



**Tuitoek v Mwere & another (Civil Suit 25 of 2019)
[2024] KEHC 11577 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11577 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL SUIT 25 OF 2019
SM MOHOCHI, J
SEPTEMBER 26, 2024**

BETWEEN

JAMES K TUITOEK PLAINTIFF

AND

DAVID MWERE 1ST DEFENDANT

NATION MEDIA GROUP LIMITED 2ND DEFENDANT

JUDGMENT

1. The Plaintiff filed a plaint dated 28th June, 2019 seeking judgment against the Defendants:-
 - i. Permanent injunction restraining the Defendants either by themselves, their servants, agents and or proxies from printing, publishing and or circulating materials defamatory of the Plaintiff or injurious of his reputation;
 - ii. General damages for libel or defamation
 - iii. Exemplary and aggravated damages for libel and defamation;
 - iv. Order for retraction of and suitable apology for the said defamatory materials or publication;
 - v. Cost of this suit
 - vi. Interest on b) c) and e) above at Court rates
 - vii. Any other or further relief that this Honourable Court shall deem fit and just to grant in the circumstances.

2. The Plaintiff claims that on 29th May, 2019 the 2nd Defendant, through its employee the 1st Defendant published or caused to be published and shared through electronic media with the public, libelous and defamatory material in respect of the Plaintiff through the link <https://www.nation.co.ke/news/>



Moi-era-leaders-may-lose-ADC-land-titles titled “MPs target powerful Moi-era leaders in ADC land dispute” stating, materially:

“...A document tabled before the committee by the Agriculture Chief Administrative Secretary Andrew Tuimur shows that the former powerful Cabinet Minister Simeon Nyachae and Moi’s close family members and friends were among 125 individuals and companies who illegally acquired the land.....

Other parties listed as beneficiaries include the late former minister Kipkalya Kones and Katana Ngala...Egerton University Vice Chancellor Prof. James Tuitoek...are also named ...true to their fears a letter dated March 13th 2015 from the National Land Commission confirmed the land was illegally allocated.”

3. According to the Plaintiff the words in their natural and ordinary meaning disparaged the reputation of the Plaintiff as the only former Vice Chancellor of Egerton University with his name and title. That the publication was reckless, false, malicious and full of spite, was also published with indifference and sensationalized to achieve maximum circulation and commercial benefit.
4. The Plaintiff further claimed that the said publication has also damaged his image, character and standing among his peers, academic and professional colleagues as well as the general public having been a Vice Chancellor and leading scientist in reputable university. That the aftermath was him suffering anxiety and distress.
5. The Defendants in their joint Defence dated and filed on 7th August 2019 denied that they published libelous or defamatory material or that the published words in their natural and ordinary meaning disparaged the reputation of the Plaintiff. They further denied the particulars of recklessness, falsehood, malice and spite or that the published words have grievously damaged the Plaintiff.
6. The Defendants in the alternative and without prejudice asserted that if the words were in deed published they were in their natural and ordinary meaning and were true in substance and consisted of statement of facts. That further the words arose from parliamentary proceedings and were published in pursuance of a social and moral duty and in protection and furtherance of a legitimate interest to the members of the public with a common interest with the Defendants and therefore privileged.

Evidence.

7. PW1, Prof. James Kiprop Tuitoek a Commissioner at National Land Commission adopted his statement dated 3rd July, 2019. It was his testimony that he sued the Defendants for a circulation on the digital platform of the Nation Media of 29th May, 2019 talking about illegally allocated squatter land in Magarini Constituency. That Dr. Taimur had produced a list of 125 beneficiaries in parliament which as per the publication it included the name of Vice Chancellor Egerton University Prof. James Tuitoek.
8. According to him it was a shock as he had never applied land from Agricultural Department Corporation (ADC) either legally or allocated illegally. He argued that the report done by David Mwere spoke about the Vice Chancellor Egerton University Prof James Tuitoek which according to him was undoubtedly referring to him as there had never been a Vice Chancellor with that name.
9. He wrote to the Managing Director ADC on 30th May, 2019 PExh-3 seeking clarification on how his name appeared and a response was sent on 6th June, 2019 PExh-4 stating that at no point was his name mentioned in parliament on any information from them. That his students had seen the information and through his lawyers he demanded an apology which never elicited a response PExh-5.



