



**Standard Media Group Ltd & 2 others v AMW & another (Civil Appeal  
E028 of 2021) [2023] KEHC 21358 (KLR) (Civ) (10 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21358 (KLR)

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

**CIVIL**

**CIVIL APPEAL E028 OF 2021**

**CW MEOLI, J**

**AUGUST 10, 2023**

**BETWEEN**

**THE STANDARD MEDIA GROUP LTD ..... 1<sup>ST</sup> APPELLANT**  
**THE MANAGING EDITOR, STANDARD MEDIA GROUP  
LTD ..... 2<sup>ND</sup> APPELLANT**  
**THE NAIROBIAN ..... 3<sup>RD</sup> APPELLANT**

**AND**

**AMW ..... 1<sup>ST</sup> RESPONDENT**  
**JGK ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment of G.A Mmasi (Mrs.) SPM. delivered  
on 23rd December 2020 in Nairobi Milimani CMCC No. 2256 of 2019)*

**JUDGMENT**

1. This appeal emanates from the judgment delivered on 23.12.2020 in Nairobi Milimani CMCC No. 2256 of 2019. The suit had been commenced by A.M.W, the plaintiff in the lower court (hereafter the 1<sup>st</sup> Respondent) by way of a plaint dated 04.04.2019 and amended on 02.09.2019 as against J.G.K, the 1<sup>st</sup> defendant in the lower court (hereafter the 2<sup>nd</sup> Respondent), The Standard Media Group Ltd, The Managing Editor Standard Media Group Ltd and The Nairobian, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendant in the lower court (hereafter the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellant/Appellants). The 1<sup>st</sup> Respondent's claim was founded on the tort of defamation arising from publications made by the 2<sup>nd</sup> Respondent, 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellant.
2. It was averred that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents got married sometime in January 2015 and at the time of the said marriage, the 1<sup>st</sup> Respondent had already communicated her Human Immuno-deficiency



Virus (HIV) status to the 2<sup>nd</sup> Respondent, who without any coercion acquiesced to the said marriage. That on or about 21.02.2019 the 1<sup>st</sup> Respondent filed a divorce petition against the 2<sup>nd</sup> Respondent and by a response to the petition and cross petition, signed and filed by the 2<sup>nd</sup> Respondent, the latter caused to be published certain statements, photographs, and communication the total content which was directly or by innuendo libelous of the 1<sup>st</sup> Respondent.

3. It was further averred that on 03.04.2019 the 2<sup>nd</sup> Respondent while using a pseudonym either himself or through his agents and or servants caused to be published and circulated an email to all addressees on the 1<sup>st</sup> Respondent's email address entitled "The unveiling of Haco Executive – A.M.G" and attached thereto the response to the divorce petition and cross petition.
4. That the 2<sup>nd</sup> Respondent through his servants, agents and through the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellant embarked on a media campaign through both print, social media and radio to disseminating information regarding the sub judice matters of the divorce petition which actions not only comprised infringement of her constitutionally guaranteed rights to privacy but also impinged on her liberties and rights to privacy as protected under the Computer Misuse and Cyber Crimes Act, No. 5 of 2018 and the National HIV and Aids Prevention Act, No. 14 of 2016.
5. It was further asserted that by posting and circulating the above publication online, the 2<sup>nd</sup> Respondent knew that the content would be read by the named email recipients and would be circulated in the worldwide web so that the libelous content in the statements and photographs complained of in the responses were aimed at directly at the 1<sup>st</sup> Respondent's character with the obvious calculation to besmirch, disparage and lower the 1<sup>st</sup> Respondent's esteem in her professional life, family life, office profession, calling and her standing in society. That she therefore suffered loss and damage.
6. The 2<sup>nd</sup> Respondent filed a statement of defence on 12.04.2019 denying the key averments in the plaint. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellant on their part filed a joint statement of defence on 19.11.2019 equally denying the key averments in the plaint and in the alternative, without prejudice to the averments in the statement of defence, averred that the articles concerning the 1<sup>st</sup> Respondent consisted of facts, and that the publications were a fair and accurate report of judicial proceedings and in public interest.
7. The suit proceeded to full hearing during which all the respective parties adduced evidence. In its judgment, the trial made a finding that the 1<sup>st</sup> Respondent had proved her case on a balance of probabilities. Judgment was thereafter entered in favour of the 1<sup>st</sup> Respondent for a total sum of Kshs. 8,500,000/- with costs of the suit, made up as follows-
  - a. General damages: for violation of privacy against the 2<sup>nd</sup> Respondent. Kshs. 1,500,000/-;
  - b. General damages: for defamation jointly and severally against the 2<sup>nd</sup> Respondent, 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellant.  
Kshs. 6,500,000/-;
  - c. Exemplary damages against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellant in lieu of an apology. Kshs. 500,000/-;Total Kshs.8,500,000/-
8. Aggrieved with the judgment of the trial court, the Appellants preferred the instant appeal on the following grounds: -
  1. The Learned Senior Principal Magistrate erred in fact and law in finding and holding that the newspaper and online publication titled "Away game: My wife offered conjugal rights to



