



**Shah v Nation Media Group Limited (Civil Suit 252 of 2014)
[2023] KEHC 19501 (KLR) (Civ) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19501 (KLR)

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

CIVIL

CIVIL SUIT 252 OF 2014

CW MEOLI, J

JUNE 29, 2023

BETWEEN

ASHOK K. SHAH PLAINTIFF

AND

NATION MEDIA GROUP LIMITED DEFENDANT

JUDGMENT

1. This suit was filed on 18.08.2014 by Ashok K. Shah (hereafter the Plaintiff) against Nation Media Group Limited (hereafter the Defendant) and is founded on the tort of defamation. The Plaintiff seeks general, exemplary and punitive/aggravated damages and costs of the suit.
2. The Plaintiff averred that at all material times, he was the Group Chief Executive Officer (GCEO) of Apollo Investments Limited whose subsidiaries are APA Insurance Limited, APA Life Assurance Limited, Apollo Assets Management Limited and Gordon Court Limited. That on 23.08.2013 the Defendant published in its newspaper known as the Daily Nation newspaper an article said to be defamatory of the Plaintiff, entitled, “Kiereini cleared for Boardroom return”.
3. To the following effect: -

“Justice Majanja yesterday found that the ex-chairman was deprived of his right to a fair hearing.

Former CMC Holdings Chairman Jeremiah Kiereini is set to make a boardroom return after a judge yesterday reversed a ban blacklisting him from holding any post in listed companies.

In a judgment that could offer a new lease of life to six other former CMC Holdings Directors blacklisted with Mr. Kiereini last year, Justice David Majanja held that Capital Markets Authority (CMA) denied him his right to a fair hearing.



My finding is that the decision of the CMA must be set aside the judge ruled invalidating the action that was taken on August 3, 2012.

The capital markets regulator, in a media statement on that date, announced that it had disqualified the CMC Holdings directors from appointment as a director of any listed company.

Also affected were former Attorney General Charles Njonjo, former CMC Holdings Chief Executive Officer Martin Forster, the company's largest shareholder Peter Muthoko, Ashok Shah, Richard Kemoli and Andrew Hamilton.

The CMA also announced it would pursue the blacklisted directors to ensure they refunded up to threefold the amounts lost under their watch.”

4. The Plaintiff averred that although he was a director of the company known as CMC Holdings at all material times, he was not among the directors who were disqualified by CMA and that his advocates by the letter dated 29.08.2013 addressed to the Defendant's Chief Executive Officer explained this fact but that no apology or admission of liability for the erroneous publication was made by the Defendant.
5. That the inclusion of the Plaintiff's name in the list of disqualified directors was a misrepresentation of the facts, and was made in bad faith and had the impact of injuring his reputation. That in their natural and ordinary meaning the said words meant and were understood to mean that the Plaintiff was inter alia, a dishonest and dishonourable person who abused his directorship position while at CMC and engaged in corrupt dealings.
6. The Plaintiff also averred that on a previous occasion, the Defendant published an equally defamatory and false publication concerning him in its Business Daily Weekend Edition of 18.11.2011 to 20.11.2011 titled:

“Loss of Moi Car that got Ashok Shah's deal with CMC cancelled.” It was pleaded in the plaint that there is a separate but similar suit currently pending before the court between the parties herein namely Nairobi High Court Civil Suit No. 560 of 2012 resulting from the just mentioned defamatory publication made.
7. On 05.02.2015 the Defendant filed its statement of defence admitting to making the impugned publication but denying the key averments in the plaint relating to the particulars of defamation. The Defendant also pleaded the defence of qualified privilege in respect to the impugned article. In his reply to the defence, the Plaintiff joined issue with the Defendant and reiterated the contents of his plaint. This was the state of pleadings prior to hearing of the suit.
8. During the trial, the Plaintiff testified as PW1. He proceeded to adopt his witness statement as his evidence-in-chief and thereafter produced his bundle of documents dated 15.08.2014 as P. Exhibits 1-4. In cross-examination, he restated the contents of his witness statement that he was at all material times the GCEO of Apollo Investments. He admitted that the word applied in the defamatory article produced as P. Exhibit 1 in relation to him was “affected” and not “disqualified.” The Plaintiff testified that he was one of the directors of CMC during the time investigations were carried out by CMA and which investigations gave rise to the case instituted by one Kiereini.
9. He further testified that following the impugned publication, he fielded several inquiries from colleagues. The Plaintiff also disclosed that the suit (Nairobi High Court Civil Suit No. 560 of 2012) previously filed by himself in relation to an earlier defamatory article published by the Defendant was determined in his favor by the decision rendered on 20.06.2019. During re-examination, the Plaintiff



