



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mogaka & 3 others v Munene (Civil Appeal E012 of 2022)  
[2023] KEHC 18194 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18194 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CIVIL APPEAL E012 OF 2022**

**WA OKWANY, J  
MAY 25, 2023**

**BETWEEN**

**JOSEPH MOGAKA ..... 1<sup>ST</sup> APPELLANT  
THOMAS OKERO ..... 2<sup>ND</sup> APPELLANT  
JOSEPHINE OKERO ..... 3<sup>RD</sup> APPELLANT  
JARED NYAKWEBA ..... 4<sup>TH</sup> APPELLANT**

**AND**

**DOMINIC MUNENE ..... RESPONDENT**

*(Being an Appeal from the Judgment of the Hon. Nyigei, Principal Magistrate at Nyamira delivered on 16th March 2022 in the Principal Magistrate's Court, Civil Case No. 138 of 2018)*

**JUDGMENT**

**Introduction**

1. The Respondent herein, Dominic Munene, and his wife one Evangelist Beth Ndung'u were members of Christian Life Centre M-COG where they were elevated to serve as pastors in other branches of the church. The Respondent and his wife were however later summoned to a meeting attended by several other pastors to discuss their new style of worship and preaching which was considered strange and not in line with the church doctrine. The Respondent and his wife declined to heed to the summons to attend the meetings.
2. It is alleged that afterward, the church leadership then decided to excommunicate the Respondent's wife. The Respondent and his wife decided to move out of the church with some congregants, church instruments and offerings. On 16<sup>th</sup> July 2018, the church building at Gekendo M-COG where the Plaintiff's wife ministered was demolished and it was suspected that the Respondent's wife was responsible for the said demolition.



## The Lower Court Suit

3. The Respondent instituted a defamation suit before the lower court against the Appellants, the Standard Group Limited and one Stanley Ongwae seeking the following orders: -
  - a. A declaration that the Plaintiff is entitled to a retraction of the defamatory words and a suitably worded apology of similar prominence as the defamatory words.
  - b. General damages for defamation.
  - c. Exemplary damages.
  - d. Aggravated damages.
  - e. Costs of the suit and interest thereon; and
  - f. Any other remedy that the court may deem fit to award.
4. The Respondent's case was that on 30<sup>th</sup> July 2018, the 1<sup>st</sup> Defendant – Standard Group Limited maliciously and wrongfully published an article titled “Excommunicated ‘Juju Preachers’ demolish church and steal offering” which article, he claimed, was highly defamatory to him and injured his reputation as a man of God. He claimed that the contents of the said article were understood to mean and were intended to mean that he was not a genuine preacher, that he would happily steal church property and offerings and in one way or another, participated in the demolition of the church.
5. On their part, the 1<sup>st</sup> and 2<sup>nd</sup> Appellants claimed that whatever was published in the newspaper was factual and that the 2<sup>nd</sup> Defendant had on several occasions sought the Respondent's wife's side of the story without any success. The Appellants were of the view that it seemed that the Respondent's wife wanted to avoid answering critical questions arising from her conduct.
6. The 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> Defendants (now 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Appellants) denied the contents of the Plaintiff and averred that they did not harbour any malice against the respondent and had no intention of injuring his reputation. They further stated that they were not responsible for any publications that may have been made against the Respondent.
7. The lower court heard the case and at the end, entered judgment in favour of the Respondent as follows: -
  - i. General Damages – Kshs. 1,000,000/=
  - ii. Aggravated Damages – Kshs. 300,000/=
  - iii. Damages in lieu of Apology – Kshs. 500,000/=
  - iv. Costs and interests at court rates.
8. Aggrieved by the said decision, the Appellants filed the instant appeal in which they seek orders to set aside the lower court judgment. They listed the following grounds of appeal in the Memorandum of Appeal: -
  - i. That the learned trial Magistrate erred in law and fact in disregarding the Appellants' evidence thus arriving at a wrong judgment.
  - ii. That the learned trial Magistrate erred in law and fact in holding that the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants contributed and/or published the alleged defamatory article.