Kamiti prisoner” published by the 1<sup>st</sup> Appellant’s Nairobi issue 12th - 18th April, 2019 was defamatory of the 1<sup>st</sup> Respondent;

2. The Learned Senior Principal Magistrate erred in fact and law in finding that the quote “Wife does not deny bedding over 35 men including a makanga, a rugby player, television anchor, sister’s hubby, club DJ’s, a church member, nine workmates and a random Indian guy” as false report of the proceedings in Divorce Petition No. 149 of 2019. The Magistrate further erred in holding that the Appellants failed the accuracy test expected of judicial proceedings;
3. The Learned Senior Principal Magistrate erred in fact in finding that the Appellants had defamed the 1<sup>st</sup> Respondent by indicating her agreement to having slept with 35 men;
4. The Learned Senior Principal Magistrate erred in fact and law in finding that there was no evidence that had been adduced where the Plaintiff admitted to sleeping with 35 men;
5. The Learned Senior Principal Magistrate erred in law in finding that the defence of absolute privilege in relation to the accuracy of the publication was thwarted by the provision of Section 6 of the Defamation Act;
6. The Learned Senior Principal Magistrate erred in law and fact in failing to consider the defence of justification as pleaded by the Appellants;
7. The Learned Senior Principal Magistrate erred in fact and law in finding that the Appellants had wrongly and in a defamatory way linked the 1<sup>st</sup> Respondent without verifying the truthfulness of the publication hence entering judgment jointly and severally against the Appellants and 2<sup>nd</sup> Respondent in the sum of Kshs. 6,500,000 as general damages and exemplary damages of Kshs. 500,000 jointly and severally against the Appellants in lieu of an unequivocal apology.” (sic)
9. It is apposite to point out at the onset that only the Appellants and the 1<sup>st</sup> Respondent participated in this appeal. The 2<sup>nd</sup> Respondent did not participate in the appeal, and there is no indication on the record that he was served with any pleading, notice or submissions either by the Appellants, or the 1<sup>st</sup> Respondent. In the circumstances, this judgment relates only to the Appellants and the 1<sup>st</sup> Respondent.
10. The appeal was canvassed by way of written submissions. As a preamble counsel for the Appellants restated the background to the instant appeal. He anchored his submissions on the decision in *Selle & Another v Associated Motor Boat Co. Ltd & Another* [1968] EA 123 on the duty of the first appellate court.
11. Addressing the question whether the impugned publication was defamatory (see grounds 1, 2, 3 & 4 in the memorandum of appeal), counsel restated the evidence tendered before the trial court, citing the relevant facets of the impugned judgment and calling to aid the decisions in *Samuel Ndungu Mukunya v Nation Media Group Limited & Another* [2015] eKLR and *J. Kudwoli v Eureka Education and Teaching Consultants & 2 others* HCC No.126 of 1990 as cited with approval in the case of *Brian Odhiambo Oluoch v The Standard Chartered Bank Limited* [2017] eKLR and *Wycliffe A. Swanya v Toyota East Africa Ltd & Another* Civil Appeal No. 70 of 2008.
12. His submission was that the words used in the article in their natural and ordinary meaning do not portray the 1<sup>st</sup> Respondent in the manner alluded to in her pleadings and that she further failed to demonstrate proof of actual or intrinsic malice, ill will or spite or any indirect or improper motive on the part of the Appellants at the time of publication. That the publication was premised on the divorce