reiterated that his name was listed in the impugned article beneath names listed by the Defendant of the disqualified directors of CMC and yet he was not among those disqualified. The Plaintiff also asserted that the concluded suit above had no relation to the present matter.

10. Churchill Midwa testified as PW2. He testified that he was an Advocate of the High Court of Kenya by profession and proceeded to adopt his witness statement dated 14.11.2017 as part of his evidence-in-chief. During cross-examination, he stated that he was an employee of Apollo Insurance Company between the years of 1996 and 2000 although he had not tendered any evidence to that effect at the trial. That he and the Plaintiff engaged in professional interactions on occasion. In re-examination, it was his testimony that his employment in Apollo Insurance Company was not in issue in the suit. This marked the close of the Plaintiff's case.
11. On his part, the Defendant's counsel opted to close the defence case without calling any witnesses.
12. At the close of the trial, parties filed written submissions which by and large rehashed the evidence at the trial. The Plaintiff's counsel argued that the ingredients of the tort of defamation as set out in *Musikari Kombo v Royal Media Services Limited* [2018] eKLR and *Mary M' Mukindia v National Media Group Limited & another* [2017] eKLR had been established by the Plaintiff. Counsel submitted that the impugned article was published in a newspaper with wide circulation and that the inclusion of the Plaintiff's name therein was defamatory.
13. Counsel asserted that while it was not in dispute that investigations were carried out by CMA against all directors of CMC in the material period regarding allegations of inter alia, fraud and corporate misgovernance, the Plaintiff was absolved from any culpability in that respect and that the report containing the findings of the investigations was within the public domain, and hence accessible to the Defendant. Thus, he asserted that the Defendant was therefore liable for publishing inaccurate information pertaining to the Plaintiff, by categorizing him as one of the directors who were disqualified.
14. Moreover, that the action of including the Plaintiff's name in the impugned publication, was a demonstration of malicious on the part of the Defendant and further accentuated by the Defendant's neglect or failure to publish an apology for the misrepresentation. It was argued that as a result of the defamatory publication, the Plaintiff's reputation both in his professional capacity and in the eyes of the general public, was lowered. Counsel cited the case of *Odongkara v. Astles* [1970] EA 377 in that regard.
15. Regarding quantum, the Plaintiff proposed a sum of Kshs. 10,000,000/- as general damages, relying on several decisions including *Daniel Musinga t/a Musinga & Co. Advocates v National Nation Newspapers Ltd* [2005] eKLR and *Musikari Kombo v Royal Media Services Limited* [2018] eKLR where the respective courts awarded sums of Kshs. 10,000,000/- and Kshs. 5,000,000/- under that head. The Plaintiff proposed an award of Kshs. 1,500,000/- in aggravated damages based on the Defendant's failure to offer any apology. Here, counsel cited the above decision in *Musikari Kombo v Royal Media Services Limited* (*supra*).
16. The Defendant's counsel submitted that the article in question was not defamatory but rather constituted fair comment on a matter of public interest. Counsel citing *Nation Media Group v Jakayo Midiwo* [2018] eKLR and *Rumba Kinuthia V K.T.N. Baraza* [2009] eKLR. Counsel also submitted that the Defendant also relied on the defence of qualified privilege because the impugned article constituted a report of the judgment which was delivered by the High Court on 22.08.2013 in Constitutional Petition No. 371 of 2012. The allegations of malice were also refuted in the submissions.