- iii. That the learned trial Magistrate erred in law and fact in holding that the article was defamatory despite evidence being adduced to the contrary.
  - iv. That the learned trial Magistrate erred in law and fact in holding that the article was false contrary to the evidence on record which indicated that the Respondent had introduced styles of worship which were not in conformity with the church doctrines.
  - v. That the learned trial Magistrate erred in law and fact in making a finding that the Respondent had suffered disrepute and injury to character without evidence being adduced to support the same.
  - vi. That the learned trial Magistrate erred in law and fact in holding that malice was proved contrary to the evidence on record.
  - vii. That the learned trial Magistrate erred in law and fact in making a finding that the article referred to the Respondent despite the article not explicitly mentioning his name.
  - viii. That the learned trial Magistrate erred in law and fact in holding that the Respondent had proved his case jointly and severally on a balance of probabilities against the Appellants in clear disregard of the evidence on record.
  - ix. That the learned trial Magistrate erred in law and fact in awarding costs to the Respondent.
  - x. That the learned trial Magistrate erred in law and fact in finding in favour of the Respondent contrary to the evidence on Record.
9. The appeal was canvassed by way of written submissions.

### **The Appellants' Submissions**

10. A perusal of the Record of Appeal reveals that the Appellants did not testify before the trial court where they only relied on in their pleadings. They however filed written submissions dated 8<sup>th</sup> February 2023 where they raised 6 issues for determination namely;
- a. Whether the trial magistrate erred in law and in fact in holding that the appellants contributed to and/or published the alleged defamatory article;
  - b. Whether the trial magistrate erred in law and in fact in making a finding that the article referred to the Respondent despite not explicitly mentioning his name;
  - c. Whether the trial magistrate erred law and in fact in holding that the article was defamatory despite evidence being adduced to the contrary;
  - d. Whether the trial magistrate erred in law and in fact in holding that the article was false, contrary to the evidence on record which indicated that the Respondent had introduced styles of worship which were not in conformity with the church doctrines;
  - e. Whether the trial magistrate erred in law and in fact in making a finding that the Respondent had suffered disrepute and injury to character without evidence being adduced to support the same; and,
  - f. Whether the trial magistrate erred in law and in fact in holding that malice was proved contrary to the evidence on record.