- court proceedings between the 1<sup>st</sup> and 2<sup>nd</sup> Respondent and therefore the trial court was bound by precedents to demand from the 1<sup>st</sup> Respondent proof of actual malice by the Appellants on a balance of probabilities. The decisions in *Nation Newspapers Limited vs. Gibendi* [2002] 2 KLR 406 and *Phinebas Nyagab v Gitobu Imanyara* [2013] eKLR as cited in *Wilfred Nyaundi Konosi vs Standard Group Limited & Another* [2022] eKLR were called to aid in the latter regard.
13. It was further asserted that the article as published concerned the 1<sup>st</sup> and 2<sup>nd</sup> Respondent pleadings before court and by dint of Section 79 of the *Evidence Act*, the divorce petition, response, and cross petition were public documents hence the court could not purport to gag the Appellants while they discharged their mandate of keeping the public informed.
  14. On whether the Appellants were entitled to the defence of justification and absolute privilege ( grounds 5 and 6 of the memorandum of appeal) , counsel cited regarding the former, the definition of justification in Halsbury’s Laws of England and called to aid the decisions in *Mwangi Kiunjuri vs Wangethi Mwangi & 2 Others* as cited with approval in *Vimalkumar Bhimji Depar Shab v Stephen Jennings & 5 Others* [2016] eKLR and *Joseph Njogu Kamunge v Charles Muriuki Gachari* [2016] eKLR . In support of the submission that the trial court failed to consider that the originator of information published in the article in question was the 2<sup>nd</sup> Respondent concerning the divorce proceedings between himself and the 1<sup>st</sup> Respondent.
  15. Counsel asserted that had the trial court considered the said defence it would have arrived at the irrefutable conclusion that the news article was based on the 1<sup>st</sup> Respondent’s confession to her former husband, which the latter produced in court as evidence in the divorce proceedings. With respect to the defence of absolute privilege, counsel argued that the publication was premised on judicial proceedings and compliant with the provisions of Section 6 of the Defamation Act.
  16. Concerning the challenge to quantum of damages raised in grounds 7 in the memorandum of appeal, counsel relied on the principles for consideration by an appellate court in interfering with awards of damages. In that regard, he cited the decisions in *Butt v Khan* Civil Appeal No. 40 of 1977, *Uren v John Fair fax & Sons PTY Limited* 117 CLC 115 pg. 50 as cited in *Gicheru v Morton & Another* [2005] 2 KLR 332, *David Kiprugut & Another v Peter Okebe Pango* Civil Appeal No. 68 of 2004, *Standard Limited v G.N. Kagia t/a Kagia & Co. Advocates* Civil Appeal No.115 of 2003 and *Jones v Pollard* [1997] EMLR 233,243 as cited in *Kenya Tea Development Agency Limited-vs-Benson Ondimu Masese t/a B.O. Masese & Co. Advocates* CA No. 95 of 2006 (Unreported).
  17. His position was that the damages awarded by the trial court were unprecedented, inordinately high, and not a fair assessment based on the guiding legal parameters. That the 1<sup>st</sup> Respondent failed to demonstrate malice, ill will or that the Appellants obtained direct financial gain from the publications. Counsel faulted trial court’s award of exemplary damages in the sum of Kshs. 500,000/-. Counsel contended that the total award on damages jointly and severally as against the Appellants in lieu of an unequivocal apology was an unfair and unreasonable solarium to the 1<sup>st</sup> Respondent. The court was thus urged to allow the appeal as prayed.
  18. On the part of the 1<sup>st</sup> Respondent, she naturally defended the trial court’s findings. Counsel for the 1<sup>st</sup> Respondent addressed each of the respective grounds of the Appellants memorandum of appeal. Addressing ground 1 of the memorandum of appeal, counsel cited *Black’s Law Dictionary* 10th Edition Page 506 on the definition of defamation, the decision in *Samuel Ndungu Mukunya vs Nation Media Group Limited & Alphonse Shiundu* [2015] eKLR and the English case of *Morgan & Investment Society Limited vs Odhams Press Limited* [1941] KB as cited with approval in the *Miguna Miguna vs Standard Media Group Limited & 4 Others* [2017] eKLR to submit that the publication by