17. Counsel also challenged the testimony by PW2 pointing out that no evidence was tendered to support the assertions that he was employed by Apollo Insurance Company or that he and the Plaintiff enjoyed a professional relationship in the material time. The court was therefore urged to disregard PW2's testimony.
18. Regarding quantum, it was contended that the Plaintiff was not entitled to any award on damages. In the alternative, it was asserted that if a finding of liability were entered against the Defendant, then the court ought to take into account the award of Kshs. 3,500,000/- previously made to the Plaintiff in Nairobi High Court Civil Suit No. 560 of 2012 and hence award him the sum of Kshs. 500,000/- in the instant suit.
19. The Court has considered the pleadings, the evidence on record and the parties' respective submissions. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the Evidence Act. The Court of Appeal in Mumbi M'Nabea v David M.Wachira [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:-

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” The above provision provides for the legal burden of proof.

However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & Others v Blue Shield Insurance Company Limited* -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

20. Further, the same court in Karugi & Another v Kabiya & 3 Others [1987] KLR 347 noted that:

“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”



21. Regarding the rationale behind the law of defamation which is the nature of the present claim, the Court of Appeal had this to say in *Musikari Kombo v Royal Media Services Limited* (supra):

“The law of defamation is concerned with the protection of a person’s reputation. Patrick O’Callaghan in the *Common Law Series: The Law of Tort* at paragraph 25.1 expressed himself in the following manner:

“The law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation: ‘As a general rule, English law gives effect to the ninth commandment that a man shall not speak evil falsely of his neighbour. It supplies a temporal sanction ...’ Defamation protects a person’s reputation that is the estimation in which he is held by others; it does not protect a person’s opinion of himself nor his character. ‘The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit’ and it affords redress against those who speak such defamatory falsehoods...”

22. Actions founded on the tort of defamation surface the tension between private interest and public interest. Article 33(1) of the *Constitution* guarantees every person’s right to freedom of expression including the freedom to seek, receive or impart information or ideas but sub-Article (3) states that “In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others”. Article 34 guarantees the freedom of the media while Articles 25 and 31 protect the inherent dignity of every person and the right to privacy. These rights are reinforced by the provisions of the *Defamation Act*.

23. Contemplating these competing rights, Lord Denning MR stated in *Fraser v Evans & Others* [1969] 1 ALLER 8;-

“The right of speech is one which it is for the public interest that individuals should possess, and indeed, that they should exercise it without impediment, so long as no wrongful act is done; and unless an alleged libel is untrue, there is no wrong committed.”

24. In *Selina Patani & Another v Dhiranji V. Patani* [2019] eKLR the law of defamation is concerned with the protection of a person’s reputation, that is, the estimation in which such persons are held by others. In that case, the Court of Appeal stated that: -

“In rehashing, we note the ingredients of defamation were summarized in the case of *John Ward v Standard Ltd*. HCC 1062 of 2005 as follows:

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

25. To succeed, the Plaintiff herein was required to establish the above ingredients on a balance of probabilities. The Defendant on its part admitted to making the impugned publication on 23.08.2013 and further admitted to inclusion of the Plaintiff’s name therein. That being the case, the key matters for determination are whether the publication was defamatory and false.