10. He produced the excerpt of the electronic versions of the Daily Nation of 29th May, 2019 and certificate signed on 14th January, 2022 PExh (1a) and (b). He stated that excerpt is about people characterized as powerful ministers, family members and friends of Moi being allocated land illegally. He denied being a close friend or family of Mr. Moi and or being allocate any ADC land.
11. He added that the Star Newspaper of Sunday 29th May, 2019 carried the same story on page 5, it said basically what Nation said and produced original Star Newspaper of 29th May, 2019 as PExh-2.
12. That the reply from ADC had confirmed that Mr. James C. Tuitoek was the beneficiary of the allotment in ADC Kisiwani. The letter further stated that the full details of the beneficiary and photographs were available, and that he had not been mentioned in their records.
13. He contended that what offended him is the report was not true and they did not check with him or ADC. He stated that he is a researcher with networks in Universities in China, Michigan and Canada and his collaborators would see him as a person benefiting from illegal transactions, getting public land from Moi era, a corrupt and greedy leader who uses his position to enrich himself causing loss of trust from them.
14. It was his testimony further that sometime in July, he applied for a job, was shortlisted, invited for an interview on 18th and 19th August and when he appeared, his suitability was challenged as a member of National Land Commission (NLC) because he was one of the people that grabbed public land. That the Parliamentary committee did not believe him when he told them he was not the one and ADC had to appear before them to confirm.
15. That one cannot disconnect the said petition from the proceedings and reporting. Pages 3 and 4 of the Hansard speak of ADC land. Page 43 report on considerations of the petition by residents of Sabaki Ward Magarini Constituency at No 26 the only name there is James Tuitoek. He questioned where the reporter got Professor. At page 152 it clarifies that the allottee was James C. Tuitoek and not Prof. James K. Tuitoek.
16. That it would have been easy for the reporter to call ADC for clarifications. The committee conducted due diligence and if the reporter had exercised due diligence he would not be in Court. He stated that he wrote to the National Assembly on 6th March, 2020 for certified copies they wrote back on 11th March 2020 with certified copies of the Hansard dated 1st March, 2019 together with proceedings of 6th March, 2019, the Petition, the report of the committee dated July 2019. The bundle dated 16th March, 2020 was marked as PMFI 6.
17. It was his assertion that he had no doubt that the report referred to him. There was no other Professor James Tuitoek former VC Egerton, there was no doubt of defamatory nature of the same. He sued the Star in HCCC No. 26 of 2019 and the Court found that the Star defamed him and was awarded costs and damages of Kshs. 11 million, on the same story.
18. That there were many of his friends who were not aware of the repost but have made conclusions. He denied ever being from Magarini and if the committee had not done due diligence he would not be in NLC. If there was no malice he would have received an apology. That there is malice, the fact that the Defendants are taking the stand that the words they wrote are true.
19. In cross examination, he did not dispute that there may be other persons with name James Tuitoek. He confirmed that from his ID card, the name professor does appear. That the other persons sued apart from the Defendants were Luke Awich and Radio Africa and the judgement was at Kenya Law though he had not produced it.