the Appellants was defamatory as a reasonable person would perceive the 1<sup>st</sup> Respondent in a negative light.

19. On ground 2, counsel called to aid Section 3(2) of the *Media Council Act* and the Code of Conduct for the Practice of Journalism to argue that 1<sup>st</sup> Respondent did not in any way admit to the contents of report in her pleadings before the divorce court and that the trial court did not err in finding that what was published was a false report which failed the accuracy test expected of judicial proceedings.
20. Responding to the Appellants' submission on grounds 3 and 4 of the appeal, counsel relied on the dicta in the American decision in *Purcell –vs- Westinghouse Broad Co*, 191, A 2nd 662 (Par 163) to submit that the Appellants' publication destroyed the 1<sup>st</sup> Respondent's reputation there being no evidence tendered of the latter's admission to sleeping with 35 men. That the Appellants failed to exercise diligence in confirming whether there was a rebuttal by the 1<sup>st</sup> Respondent to 2<sup>nd</sup> Respondent's accusations in the divorce proceedings, instead, proceeding to publish the article without according the 1<sup>st</sup> Respondent a right of reply.
21. Concerning the Appellants' justification/ absolute privilege defence referred to in grounds 5 and 6 of the memorandum of appeal, counsel relied on the English cases of *Reynolds vs Times Newspapers [1999] 4ALL ER 609* and *Digby v. Financial News Ltd. Collins, M.R.*, as cited in *Joseph Njogu Kamunge v Charles Muriuki Gachari [2016] eKLR* to assert that the Appellants' publication was not covered by absolute privilege and or justified as they failed to conduct due diligence or accord the 1<sup>st</sup> Respondent her right to reply prior to publication.
22. Concerning damages, counsel emphasized the foregoing assertion and stated that the trial court's award was also intended to instill a sense of responsibility on the part of the Appellants. Hence, this court ought to court to uphold the trial court's award of damages. Citing *C A M v Royal Media Services Limited Civil Appeal No. 283 of 2005 [2013] eKLR*, *Standard Limited v G.N. Kagia T/A Kagia & Company Advocates [2010] eKLR* and *Ken Odondi & 2 Others vs James Okoth Omburah t/a) Okoth Omburah& Company Advocates [2013] eKLR*. In conclusion the court was pressed to dismiss the appeal with costs to the 1st Respondent.
23. The court has considered the record of appeal as well as the submissions by the respective parties. From the grounds raised in the memorandum of appeal, the instant appeal turns on the twin issues of liability and damages. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in *Selle –Vs- Associated Motor Boat Co. [1968] EA 123* in the following terms: -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”



24. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another vs Duncan Mwangi Wambugu* [1982 – 1988] 1 KAR 278. Pertinent to the determination of issues before this court are the pleadings, which form the basis of the parties’ respective cases before the trial court. In *Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91, the Court of Appeal stated in the foregoing regard that: -

“We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.” (Emphasis added).

25. The court outlined the gist of the respective parties’ pleadings, in the earlier part of this judgment. The dispute between the parties revolved around the purported publication of defamatory material by the 2<sup>nd</sup> Respondent and the Appellants and the key question for determination is whether the trial court’s findings on the issues falling for determination were well founded.

26. The trial court addressed itself in some detail on the issue of liability by considering each respective defendant’s culpability. I find it useful to quote in extenso the relevant facets of the judgment as hereunder; -

“....this court directed the parties to file their respective submissions.....the parties complied. I have equally read the decisional law cited therein.