11. On the first issue, the Appellants submitted that the defamatory article was published by Standard Group Limited and that no nexus was established between them and the said company. The Appellants submitted that they did not compel the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to publish the article and that it is the said defendants who stood to gain from the publication in their newspaper. Reference was made to the case of *Swanya v. Toyota East Africa & Another* (2009) eKLR and *Zamzam Hussein Aligele v. Joseph Lekuton* (2020) eKLR where the court outlined the ingredients of the tort of defamation.
12. On the second issue, the Appellants submitted that the impugned article did not mention the Respondent by name which fact the Respondent acknowledged during cross-examination. They stated that the article referred to preachers while the Respondent himself stated that he was merely a church member who preached. It was submitted that it was therefore an error on the trial court to draw an inference that the article referred to the Respondent and his wife.
13. On the third issue, it was submitted that there was a causal nexus between the tort of defamation and the provisions of Articles 33 and 34 of the *Constitution* which provides the test for the permissibility of this tort in light of freedom of speech and freedom of the media. It was submitted that the court ought to have balanced the public interest on the aspect of the right to information against the right to protect the dignity and reputation of individuals. They argued that the independence of the media should never be curtailed on account of fear of defamation suits. For this argument, the Appellants cited the case of *Institute of Social Accountability & Another v. National Assembly & 4 Others* (2015) eKLR where the duty of the court under Article 259 of the *Constitution* was discussed, and the cases of *S M W v. Z W M* (2015) eKLR, and *Musikari Kombo v. Royal Media Services Limited* (2018) eKLR where the court outlined the test for a defamatory statement.
14. It was submitted that the Respondent and his wife were excommunicated from the church for introducing a strange style of worship in the church and that there were excerpts from the Respondent's wife's Facebook account to prove this allegation. The added that the Respondent and his wife were excommunicated after being given an opportunity to defend themselves in a pastors' meeting which they did not attend. They contended that the Respondent's case did not meet the threshold of defamation as his wife did not return the church property.
15. On whether the trial magistrate erred in holding that the publication was false, contrary to the evidence on record, it was submitted that the Respondent conceded that he introduced strange styles of worship using handkerchiefs and anointing oil. The Appellants noted that the Respondent did not tender any evidence to show that he had indeed purchased the church equipment as he had alleged. For this argument, reliance was placed on the decision in *M M v. Nairobi Star Publications Ltd.* (2017) eKLR in which the court held that a defamatory statement had to be false.
16. On whether the trial magistrate erred in finding that the Respondent suffered disrepute and injury to his character, the Appellants argued that the most essential ingredient in a defamation suit is the effect of the words on third parties which must be established on a balance of probabilities. It was submitted that the Respondent did not tender any evidence to show his character and reputation before and after the publication so as to demonstrate that the article demeaned his character/reputation. According to the Appellants, the failure to present this evidence was fatal to the Respondent's case. Reliance was made to the cases of *Hezekiel Oira v. Standard Limited & Another* (2016) eKLR, *George Mukuru Muchai v. The Standard Ltd.* HCCC No. 2539/1997 and *Selina Patani & Another v. Dhiranji Patani* (2019) eKLR where the court emphasized on the need to call witnesses to testify to the manner in which a claimant has been defamed.
17. On proof of malice, the Appellants submitted that the trial court did not find any malice on their part and that it was therefore not clear why the court concluded that the Respondent had proved



its case against the defendants. It was submitted that if there was to be any malice, then the same was attributed to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and not the Appellants. The Appellants cited the case of *Ibrahim Mukhtar Abasheikh v. Royal Media Services & Another* (2020) eKLR, where it was explained that malice was a necessary consideration and must be proven by cogent evidence.

### The Respondent's Submissions

18. Through his submissions are dated 4<sup>th</sup> April 2023, the Respondent raised three main issues namely;
  1. Whether the Respondent had proved the ingredients of defamation;
  2. Whether the damages awarded by the trial court were excessive; and,
  3. Whether the circumstances of the case, the weight of the precedents in similar circumstances and the Appellant's submissions were considered.
19. On the ingredients of defamation, the Appellant submitted that he was a well-renowned preacher and a person of good reputation, high moral standing, and integrity and that the publication insinuated that he was an evil preacher who could steal from the church and participate in its demolition. He added that he could not preach again after the publication as his reputation was injured. Reference was made to the definition of the tort of defamation as stated in *Harry Street's The Law of Torts, Gately on Libel and Slander* 6<sup>th</sup> Edition at page 6, *Halsbury's Laws of England* 4<sup>th</sup> Edition, Vol. 28 at page 23 and Winfield and Jolowicz on *Tort* 8<sup>th</sup> Edition at page 25 . The Respondent also cited the cases of *Fibi Munene v. Nation Newspapers & 2 Others* (2007) eKLR, *Abdi Mohammed Farah v. Nairobi Star Publication Limited & Another* (2015) eKLR, *Wycliffe A. Swanya v. Toyota East Africa Limited & Another* Civil Appeal No. 70 of 2008 (2009) eKLR and *Rodgers Abisai v. Wachira Waruru & Another*, Court of Appeal, Nairobi Civil Appeal No. 12 of 2003 where the courts outlined and discussed the ingredients of defamation.
20. It was further submitted that even though the Respondent was not expressly mentioned on the article, the evidence tendered before the trial court indicated that it referred to the Respondent. On this point, the Respondent relied on the case of *Knupffer v. London Express Newspaper Limited* (1944) 1 ALL ER 495 and *Mary Waitihira Kariuki v. Nation Media Group* (2015) eKLR where the courts held that the defamatory words need not mention a claimant by name but must be understood to have been published in reference to them.
21. The Respondent submitted that the false and malicious statement was published in the Standard Newspaper of 30<sup>th</sup> July 2018 and that the Appellants did not apologize to him despite demand being made. It was the Respondent's case that the Appellants acted on a personal vendetta against him without verifying the truth concerning the allegations which they also repeated in their testimonies before the trial court. Reference was made to the case of *Mikidadi v. Khabfan & Another* (2004) 2 KLR 496 where the court held that clarification of the truthfulness of the story must be sought before publication and *Phinebas Nyagah v. Gitobu Imanyara* Civil Suit No. 697 of 2009 (2013) eKLR where the court held that failure to inquire the truthfulness of the information amounted to malice.
22. On whether the trial court exercised its discretion by correctly applying the principles in assessing damages payable to the Respondent, it was submitted that an appellate court should only interfere with the award of damages where it is demonstrated that the court acted on a wrong principle or that the award was manifestly high or inadequate. For this argument, the Respondent referred to the cases of *Bashir Ahmed Butt v. Uwais Ahmed Khan* (1982-88) KAR 5 cited in *Beatrice Njeri Maina v. Augustine Maina Ngetha* (2015) eKLR; *Raphael Lukale v. Elizabeth Mayabi & Another* (2018) eKLR, *John v. MGM Ltd* (1997) Q.B. 586; *Ken Odondi & 2 Others v. James Okoth Omburah t/a Okoth Omburah &*