20. That as per P. Exhibit 1b the name that appears there is Prof. James Tuitoek and Kiprop does not appear. He added that he almost lost the chance to become a commissioner since the Petitioners had come in after the publication in the Star and the Nation, on 19th September, 2019. He confirmed that the Petitioners did not refer to the Nation Media Group. That the Petitioners raised their own complaints quoting the time. That he was at risk when he appeared before parliament but parliament cleared him.
21. He clarified that he did not have the gadgets to verify the source of the excerpt and the certificate but had a certificate to show some computer competence. That the computer and printer were issued by the university and was surcharged for it.
22. He Confirmed that he was the former Vice Chancellor of Egerton University appointed under the Kibaki government and that the terms Prof, Vice Chancellor, whether current or former on their own are not unique. He also confirmed that the person that brought to his attention the item in the Nation or the collaborations mentioned with international institutions was not included in his statement. It was his argument that he mentioned them as they were facts and he was under oath. He also had no proof of documents to show those collaborations or change of collaborations but added that he was still collaborating with them.
23. He admitted to a sequence of three Vice Chancellors of Egerton University before him from the Kalenjin Community and all from Baringo just like the late D. T. Arap Moi. He confirmed that since his departure there had been two Vice Chancellors and none were from the Kalenjin Community.
24. PW2, Lilian Kosgei Senior Legal Officer with Agricultural Development Cooperation representing the managing director testified in regard to the letter dated 6th June, 2019 PExh-6 from ADC. She confirmed receipt of PW1's letter dated 30th May, 2019. She confirmed knowledge of the publishing alleging the Plaintiff was an illegal allottee in Magarini of an ADC report tabled in parliament.
25. She stated that they clarified that the allocation done in Kiswani Magarini was for Mr. James C. Tuitoek a different person from Prof. Tuitoek and the report did not suggest the allottee is a former vice chancellor. That their details were available for inquiry and scrutiny and Nation Media did not seek any clarification.
26. In cross examination, denied knowing the Plaintiff personally or being the author of the document. She nevertheless confirmed they determined the outstanding difference as one was a professor and another was not. Further, the professor has initial "K" while allottee has initial "C" and that the names cannot create confusion as they are distinct the records are clear.
27. PW3, Nichench Khainja Zadock Principal Hansard Editor at Parliament and a lawyer by profession having joined parliament in 2002. He stated that he was in Court responding to summons served on Clerk S. Njoroge of National Assembly on the 18th January, 2024
28. He produced 3 documents in the supplementary list of documents dated 16th March, 2020 that is forwarding letter from parliament dated 11th March, 2020, Hansard Wednesday 6th March, 2019 and the report on department committee on land's "report on consideration of petition of residents of Sabaki Ward Magarini constituency regarding dispossession of ancestral land." Hansard dated Tuesday 1st October, 2019. as PExh 6, 7, 8 and 9.
29. In cross examination he stated that the reports were verbatim, denied knowing the Plaintiff but stated that he could understand a little bit of the case. That at Serial 26 the name is James Tuitoek, at the top of table is ADC Kisiwani allocation. There was no title professor, no initial in between. That probably with initial or title one would tell the difference. That the special motion has title "approval of



nominees for appointment as chairperson and members of National Land Commission. Sub-section B is “Approve the appointment of following persons to NLC with person No.3 as Prof. James K. Tuitoek. Could not tell whether the professor is same as the one on Hansard but that he was appointed as member of NLC.

30. That at paragraph 152 the distinction came out as the Committee exercised due diligence and from the documents submitted by ADC indicates the names did not match with nominee in question. That the ID of Mr. James C. Tuitoek is 23422499 and Prof. James Tuitoek was 0323892.