26. On whether the words referring to the Plaintiff were false, the court considered the pleadings and testimony by the Plaintiff that the impugned publication constituted a misrepresentation fact by portraying him as one of the disqualified directors of CMC, following the investigations undertaken at the behest of CMA. That while CMA had initially called for an investigation to be carried out following allegations of fraud, corporate misgovernance and conflict of interest pertaining to all directors of CMC, following the release of the investigation report which was tendered as P. Exhibit 3, the Plaintiff was of all blame, while the directors who were found liable were disqualified.
27. The Plaintiff also tendered a resolution which was similarly tendered as P. Exhibit 3 to support his averments. In the absence of any evidence to the contrary, it is apparent that the aforesaid documents were in the public domain and accessible to the Defendant at all material times.
28. From the court's study of the impugned article, it is clear that whereas the said article was published in respect to the decision rendered by the court in Constitutional Petition No. 371 of 2012, the Defendant while naming disqualified CMC directors specifically included the Plaintiff's name. Yet, on the evidence the Plaintiff was not among the directors who were disqualified.
29. The Plaintiff also tendered as P. Exhibit 2 being a copy of an article earlier published by the Defendant on 06.08.2012 on the subject of disqualification of the directors. The said list did not include the Plaintiff's name indicating knowledge on the part of Defendant of the inaccuracies in the impugned article concerning true position of the Plaintiff as a director of CMC. Furthermore, by his testimony, the Plaintiff stated that he also clarified that position to the Defendant in the demand letter dated 29.08.2013 (P. Exhibit 4) but this did not elicit a correction by the Defendant. In view of the foregoing, the court is persuaded that the alleged publication concerning the Plaintiff was patently false.
30. Gatley on *Libel and Slander* 6th Edn. states that; -
- “A man commits the tort of defamation when he publishes to a third person words (or matter) containing an untrue imputation against the reputation of another”.
31. The next question to be answered is: was the Defendant's publication defamatory? A defamatory statement is defined in *Halsbury's Laws of England* 4th Edition Vol. 28 paragraph 10 as:
- “....a statement which tends to lower a person in the estimation of right-thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business”.
- See also the Court of Appeal definition of a defamatory statement in *SMW v ZWM* [2015] eKLR.
32. The Court stated in *Elizabeth Wanjiku Muchira v Standard Ltd* [2011] eKLR that whether a statement is defamatory or not is not so much dependent on the intentions of the defendant but on the “probabilities of the case and upon the natural tendency of the publication having regard to the surrounding circumstances. If the words published have a defamatory tendency it will suffice even though the imputation is not believed by the person to whom they are published.”-*Clerks & Lindsell on Tort* 17th Edition 1995-page 1018.”



33. In Musikari Kombo (supra) the Court of Appeal stated that:

“The test for whether a statement is defamatory is an objective one. It is not dependent on the intention of the publisher but on what a reasonable person reading the statement would perceive. In *Halsbury’s Laws of England* 4th Edition Vol. 28 at page 23 the authors opined:

“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.”

34. The Plaintiff pleaded in his plaint and testified that the published article defamatory in the natural and ordinary meaning. That the contents of the publication are manifestly defamatory and impute that the Plaintiff had engaged in corrupt and fraudulent dealings during his tenure as one of the directors of CMC, hence the alleged disqualification. PW2 also testified that upon reading the impugned article, he developed doubts concerning his hitherto perception of the Plaintiff’s integrity and contacted him to confirm the truth of the assertions contained in the article. Consequently, the court finds that the statements published, as stated in Elizabeth Muchira’s (supra), had a defamatory tendency, whether believed by the people to whom they were published or not.

35. Having satisfied itself that the Plaintiff has established that the impugned article was defamatory of him, the court must also address the question whether the publication is covered by fair comment and qualified privilege. It does not appear so. First, the statements referring to the Plaintiff were passed off as factual. The defence of fair comment is unsustainable where the basic facts upon which such comment premised are false. See *Nation Media Group Ltd. v Alfred N. Mutua* [2017] eKLR. Besides, the defence of fair comment was not pleaded in the statement of defence but instead, the Defendant surreptitiously introduced it through its submissions.

36. As regards, the defence of qualified privilege which was pleaded in the statement of defence under section 6 of the *Defamation Act*, it was held in *Adam v Ward* [1917] AC 309 that:

“A privileged occasion is, in reference to qualified privilege an occasion where the person who makes the communication has an interest or duty, legal, social or to make it to the persons to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it. This reciprocity is essential.”

37. It is not in doubt that the matter of the management of CMC was of great public interest and the Defendant had a duty to inform the public. However, as stated in *Dorcas Florence Kombo v Royal Media Services* [2014] eKLR the defence of qualified privilege can be negated by evidence of reckless conduct. In the present instance, the Defendant did not seek to verify the identity of the disqualified directors from already available information, and its own previous article concerning the disqualification. Nor correct the contents of the impugned article as related to the Plaintiff, despite being notified by the Plaintiff that the Plaintiff’s directorship was not affected by the disqualification process. Hence his name was erroneously listed in the category of directors who had been disqualified by CMA.