*Company Advocates* (2013) eKLR and *CAM v. Royal Media Services Limited* (2013) eKLR where the courts outlined the principles for determining whether to disturb an award by a trial court and how to determine appropriate awards in defamatory cases.

23. On whether the trial court considered all the material placed before it and arrived at the correct decision, the Respondent submitted that the Appellants did not adduce any evidence to counter his case at the hearing and that the trial court, therefore, arrived at a well-reasoned decision based on the available evidence.

### **Analysis and Determination**

24. It is trite that on a first appeal, the court is expected to scrutinize and analyse the evidence adduced before the trial court afresh and arrive at its own independent findings. This principle was restated by the Court of Appeal of England in the case of *Coghlan v. Cumberland* (1898) 1 Ch. 704, thus: -

“Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong...When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen.”

25. I have considered the Record of Appeal and the parties' rival submissions. I find that the following issues arise for determination: -

- i. Whether the article published on 30<sup>th</sup> July 2018 was true in fact and in substance or whether it was capable of being construed as defamatory in its natural and ordinary meaning.
- ii. Whether the Respondent proved that he suffered disrepute and injury to his character as a result of the publication of the said article.
- iii. What damages, if any, are awardable and who should pay costs?
- i. Whether the article published on 30<sup>th</sup> July 2018 was true in fact and in substance or whether it was capable of being construed as defamatory in its natural and ordinary meaning.

26. Defamation was described by the British Columbia Court of Appeal in *Murphy v. LaMarsh* (1970) 73 W.W.R 114 as follows:-

“A brash young radio reporter, named Ed Murphy (heartily detested by most of the Press Gallery and the members), had somehow learned that Maurice Lamontagne (then Secretary of State, and a long-time friend and adviser of the Prime Minister) had purchased furniture but had not paid for it.”



27. The Supreme Court on appeal found that there was an actionable libel in this case, (appeal dismissed) and wrote:-

“(Defamation is where) a shameful action is attributed to a man (he stole my purse), a shameful character (he is dishonest), a shameful course of action (he lives on the avails of prostitution), (or) a shameful condition (he has smallpox). Such words are considered defamatory because they tend to bring the man named into hatred, contempt or ridicule. The more modern definition (of defamation) is words tending to lower the plaintiff in the estimation of right-thinking members of society generally.”