....In this case, the 1<sup>st</sup> Defendant while denying having published or caused to publish the email on 3<sup>rd</sup> March 2019 to which the following link was posted and published to the Plaintiff’s contacts.....that link in the descriptive components contained the 1<sup>st</sup> Defendant’s date of his response and cross petition filed on 29<sup>th</sup> March 2019.....from the link it is indicative in this regard and the documents in the said link which belong to the 1<sup>st</sup> Defendant.....are his pleadings. The *Evidence Act* bars one through estoppel to deny the existence of a thing if their act or omissions caused one to rely on the said act or omission. That email has information in its body, the contents of which strikingly resembles the pleadings of the 1<sup>st</sup> Defendant in the divorce cause. It would only be reasonable for this court based on this strikingly rare occurrence which I fail to find as a coincidence. I find the 1<sup>st</sup> Defendant on the basis of evidence as having published the impugned email on a balance of probabilities.

.....The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendant while noting that they are not in any manner the agents of the 1<sup>st</sup> Defendant made a case for their fair commenting on judicial proceedings as a justification for its publication.....A fair and accurate report of proceedings heard before any court exercising judicial authority in Kenya qualifies for absolute privilege.....it is but



clear that the circumstance of the present case noting that publication has been admitted by the said defendants save that they have invoked the defence of justification, fair and accurate reporting and that if in any case the words complained about were not particularized.

As I have noted above, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendant in this matter do not deny publication in terms of the Plaintiffs cause of action as relates to the pleadings in Divorce 149 of 2019 filed in court on 29<sup>th</sup> March 2019 save that they plead the same as privileged by dint of absolute privilege.

.....The Plaintiff contends the words so published by the 1<sup>st</sup> Defendant were defamatory to her as in their estimation ordinary meaning would mean that she is a harlot, an unfit parent who abets a crime and one who took part in illegal and unethical behavior..... In the court's considered view, the words in the email as published by the 1<sup>st</sup> Defendant were defamatory. They in their ordinary meaning lowered the plaintiff's estimation in the eyes of right-thinking members of society including her colleagues.

On the part of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendant that they defamed her by indicating her agreement to having slept with 35 men while she had not done so in any of her pleadings before the divorce court....is a false report of the proceedings and fails the accuracy test expected of judicial reporting. The said falsehood having been disseminated then find the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendant as per the story in the 4<sup>th</sup> Defendants newspaper as defamatory as not accurate as per the requirements of the journalist code, from my perusal of the said pleadings and the adducing of evidence.

No evidence has been shown where the plaintiff admits to sleeping with 35 men. The defence as to the accuracy of their reporting is thwarted by the provisions of Section 6 of the Defamation Act....This court while looking at the totality of the evidence on record reaches a decision that indeed the impugned words published by the Defendant were defamatory to the plaintiff character” (sic)

27. 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 in discussing the standard of proof in civil liability claims in our jurisdiction held that:-

“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 recognises 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.”

28. Hence, the duty of proving the averments contained in the amended plaint lay squarely upon the 1<sup>st</sup> Respondent. In *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347 the Court of Appeal stated 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. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...-. 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.” (Emphasis added)

29. In *Halsbury's Laws of England* 4th Edition Vol. 28 paragraph 10, a defamatory statement is defined 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.

30. Additionally, *Gatley on Libel and Slander* 6<sup>th</sup> 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 Court of Appeal in addressing the rationale behind the law of defamation in *Musikari Kombo v Royal Media Services Limited* [2018] eKLR stated inter alia that:

“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..”