Defence Case

31. DW1, David Mwere a reporter working with the Nation Media Group attached to Parliament. He adopted his Witness statement dated 15th January, 2020 confirmed he was the author of the publication which was both in print and electronic form. That he had relied on the proceedings of the departmental committee on lands. That before the committee was a list of 125 individuals presents and No. 26 read James Tuitoek.
32. He stated that he was present during the proceedings where a Petition had been filed by a group of residents claiming irregularity of allocation of the ADC land. The List presented had no initial “K” against Mr. Tuitoek and that it was not easy to differentiate James Tuitoek and James K. Tuitoek and as a journalist James Tuitoek was former Vice Chancellor James Tuitoek.
33. He produced the report on vetting of nominees for the appointment to the position of chairperson and member of NLC dated 26th September, 2019. That at page 16 of the report there were affidavits of Mr. Mwalimu Kazungu Ngandu and Mr. Charo Kahindi contesting the nomination of Prof. James K. Tuitoek. At paragraphs 17 and 33 (2) they talk of the list of 125. He testified that ADC confirmed that the two are different people and Prof James K. Tuitoek never benefited from any allocation.
34. That the committee recommended Prof James K. Tuitoek as a member therefore he never lost anything as he was exonerated in the session. That their article was not out of malice and that it was his belief that the article portrayed the true record and was published in the honest belief that the words were true the same having been tabled and vetted in the circumstances and verily believed to be privileged.
35. The matter was recorded in the Hansard and invited Court to consider Section 11 of the [Defamation Act](#). the Plaintiff never lost on the job he was seeking and that he never had any malice.
36. In cross examination he confirmed that he published the story, and whatever he was doing he did on behalf of Nation Media Group. He also confirmed that the print circulation is the largest in the country but their online circulation is larger than print circulation. He further confirmed that Nation Media Group was a money-making business. He still confirmed also that the link was a Nation Media Group (NMG) link containing the list of illegal allottees and that the Plaintiff used the words in verbatim.
37. He denied knowing the Plaintiff but what came to mind was the it was the former Vice Chancellor. He confirmed there was no “K”, no “Prof.” and no “former vice chancellor at Egerton university”.
38. That during the committee proceedings, some of the members were unsure if it was professor and he confirmed that he never made efforts to ascertain if it was Professor. He confirmed that if he had ascertained that he would not have published the article.
39. That the first initiative he took after the demand, he followed the Plaintiff after the ADC clarification and discussed with him, the Plaintiff spoke to his editor and said the issue was address. That he did not follow up since it was not him who publishes apologies and was unaware of any apology by Nation Media Group. He clarified that he had not taken any initiative to retract and apologize. That the matter



was settled by ADC. Affidavits were filed during the Plaintiff's vetting and public was invited. The Plaintiff faced petitioners.

40. It was his belief that the affidavits made referenced to the list not Nation Media Group. That it came after publishing the story Taimur list never mentioned professor. Although the Petition referred to Prof James K. Tuitoek he could not speak for the Petitioners.

Plaintiff Submissions

41. It was submitted that the words published by the Defendants were defamatory as they lowered the Plaintiff's reputation in the eyes of the ordinary persons in the society and exposed him to ridicule and relied on the Court's interpretation in *SMW v ZWM* [2015] eKLR and *J Kudwoli & another v Eureka Educational and Training Consultants & 2 Others* [1993] .[1993] eKLR.
42. Further that the words referred to the Plaintiff since he was the only former vice chancellor with the said name reliance was placed in *Mwangi Kiunjuri v Wangechi Mwangi & 2 Others* [2008] eKLR. where the Court cited the case of *Newstead v London Express Newspaper Limited* [1940] 1KB 377 [1939] 4 ALL ER 319 where the Court held that where word don't expressly refer to a Plaintiff they may be held to refer to him by ordinary readers and the Courts ought to consider whether the ordinary reader understood the words to refer to the Plaintiff.
43. It was also submitted that the publication was indeed authored by the Defendants and was false, the Defendants are therefore liable for defamation. Reliance was placed in *Gatley & Lindsell on Salander and Liabel* at page 197 and *Rentco East Africa v Dominic Mutua Ngozi* [2021] eKLR.
44. On the issue of privilege, it was submitted that the Defendants do not qualify since it was not applicable despite being a common law defence developed in *Reynolds v Time Newspaper Limited* [2001] 2 AC 127 and defined in *Chirau Ali Mwakwere v Nation Media Group Limited & Another* [2009] eKLR. The Plaintiff submitted that the required threshold was not met to be accorded the protection under the doctrine of qualified privilege.
45. On damages the Plaintiff submitted that he was entitled to damages as sought the Court to be guided by the decision in *Nakuru HCC No. 26 of 2019 Professor James K. Tuitoek v Luke Awich and 2 Others* that awarded him Kshs 10 million in general damages and Kshs. 1 million in exemplary damages and that in this case the Defendants are yet to remove the publication from their website further aggravating the situation.