28. Gately on *Libel and Slander* 6<sup>th</sup> Edition at page 6 defines what amounts to a defamatory statement as follows: –

“A defamatory statement must be false and it must also be defamatory to the plaintiff, that it is to say, the statement must contain, whether expressly or by implication, a statement of fact or expression of opinion which would lower the plaintiff in the estimation of a reasonable reader who had knowledge of such other facts not contained in the statement, as the reader must reasonably be expected to possess.”

29. The above definitions reveal that the tort of defamation will arise when statements or words that are defamatory in nature are made public. The words must have the ability to discredit a person and his character or to bring him or her to disrepute and contempt.

30. The ingredients of defamation were set out in the case of *John Ward v. Standard Limited*, HCCC 1062 of 2005 as follows: -

- a. The statement must be defamatory.
- b. The statement must refer to the Plaintiff.
- c. The statement must be published by the Defendant.
- d. The statement must be false.

31. It was the Respondent’s case that defamatory statements were published against him by the Standard Group Limited and Stanley Ongwae who were the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the trial court. The said article read as follows: -

“Excommunicated ‘juju preachers’ demolish church and steal offering.

Juju Gospel is at the center of woes bedeviling a church in Nyamira County after excommunicated preachers demolished the house of God and stole property. The preachers who were labelled as apostates had been ousted from the congregation of Christian Life Centre Church of God, Gekendo in Nyamira South where they had introduced a strange style of worship which is not within the doctrines of the Christian organization. The preachers who are husband and wife are said to have introduced a juju style of worship which was repulsed by the faithful... Mogaka says even the handkerchiefs were brought from Nigeria when the husband visited the country early this year. The renegade preacher is also said to have been conferred with holy orders of performing miracles. ‘The couple had totally overturned the church’s doctrines and they were now preaching the gospel of getting worldly wealth when our focus should be on heavenly wealth as pronounced in the Bible’, the Bishop said... ‘They demolished the church and took away 150 iron sheets and



machines, all valued at around Kshs. 300,000/=’, the church’s Rev. Josephine Okero said. The couple is also accused of stealing offerings which the wife has been collecting because she doubled up as the treasurer.”

32. In determining whether the above statements are defamatory in nature, I refer to the case of *Alnashir Visram v. Standard Limited* [2016] eKLR where it was held that:-

“84. The big question is whether the words as published of and concerning the plaintiff are defamatory of his character and reputation. A publication is considered to be defamatory of a person’s character and reputation if it conveys a meaning which is likely to either lower the persons’ reputation in the eyes of ordinary reasonable members of the community; lead those people to ridicule, avoid or shun or despise the person; or injure the person’s reputation in business, trade or their profession.

85. It is worth noting that the meaning behind the publication can be implied or express. It all depends on the context and circumstances of each case. Thus, defamation may arise from the direct meaning of words used when taken on the face value, through an innuendo from the statement itself, or from an innuendo based on known facts that are not included in the statement. It is also irrelevant whether the publisher or author intended to make a defamatory statement of and concerning the plaintiff when he or she published the defamatory words complained of. The applicable test is an objective test; whether or not the statement is defamatory is judged against contemporary community standards from the standpoint of a reasonable person.

86. Further, it is important to note that not all criticism or abuse is necessarily defamatory. The main issue is whether or not the ordinary person would tend to form a significantly lower opinion of the plaintiff because the plaintiff is the subject of that criticism.”

33. I have considered the above statements and in their ordinary meaning they paint a negative picture of the person the article refers to. These statements demonstrate that whoever is being referred to in this excerpt is a false preacher and criminal owing to their style of worship, actions of demolishing the church and stealing the church offering and property. I find that in their direct and implied form, the statements are degrading of the subject’s character and may be construed as defamatory at face value.