32. Potentially, 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 latter rights are reinforced by the provisions of the Defamation Act.
33. 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.”
34. In *Selina Patani & Another vs Dhiranji V. Patani* [2019] eKLR the Court of Appeal reiterated that the law of defamation is concerned with the protection of reputation of persons, that is, the estimation in which such persons are held by others. The Court further 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.”
35. During the trial, the 1<sup>st</sup> Respondent testified as PW1. Adopting her witness statement filed on 21.01.2020 as her evidence- in- chief she produced the bundle of documents in the list of documents filed on 16.09.2020 as PExh.1 to PExh.8. The gist of her evidence was that she got married to the 2<sup>nd</sup> Respondent in January 2015 but left the matrimonial home before filing her divorce petition on 21.04.2019 and that the petition was eventually determined. That the 2<sup>nd</sup> Respondent is an IT Professional and before their marriage, she had disclosed her HIV status to the 2<sup>nd</sup> Respondent.
36. It was her evidence further that prior to her marriage she had shared some naked photographs and emails with the 2<sup>nd</sup> Respondent regarding her earlier romantic relationships. Having not shared the photographs with anyone else she did not permit 2<sup>nd</sup> Respondent to share the same as he did, and without her consent. She stated that in 2018, the 2<sup>nd</sup> Respondent had gained unauthorized access to her mobile phone, and her WhatsApp messages, and that the pleadings he had filed in the divorce proceedings found their way to her place of work. That the pleadings were eventually circulated on social media while the article in the Nairobi newspaper falsely stated that she had sexual relations



- with 37 men while married. She stated that the publication had a devastating effect on her impacting her employment.
37. Under cross-examination she admitted having filed a divorce petition that resulted in a decree absolute being issued. She asserted being a marketing expert and thus unqualified in matters of technology. She further confirmed having not tendered material regarding any report to a relevant authority that her device had been illegally accessed by the 2<sup>nd</sup> Respondent and asserted that she did not share her naked photographs with any third party save for the 2<sup>nd</sup> Respondent. She acknowledged that the 2<sup>nd</sup> Respondent filed a response to her divorce petition and that the documents filed in court became public records and accessible to the Appellants. Admitting the Appellants' articles did not disclose her HIV status, she asserted that the claims therein that she had slept with 30 men in three years during the subsistence of her marriage amounted to a criminal offence. She concluded by confirming that she did not tender proof of the article having been published in several social media platforms.
  38. On re-examination, she reiterated that the gist of her complaint related to the documents filed by the 2<sup>nd</sup> Respondent. That despite the court order restraining the Appellants from further publication, they failed to comply.
  39. The 2<sup>nd</sup> Respondent testified as DW1. He identified himself as a Computer IT Scientist and equally adopted his witness statement dated 21.11.2019 as his evidence- in- chief. The kernel of his evidence was that he merely filed an answer to the divorce petition filed by the 1<sup>st</sup> Respondent and thus did not publish the material in respect of the divorce proceedings. He categorically denied accessing the 1<sup>st</sup> Respondent's mobile device and emails asserting that a report was yet to be made to the police for any offence in that regard.
  40. During cross-examination, he confirmed the existence of the marriage and subsequent divorce from the 1<sup>st</sup> Respondent and the fact that the latter had disclosed her HIV status prior to their marriage. That the email communication between himself and the 1<sup>st</sup> Respondent produced by the latter was exchanged in 2010 prior to their marriage, and that he introduced the same in his cross petition to the divorce proceedings. He further denied accessing the 1<sup>st</sup> Respondent's phone or laptop, stating he did not know where the Appellants received the information as published. He confirmed that the 1<sup>st</sup> Respondent is mother to his child; that whereas he did not send out any emails as asserted by the 1<sup>st</sup> Respondent, the WhatsApp screen shots were for purposes of the divorce petition. He contended that the publication by the Appellants appeared to have been lifted from his court documents.
  41. Upon re-examination he reiterated that the 1<sup>st</sup> Respondent's evidence tendered in the trial proceedings were all part of his documents in respect of the divorce proceedings and that no report had ever been made to the police regarding his alleged unauthorized access to the 1<sup>st</sup> Respondent's communication devices.
  42. On behalf of the Appellants, David Odongo testified as DW2. He identified himself as a journalist with the 1<sup>st</sup> Appellant and equally adopted his witness statement filed on 24.09.2020 as his evidence- in - chief. He produced the bundle of documents in the list of documents dated 09.09.2020 as DExh.1 and DExh.2 respectively. On cross-examination he confirmed publication of the impugned article by the Appellants, however stating that the 1<sup>st</sup> Respondent's comments were not sought before the article was published. That having perused the material in respect of the divorce proceedings before publication he established the veracity of the material.
  43. He stated that statements in the article that the 1<sup>st</sup> Respondent had been sexually involved with 35 men during her marriage were lifted from the court documents. That it was his duty to publish the story and that having examined the rival material in the divorce proceedings, he published a balanced article.