Defendants' Submissions

46. The Defendants submitted that the ingredients of defamation as expounded in books and the case of *J Kudwoli & another v Eureka Educational and Training Consultants & 2 Others* (supra) were not met. That a tort of defamation cannot be based on anger as expressed by the Plaintiff and he needed to call the people who called him as witnesses. That the published words must show injury. It was their argument that the article was not specifically about him but of other close allies of former President Moi.
47. On the aspect of qualified privilege, it was submitted that the public had a legitimate interest in the subject matter and therefore the article published is protected. That *the constitution* under Articles 33 and 34 guarantees the public to have information and that it was contrary to public policy to hamper freedom of communication. Reliance was placed in *Nation Newspaper Limited vs Gilbert Gibendi* [2002] eKLR, and *Francis Cheron Ngeny & 11 Others v Sammy Kiprop Kilach* [2007].



48. It was also argued that the Plaintiff failed to prove his case to the required standards as provided under Sections 107 and 108 of the *Evidence Act*. The injury on the Plaintiff's reputation was not established and he had to prove that a large number of people actually read the article and their perspective changed negatively.
49. On damages it was contended that since he had not proved his case he was not entitled to any general damages however, if the Court were to find in his favour, only a nominal amount in damages would suffice. As regards aggravated and exemplary damages there was no evidence of actual damage to his reputation or proof that the Defendant benefitted commercially therefore the awards were not merited and relied on the pronouncement in *Royal Media Services Limited T/A Citizen TV & Another v Alfred Amayio Maiko* [2021] eKLR. Damages in lieu of an apology were not merited as there was no defamation.

Analysis and Determination.

50. This Court has considered the pleadings, the evidence on record, submissions made on behalf of the parties and the law. The issues for determination are therefore:-
- i. Whether the Defendant's publications were defamatory of the Plaintiff
 - ii. Whether the publication was protected under the doctrine of privilege
 - iii. Whether the Plaintiff is entitled to the prayers sought
 - iv. Who bears costs of the suit.
51. The Court of Appeal in case of *Wycliffe A. Swanya v Toyota East Africa Limited & Another* (2009) eKLR outlined the elements of defamation as follows: -
- “It is common ground that in a suit founded on defamation the plaintiff must prove:-
- i. That the matter of which the plaintiff complains is defamatory in character.
 - ii. That the defamatory statement or utterance was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.
 - iii. That it was published maliciously.
 - iv. In slander subject to certain exceptions that the plaintiff has suffered special damages.”
52. For the claim of defamation to stand the Plaintiff has to demonstrated that any reasonable man coming into contact with that information would infer that he was defamed in character, the publication was published by the Defendants, the publication was actuated by malice and the publication occasion damaged to him. It is not in dispute that the publication was made by the Defendants as the 1st Defendant in his sworn testimony admitted to writing it and that the same was published both in electronic form and print. He also admitted the link belonged to Nation Media Group and that the Plaintiff had reproduced the publication in verbatim.



53. On whether the words were defamatory in nature, looking at the publication of 29th May, 2019 the Plaintiff's major complaint and the aspect that seem to have aggrieved him was that the Defendants linked him to 125 individuals who were beneficiaries of an illegal allocation of ADC land .

“Other parties listed as beneficiaries include the late former minister Kipkalya Kones and Katana Ngala...Egerton University Vice Chancellor Prof James Tuitoek...are also named.”