38. The Code of Conduct for the Practice of Journalism provides thus:

“Accuracy and fairness



- (1) A person subject to this Act shall write a fair, accurate and an unbiased story on matters of public interest.
- (2) All sides of the story shall be reported, wherever possible.
- (3) Comments shall be sought from anyone who is mentioned in an unfavourable context and evidence of such attempts to seek the comments shall be kept”.

39. In *Uhuru Muigai Kenyatta v Baraza Leonard* [2011] eKLR the Supreme Court stated:

“While taking the defence of justification, or qualified privilege in a defamation case, the defendant was required by law to establish the true facts and the plaintiff has no burden to prove the defence raised by the defendant. Once verified, the justification or qualified privilege does not inure the defendant and in any event, the onus that the same is true rests on the defendants to make it a fair publication.”

40. Upon reviewing the material on record, the court is of the considered view that the Defendant acted in a reckless and therefore malicious manner by failing to verify and/or correct the information published concerning the Plaintiff and in failing to retract the impugned publication or tender an apology to the Plaintiff at the earliest. The court finds that the Plaintiff has proved his case on a balance of probabilities and therefore finds the Defendant liable for defamation.

41. Regarding damages, the court has considered the parties’ submissions. The purpose of awarding general damages in a libel action is to compensate the plaintiff for the damage done to his reputation and the court has wide discretion, depending on the peculiar circumstances of the case before it. See *CAM v Royal Media Services* (2013) eKLR. The Court of Appeal in *Evans Gicheru v Andrew Morton & Another* [2005] eKLR adopted factors to guide assessment of damages for defamation from *Jones v. Pollard* [1997] EMLR 233, as follows:

“

- “(i) The 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. (ii) The 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. (iii) Matters tending to mitigate damages, such as the publication of an apology. (iv) Matters tending to reduce damages, and (v) Vindication of the plaintiff’s reputation past and future.”

See also *John v MGM LTD* [1997] QB 586.

42. No doubt the libel in this case was fairly grave and touched on the Plaintiff’s personal integrity, honour, and professional reputation. The publication also potentially had a wide circulation. There is nothing to indicate that the Defendant attempted to retract the publication or tender an apology to the Plaintiff, even after the misrepresentation of facts was brought to its attention. Moreover, in answer to the Defendant’s submissions regarding consideration of the award made in the separate case namely Nairobi High Court Civil Suit No. 560 of 2012, the court is of the view that the said case though involving the same parties herein arose from different facts and is distinct from the present one. Hence the Defendant’s argument that the Plaintiff is entitled to a lesser sum in view of the earlier award cannot lie.



43. That said, upon considering the award proposed in the Plaintiff's submissions, the court notes that a majority of the authorities cited by the Plaintiff involved persons of higher prominence and standing in society hence the higher awards made on general damages. In the court's view, an award of Kshs. 3,000,000/- would constitute reasonable compensation under this head, being persuaded by a similar award made in *Abdi Abdullahi v Fazal Butt & another* [2022] eKLR involving a party who like the Plaintiff herein, was a director.
44. Concerning aggravated damages, it is apparent that no formal apology was made by the Defendant in a bid to mitigate the damage already occasioned to the reputation of the Plaintiff, noting that the impugned publication had a wide circulation. The court is therefore satisfied that the Plaintiff is entitled to an award of aggravated damages and finds a sum of Kshs.500,000/- to be fair upon considering the awards made in *Musikari Kombo v Royal Media Services Limited* (supra).
45. Exemplary/punitive damages, though pleaded was not canvassed in submissions. The court therefore declines to make any award here.
46. Judgment is therefore entered for the Plaintiff and against the Defendant in the total sum of Kes.3,500,000/- (Three Million Five Hundred Thousand) with costs and interest.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 29TH DAY OF JUNE 2023.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: Mr. Mege

For the Defendant: Ms. Koech h/b for Mr. Kiragu

C/A: Carol