34. The second ingredient to be considered is whether the statements referred to the Respondent. The Appellants denied that the article referred to the Respondent and his wife and stated in their submissions that the article referred to preachers while the Respondent had testified that they were merely church members who preached. They also argued that the article referred to a couple who could have been any couple in the church and not necessarily the Respondent and his wife. The Respondent on his part argued that the evidence presented in court demonstrated that the article published referred to him.

35. I have reviewed the statements in the publication and noted that none of them expressly mentioned the Respondent by name. The evidence tendered by the Respondent only showed that the article referred to a preacher who advocated for the use of handkerchiefs and anointing oil to perform miracles contrary to the church doctrines and was excommunicated from the church. In his cross-examination, the Respondent conceded that the letter of excommunication was only addressed to his wife and that it would not be public knowledge unless he himself published it. It would therefore be impossible for



any reader who came upon the article to conclude that it made reference to either the Respondent or his wife. This second ingredient therefore fails.

36. On whether the statement was published by the Appellants, I find that it was not disputed that the publication was made in the Standard Newspaper. The question which begs an answer is whether Appellants herein were responsible for publishing the said defamatory information in the newspaper. The Appellants' case was that it was the only the 1<sup>st</sup> and 2<sup>nd</sup> Defendants before the trial court were responsible for publishing and disseminating the information to third parties.
37. The English Court of Appeal *Pullman v. Walter Hill & Co.* (1891) 1 QB 524, defined publication as follows:-

“What is the meaning of ‘publication’? The making known the defamatory matter after it has been written to some person other than the person of whom it is written. If the statement is sent straight to the person of whom it is written, there is no publication of it; for you cannot publish a libel of a man to himself. If there was no publication, the question whether the occasion was privileged does not arise..... If the writer of a letter shows it to his own clerk in order that the clerk may copy it for him, is that a publication of the letter? Certainly it is, showing it to a third person; the writer cannot say to the person to whom the letter is addressed, ‘I have shown it to you and to no one else.’ I cannot, therefore, feel any doubt that, if the writer of a letter shows it to any person other than the person to whom it is written, he publishes it.”

38. A perusal of the evidence presented before the trial court shows that it was the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who wrote and published the information against the Respondent. My finding is that the mere fact that the Appellants were quoted in the said article does not necessarily mean that they gave the information to the 2<sup>nd</sup> Defendant.
39. It was not disputed that the 2<sup>nd</sup> Defendant, before the trial court, is the one who drafted the contents of the article and came up with the final product. This does not necessarily mean that the Appellants were the ones responsible for what was written. I find that the responsibility of reporting a correct account of facts without defaming another person was vested solely on the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Consequently, I find that the alleged defamatory article was prepared, published and disseminated by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and not the Appellants themselves and therefore any legal action ought to have been brought against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
40. The fourth ingredient of defamation concerns whether a statement is defamatory. Such a statement has to be false and there has to be evidence of malice. Mativo J. (as he then was) in *Joseph Njogu Kamunge v. Charles Muriuki Gachari* [2016] eKLR explained malice stating thus: -

“Further, the words must be malicious. Malicious here does not necessarily mean spite or ill will but there must be evidence of malice and lack of justifiable cause to utter the words complained of. Evidence showing the defendant knew the words complained of were false or did not care to verify can be evidence of malice. The defamatory words must be shown to have been published by the defendant.”

41. In the case of *Phineas Nyagah v. Gitobu Imanyara* (2013) eKLR, Odunga J. (as he then was) held 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... malice



may also be inferred from the relations between the parties....The failure to inquire into the facts is a fact from which inference of malice may properly be drawn.”