He further testified that the article as published did not indicate what occurred prior to the marriage. Upon re-examination he reiterated that the documents in relation to the court proceedings were public documents and freely accessible.

44. Having set out the respective parties' evidence before the trial court, this court must consider whether the 1<sup>st</sup> Respondent established her case against the Appellants on a balance of probabilities. Based on the ingredients of defamation in *Selina Patani* (supra), there is no dispute in this matter regarding ingredients (ii) and (iii) above as Appellants readily admitted both in their statement of defence and through DW2's evidence to publishing the articles in question regarding the 1<sup>st</sup> Respondent. The key issues in dispute are whether the articles as published are defamatory and false and or whether the defence of qualified privilege or fair comment as per Section 6, 7 and 15 of the Defamation Act was available to the Appellants.
45. There is no dispute that at the material time, the 1<sup>st</sup> Respondent was a marketing executive, earlier married to the 2<sup>nd</sup> Respondent before a divorce initiated by her through a petition for divorce. Her case was that during the said divorce proceedings, the 2<sup>nd</sup> Respondent and the Appellants published defamatory material calculated to disparage her, and lower her estimation in her professional life, family life, office profession, calling and her standing in society. Hence occasioning her loss and damage.
46. The print version of the article produced as Pexh.7 and admittedly published by Appellants in "The Nairobi Newspaper, 12-18 April, 2019" issue read as follows:

"Away game: My Wife offered conjugal rights to Kamiti prisoner.

Wife does not deny bedding over 35 men including a makanga, rugby player, television anchor, sister's hubby, club DJ's, a church member, nine workmates and a 'random Indian guy'.

By The Nairobi Reporter

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A city woman who has filed for divorce has been accused by the husband of sleeping with more than 35 men.

Joel Karanja, a city IT guru, parted ways with Angela Mwihaki, his wife of four years who filed for divorce citing among others "cruelty" and "irreconcilable differences" But Gachanja in his replying affidavit filed at the Milimani Commercial Court's in Nairobi accuses the marketing manager of serial infidelity with a wide array of suitors.

Gachanja who was divorced before meeting Angela, lists her former bosses in various blue-chip companies among the men she slept with besides a Kenyan International player, a renowned rugby heckler, a sports television anchor, her pediatrician, basketballers (3), a thespian, a former comedian, club DJ's (2), a church member, a makanga, nine workmates and 19 'boyfriends'.

Gachanja's affidavit also charges that Angela also had sexual relations with her sister's husband and his two friends and a 'random Indian guy'.

Shockingly, Angela does not deny she had affairs with all the men listed including trooping to the Kamiti Maximum Security prison where she offered conjugal rights to an inmate while still married to Gachanja. Angela had met the Kamiti inmate on an online dating site. One of the men has filed an affidavit owning up to an affair with Angela while four verbally asked for forgiveness from Gachanja.



In the affidavit filed under Divorce Petition Number 149 of 2019, Gachanja Says “the petitioner voluntarily moved out of our matrimonial bedroom on 16 February and filed for divorce on 21 February 2019.”

He has also attached pictorial evidence of nudes and incriminating WhatsApp conversations his wife shared with several men in high positions. He also attached an in-depth confession in which Angela gives a blow-by-blow account of her mind-boggling sexual athleticism. Gachanja notes in his affidavit that Angela, whom he married at the Attorney General’s Chambers in 2015 has “lost her chastity, honor, integrity and prestige of a married woman and lowered herself by randomly flirting with her social media contacts and even sending suggestive and nude pictures and erotic content for momentary thrills”.

Angela Mwhiki had innocently emailed a confession to Gachanja when they broke but made up for the first time.