54. This Court concurs with the Court of Appeal In *Miguna Miguna v Standard Group Limited & 4 others* [2017] eKLR, where it stated as follows: -

“Speaking generally a defamatory statement can either be libel or slander. Words will be considered defamatory because they tend to bring the person named into hatred, contempt or ridicule or the words may tend to lower the person named in the estimation of right-thinking members of society generally. The standard of opinion is that of right-thinking persons generally. The words must be shown to have been construed or capable of being construed by the audience hearing them as defamatory and not simply abusive. The burden of proving the defamatory nature of the words is upon the plaintiff. He must demonstrate that a reasonable man would not have understood the words otherwise than being defamatory. See *Gatley on Libel and Slander* (8th edition para. 31).

55. In *Halsbury's Laws of England 4th Edition Vol. 28* at page 23, the authors opine: -

“In deciding whether or not a statement is defamatory, the Court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand them in a defamatory sense.” see *JMK & another v Standard Digital & another* [2020] eKLR.”

56. The publication spoke of “Egerton University Vice Chancellor Prof. James Tuitoek”. It has been established that here was and has only been one Vice Chancellor at Egerton University with the name James K. Tuitoek. The Plaintiff has demonstrated that he was vice chancellor of the institution an assertion that was not challenged or disputed by the Defendants. Having said so, the publication undoubtedly inferred to the Plaintiff.

57. The Plaintiff denied being an allottee of any land by ADC or any ties to the Moi family. The 1st Defendant testified that he was present during the proceedings where a Petition had been filed by a group of residents claiming irregularity of allocation of the ADC land and as a journalist James Tuitoek was former Vice Chancellor. It is noteworthy that the publication was made on 29th May, 2019 while the Petition was filed on 19th September, 2019. The Publication came way before the Petition.

58. The other consideration was that allottee as confirmed by PW2 was not the Plaintiff. The Defendants erroneously listed the Plaintiff as a beneficiary of an illegal allocation without confirming the facts. The words that gave rise to this case were made in print and electronic forms and the intention was to communicate to third parties or were intended for the public.

59. The act of publishing information without true facts trivialized the Plaintiff's reputation since anyone reading that publication automatically inferred to the character of “Egerton University Vice Chancellor Prof. James Tuitoek who in this case is the Plaintiff. The publication presents the general assumption that of illegal allocation of land by someone with tie to the late former President Moi.



60. The Defendants argue that since the Plaintiff was confirmed as a member of the National Land Commission he never lost anything and thus did not suffer any injury. The record shows that the Plaintiff's membership to the National Land Commission was challenged since the Petitioners felt he was not qualified having been implicated in illegal land allocation. Although the Petition did not mention Nation Media Group, the fact that his nomination was contested in the Petition dated 26th September, 2019 which came in 3 months after the publication and further by the fact that the Parliamentary Committee had to summon ADC to clarify the allotment and the names is manifest how deep the damage had gone. His suitability for the position at the National Land Commission was put question which is injurious.
61. What the Defendants published was not the truth, was not accurate which was also injurious to his character. The information was not cross checked with the source, that is DC or the Plaintiff and the Court finds that the words in their ordinary meaning did defame the Plaintiff.
62. On the aspect of malice this Court concurs with the sentiments of Odunga J. (as he then was) in *Phiness Nyaga Vs. Gitobu Imanyara* [2013 eKLR] wherein it was stated that:
- “Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice but the law does not weigh in a hair balance and it does not follow merely because the words are excessive, there is therefore malice. Malice may also be inferred from the relations between the parties before or after publication or in the conduct of the defendant in the course of the proceedings. Malice can be founded in the publication itself if the language used is utterly beyond the facts. The failure to inquire into the facts is a fact from which inference of malice may properly be drawn. Any evidence, which shows that the defendant knows the statement was false or did not care whether it be true or false will be evidence of malice. (Emphasis) See *Godwin Wachira vs. Okoth* [1977] KLR 24; *J P Machira vs. Wangethi Mwangi* (supra).”
63. The 2nd Defendant in cross examination admitted that he never made efforts to ascertain if James Tuitoek was actually the Plaintiff. There was failure to inquire and failure to publish what was accurate. The Defendants addition of the titles of the Plaintiff and the initials “K” was reckless and negligent which this Court infers malice on their part.
64. All factors considered; this Court is of the considered view that the Plaintiff established to the required standards that the words published on 19th May, 2019 by the Defendants were defamatory in nature.
65. The Defendants have argued that the words published and their publication falls under qualified privileged and were therefore entitled to the protection of absolute privilege. The Defendant have also submitted that the public was entitled to information and it would be contrary to public policy and *the Constitution* to curtail the access to information.
66. The Defendants relied on Section 11 of the *Defamation Act* which provides as follows:
- “In any action for libel in respect of the publication of any extract from, or abstract of, any parliamentary report it shall be a defence for the defendant to show that the matter in question was in fact an extract from, or abstract of, a parliamentary report and that the publication thereof was bona fide and without malice”
67. Nevertheless, looking at Section 7 of the *Defamation Act* it addresses qualified privilege and provides that:



1. Subject to the provisions of this section, the publication in a newspaper of any such report or other matter as is mentioned in the Schedule to this Act shall be privileged unless such publication is proved to be made with malice.
68. Under Section 7, for the publication to be accurate and to fall within the Defence of qualified privilege, the Defendants must demonstrate that there was no malice in the publication and was done in good faith. The Defendants asserted that the words arose from parliamentary proceedings and were published in pursuance of a social and moral duty.
69. The Court of Appeal in *Charles Katiambo Musungu v Dorine Lusweti* [2021] eKLR observed that: -
 - “Qualified privilege may apply where the matter is of public interest or concern. The defence of qualified privilege is available when the defendant shows.
 - a. The statement is made in the discharge of a public duty.
 - b. Statement made on a subject matter in which the defendant has legitimate interest.
 - c. Statement made by a defendant to obtain redress for a grievance
 - d. Reports of parliamentary proceedings
 - e. Extracts from or abstracts of Parliamentary reports, papers, votes or proceedings published by the authority of Parliament. [See *Gatley on Libel and Slander* 8th Edition page 441]

In Halsbury’s Law of England 4th Edition Vol. 28 at Paragraph 109 the rationale for the defence of qualified privilege is explained as follows.

“On grounds of Public policy the law affords Protection on certain occasions to a person acting in good faith and without any improper motive who makes a statement about another person even when that statement is in-fact untrue and defamatory. Such occasions are called occasions of qualified privilege. The principal categories of qualified privilege are;

1. Limited communication between persons having a common and corresponding duty or interest to make and receive the communication.
 2. Communication to the public at large or to a Section of the Public made pursuant to a legal, social or moral duty to do so in reply to a public attack.
 3. Fair and accurate reports published generally or proceedings of specified persons or bodies.”
70. The Code of Conduct for the Practice of Journalism in Kenya, underscores the necessity of accurate and fair reporting. This Court has already established that the publication and the reporting by the Defendants was erroneous and made inference to the character of the Plaintiff.
 71. From the evidence on record, it is clear that the list presented by Dr. Taimur in parliament did not include the Plaintiff and therefore the argument that the words arose from parliamentary proceedings does not hold water. The Court has established that the words were manifest of malice and the failure



to inquire into the facts inferred malice Phiness Nyaga Vs. Gitobu Imanyara (supra). The defence of privilege is therefore not applicable in the circumstances.

72. In damages the Plaintiff has sought:

General damages Kshs. 15,000,000

Aggravated damages Kshs. 2,000,000

Exemplary damages Kshs. 5,000,000

Damages in Lieu of Apology Kshs. 6,000,000

Total Kshs. 28,000,000

73. In Ken Odondi & 2 Others vs James Okoth Omburah t/a) Okoth Omburah & Company Advocates [2013] eKLR the Court stated:

“So the respondent was not only entitled to general damages for defamation but was also entitled to exemplary damages to punish the appellants who had defamed him and refused to retract the offending article or apologize. In the English Court of Appeal decision in the case of John v MG Ltd. [1996] I ALL E.R. 35 the Court held:

“The successful plaintiff in a defamation action is entitled to recover, the general compensatory damages such sum as will compensate him for the wrong he has suffered. That must compensate him for damages to his reputation, vindicate his name, and taken account of the distress, hurt and humiliation which the defamatory publication caused.....