42. From the above cited case, it is clear that a defamatory statement must be made without a proper justification which will impute malice. Further, a key ingredient in this regard is that such statements must also be false. The evidence before this Court must therefore be tested against the parameters of truthfulness since this will suffice as a defense in a defamation claim and will subsequently negate proof of defamation. Where such a statement is found to be false, malice will be imputed.
43. The facts of this case clearly demonstrate that there were underlying issues in the Christian Life Centre Church of God when the leadership of the church alongside congregants raised concerns about the manner in which the Respondent and his wife conducted themselves in church. It was evident, from the Appellants’ testimony, that the church leadership did not accept the use of handkerchiefs and anointing oil for healing and performing miracles. It was also alleged that the preaching of the doctrine of prosperity was contrary to the church’s doctrines.
44. The Appellants’ case was that the Respondent and his wife, Pastor Beth Ndung’u, were summoned, on several occasions, to attend the pastors’ meetings and explain themselves but failed to do so thereby causing outrage in the church leadership. The Respondent’s wife was eventually removed from the church leadership and instructed to cease acting as a pastor. It was after her removal that the church was reported to have been demolished.
45. I have taken note of a letter dated 14<sup>th</sup> July 2018 to the OCS Nyamira Police Station by the church leadership seeking intervention to have the Respondent return all the church equipment. From the minutes of the pastors’ meetings held on 16<sup>th</sup> July 2018, it is also clear that the church leadership took the view that the Respondent’s wife was the first suspect in the church demolition that occurred on the same date of her removal especially because the same transpired after she was served with a letter of expulsion from the church. These documents, however, were never produced in evidence and are therefore not admissible.
46. It is nevertheless clear from the Respondent’s own testimony that there was a rift in the church. The Respondent testified that he and his wife had no issue in performing miracles and that they approved of the use of handkerchiefs and anointing oil in their ministry. He also admitted, during re-examination, that the church did not give him any doctrines to go by.
47. Evidently, the statements published by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants is believed to have emanated from information given by the church leadership - the Appellants - who expressed concerns about the Respondent and his wife. The main question here, therefore, is whether the statements against the Respondent and his wife were true and therefore justified.
48. I have carefully considered the Respondent’s testimony and it is clear that his wife believed in the use of handkerchiefs and anointing oil to perform miracles. The Respondent also verified certain Facebook excerpts as belonging to his wife. I, therefore, find that it cannot be said that the Appellants gave a false account of information when the church leadership reported these facts to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
49. I have also considered the fact that the Respondent did not produce evidence before the trial court to demonstrate that he was the legal owner of the church equipment that they took when they left the church. In the absence of this piece of evidence, this Court is inclined to believe that the Appellants’ claims were truthful and factual. Moreover, the Respondent testified that they took the church property because he is the one who purchased them. The Respondent did not however tender any evidence to show that he bought the said property thus lending credence to the Appellants’ claim



that they carried away church property. I am guided by the principles in Gatley on Libel & Slander 9th Ed. Pg. 321 para 13.45 which reads as follows: -

“The onus of proving that the report is fair and accurate lies on the defendant, but it is sufficient if this appears from the plaintiff’s own evidence. If the defendant fails to prove that the report is fair and accurate, the plaintiff is entitled to succeed, however honestly it may have been published. Whether the report is fair and accurate is a question of fact for the jury, provided always that there is some evidence of unfairness or inaccuracy to go to the jury. ....”

50. My further finding is that, even though the Appellants did not tender any evidence before the trial court, the claims that the Respondent used handkerchiefs for healing and that the Respondent made away with church property, were not denied by the Respondent. I therefore find that there was truth in the said publication which negates the claim of malice on the part of the Appellants. It is trite that a truthful statement is a defense in a case of defamation. I am guided by the decision in the case of *Thomas v. CBC - Thomas v. Canadian Broadcasting Corp. and Sanders*, (1981) 27 A.R. 547 (NWTSC) where it was held that:-

“The gist of the torts of libel and slander is the publication of matter (usually words) conveying a defamatory imputation. A defamatory imputation is one to a man’s discredit, or which tends to lower him in the estimation of others, or to expose him to hatred, contempt or ridicule, or to injure his reputation in his office, trade or profession, or to injure his financial credit. The standard of opinion is that of right-thinking persons generally. To be defamatory an imputation need have no actual effect on a person’s reputation; the law looks only to its tendency. A true imputation may still be defamatory, although its truth may be a defence to an action brought on it; conversely untruth alone does not render an imputation defamatory.”

