was represented by Mr Bhailal Patel took a negligible part. She was present at the recording of the interview and took some notes but as instructed left the editing entirely to the 2nd respondent. She saw the edited version only when it appeared in the magazine. The article however appears under her name without her dissent and she cannot entirely escape responsibility. Perhaps she will bear in mind in future that compliance with instructions affords no defence in such cases.

The 1st respondent, Professor Wangari Mathai, is committed to prison for six months.

The 2nd respondent, Mohamed Salim Lone, is committed to prison for three months but the committal warrant will lie with the Registrar for 7 days and will be discharged on payment of a fine of ten thousand shillings.

The 3rd respondent is given an unconditional discharge.

The 1st and 2nd respondents will pay the costs of the Attorney-General. The 2nd respondent, however, having indicated through his counsel that he had no doubt as to the jurisdiction of the court to punish him for scandalizing the court and his liability to such punishment, we order him to pay one-third of these costs, the remainder to be paid bythe 1st respondent.