Exemplary damages on the other hand had gone beyond compensation and are meant to “punish” the defendant. Aggravated damages will be ordered against a defendant who acts out of improper motive e.g where it is attracted by malice; insistence on a flurry defence of justification or failure to apologize”.

In the matter before us all essential elements for award of aggravated damages which are well set out in the said English case existed and the award of Kshs. 500,000/= was founded on a proper appreciation of the law.”

74. Looking at some of the decisions and the awards in defamation case:

- a. In Miguna Miguna v Standard Group Limited & 4 others (supra) the Court of Appeal award of Kshs. 500,000 in general damages was upheld by the Court of Appeal. the Court went ahead and awarded a further sum of Kshs 1,000,000 aggravated damages because the Respondent failed to retract the publication and further offer an apology which they were required to.
- b. In Musikari Kombo v Royal Media Services Limited [2018] eKLR the Appellant was awarded Kshs. 5,000,000 as general damages and Kshs 1,000,000 as aggravated damages.
- c. JMK & another v Standard Digital & another [2020] eKLR the Court awarded the Plaintiff’s Kshs 4,000,000 each for defamation and Kshs 400,000 each in lieu of apology in lieu of apology.
- d. Elisha Ochieng Odhiambo v Booker Ngesa Omole [2021] eKLR Aburirli J awarded Kshs 5,000,000 for defamation and Kshs. 1,000,000 as aggravated damages plus costs



75. The Court of Appeal in *CAM v Royal Media Services Limited* [2013] eKLR stated that:

“No case is like the other. In the exercise of discretion to award damages for defamation, the Court has wide latitude. The factors for consideration in the exercise of that discretion as enumerated in many decisions including the guidelines in *Jones V Pollard* (1997) EMLR 233-243 include 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; subjective effect on 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; matters tending to mitigate damages for example, publication of an apology; matters tending to reduce damages; vindication of the Plaintiff’s reputation past and future.”

76. Having found that the publication by the Defendants was defamatory in nature, that the Plaintiff was linked to illegal acts of land allocation as published by the largest print and electronic media house in the country few months before his appointment as commissioner injured his character and reputation.

77. Now therefore bearing in mind previous awards in comparative cases this Court finds that an award of Kshs. 5,000,000 as general damages and Kshs 1,000,000 as aggravated damages as appropriate. Further the fact that the Defendants went ahead and linked the Plaintiff to the allocation without confirming facts was reckless and it caused the Plaintiff’s name to be dragged through unnecessary scrutiny by the public therefore, the Plaintiff is awarded Kshs 500,000 in lieu of an apology.

78. The upshot of the foregoing is Judgment is hereby entered for the Plaintiff against the Defendants as follows:

- i. Permanent injunction is hereby issued restraining the Defendants either by themselves, their servants, agents and or proxies from printing, publishing and or circulating materials defamatory of the Plaintiff or injurious of his reputation;
- ii. Order is hereby issued for retraction of a suitable apology for the said defamatory word in the publication of 29th May, 2019;
- iii. General damages for defamation of Kshs.5,000,000.
- iv. Aggravated damages of Kshs 1,000,000.
- v. Kshs 500,000 in lieu of apology.
- vi. Cost of this suit.
- vii. Interest on iii) iv) v) and vi) above at Court rates from the date of this judgement.

It is so ordered.

DATED, SIGNED AND DELIVERED ON THIS 26TH DAY OF SEPTEMBER, 2024.

MOHOCHI SM

JUDGE OF THE HIGH COURT