51. I also note that no evidence was tendered to demonstrate that the Appellants referred the Respondent or his wife as ‘Juju Preachers’. To my mind, this could have been a creation of the newspaper reporter in his style of drafting aimed at making his article attractive to its readers. I find no fault on the part of the Appellants over the use of the words “Juju Preachers”.
52. My finding is that even if the statements published in the said Article in the Standard Newspaper referred to the Respondent, they were not published by the Appellants and lastly, they were truthful and therefore justified. I find that the Respondent did not prove the ingredients of defamation.
53. My above findings would have been sufficient to determine this appeal but I am still minded to consider the last issue for determination which is whether the Respondent proved that he suffered injury to his character/reputation as a result of the publication.
54. It was the Respondent’s case that he was a well-renowned preacher and a person with a good name, reputation, high moral standing and integrity and that the said article ended his preaching career. In *Selina Patani & another v. Dhiranji V. Patani* [2019] eKLR at paras. 26-27 it was held thus:-

26. The other issue for our consideration is whether the Judge erred in finding it was imperative to call a third party to prove the appellants claim for defamation. In principle, defamation is actionable per se. This does not mean the ingredients of the tort must not be proved. It simply means you must prove the elements of the tort of defamation; what need not be proved is the damage suffered. If no damage is proved, a claimant may be entitled to nominal damages. In this case, the legal issue is whether the appellants proved there was publication to a third party and injury or damage suffered to their reputation.



27. The evidence on record is the testimony by the 2<sup>nd</sup> appellant that her boss read the letter. The alleged boss was never called to testify. No other third party was called to testify as to the publication and injury to reputation. As to whether the appellants character and reputation was destroyed, there is no evidence on record from a third party stating that as a result of reading the impugned letter, the appellants reputation and standing in society was injured. It is in this context that we agree with the learned Judge that a person's own view about his/her reputation is not material in a claim for defamation; there must be evidence from a third party to the effect that the standing and reputation of the claimant has been lowered as a result of the defamatory publication. In the absence of third party evidence, we find no error of law on the part of the Judge in arriving at the determination that the appellants did not prove their claim for defamation. (Emphasis added)
55. I did not find any evidence, by the Respondent, indicating the manner in which his reputation was damaged. It would have been proper and necessary for the Respondent to call at least one witness to testify in this regard. In the circumstances of this case, this Court cannot rely solely on the Respondent's assertions that he suffered injury to his reputation without the same being established through evidence. This court cannot take it for granted that any person who presents himself as a preacher is a person of high moral standing. It is therefore my finding that the Respondent failed to prove that he suffered injury as a result of the said publication.

**ii. What damages, if any, are awardable and who should pay costs?**

56. Having found that there was an element of truth in the statement published in the Newspaper and having established that there was no malice on the Appellants' part or evidence of injury to Respondent's character, and further, having found that the Appellants were not the publishers of the alleged defamatory article, I find that the instant appeal is merited. Consequently, I allow the Appeal and find that the trial court erred in finding that defamation was proved as against the Appellants and in making the said award.
57. In the end, I set aside the judgment and award made by Hon. Nyigei on 16<sup>th</sup> March 2022 in Principal Magistrate's Court, Civil Case No. 138 of 2018 and in its place enter a judgment dismissing the Respondent's case against the Appellants herein.
58. On the issue of costs, it is trite that costs follow the events and I therefore award the Appellants the costs of this appeal and the lower court case together with interest thereon.

**JUDGMENT SIGNED, DATED AND DELIVERED IN CHAMBERS AT NYAMIRA THIS 25<sup>TH</sup> DAY OF MAY, 2023.**

**W. A. OKWANY**

**JUDGE**