Gachanja, in his suit papers had used Mwhiki’s confession to write a flowing and detailed account of each and every sexual encounter his wife has ever engaged in, how the affairs started naming the men, whether protection was used or not and the location the sex took place at which were mostly in lodgings, car parks or inside parked cars.

In her defense, Angela terms Gachanja as an insecure, foul-mouthed man with an ungovernable temper.

“The defendant is a man pregnant with imagination constantly accusing me of cheating and having extramarital affairs. The constant acrimony between the parties mainly caused by unfounded insecurities on the part of the defendant.”

Angela Mwhiki avers that by the time of their marriage “we lived in a house I owned and was solely paying the mortgage until sometime in October 2015 when we purchased and moved into our house in Redhill toward which I contributed half of the purchase price”.

She continues “On the 16 February 2019, the defendant ordered the plaintiff to remove her belongings from the matrimonial home and locked her out of the matrimonial home. The plaintiff is apprehensive of the defendant who has a history of violence, destruction of property, arson, an ill temper, and foul mouth for her own safety and that of the children decided to vacate the matrimonial home to seek safe haven. I swear by this affidavit that I am hiding both in fear of my life and the lives of my children due to the violent nature of the defendant.”

She further claims Gachanja hurled unprintable insults at her and accuses him of hacking her phone.

“The defendant has abused me in front of the children and called me a slut, a whore, and a trollop in front of my son. I know for a fact the defendant has hacked into my personal phones and constantly read my communication and listens to my calls. The defendant has also on occasion burnt my clothes and other belongings. He has on more than one occasion physically assaulted me thereby prompting me to report the matter to the Kenya Police who provided me with an abstract.”

Angela is demanding that Gachanja contributes Sh431,000 as his share towards the upkeep and the maintenance of the family; Monthly rent Sh130,000, electricity Sh5,000, medical Sh5,000, education fund Sh10,000, gas Sh.2,500, house help Sh18,000, water Sh5,000, food per month Sh50,000, school fees and transport Sh150,000, clothing Sh5,000,



entertainment Sh30,000. But she wants Gachanja to pay Sh215,000 every month pending the determination of the case.” (sic)

47. The online article PExh.8, was a replica of the print version of the publication, PExh.7. The gist of the 1<sup>st</sup> Respondent case before the trial court against the Appellant was that the statement in the article in the Nairobiian stated that while married to the 2<sup>nd</sup> Respondent, she slept with 37 men was false and the said publication had a devastating effect. The Appellants rebutted the above by arguing that the publication was lifted from the court documents in respect of the divorce proceedings between the 1<sup>st</sup> and 2<sup>nd</sup> Respondent therefore the same was covered by privilege.
48. Both the print and online article employed sensationalized phrases and words in reference to the 1<sup>st</sup> Respondent, including “does not deny bedding over 35 men” “sleeping with more than”, “sexual athleticism”, “had affairs” and “offered conjugal rights to an inmate while still married” . The articles expressly referred to the divorce proceedings between the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent on purported grounds of serial infidelity on the part of the 1<sup>st</sup> Respondent, and alleged cruelty and irreconcilable differences on the part of the 2<sup>nd</sup> Respondent.
49. On the question whether the words referring to the 1<sup>st</sup> Respondent were defamatory, the test to be applied was spelt out in the case of the *Onama v Uganda Argus Ltd* (1969) EA where the East African Court of Appeal stated that:
- “In deciding whether the words are defamatory, the test is what the words could reasonably be regarded as meaning, not only to the general public, but also to all those “who have a greater or special knowledge of the subject matter”.
50. 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* 17<sup>th</sup> Edition 1995-page 1018.”
51. Further, in Musikari Kombo (supra) the same Court 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.”
52. It was the duty of the 1<sup>st</sup> Respondent to adduce evidence that an ordinary reasonable person who knew her before, would upon reading the said publication, view her differently, or in other words, that the statements in the article, whether believed by such reader or not, had the tendency to lower the reputation of the 1<sup>st</sup> Respondent in the reader’s eyes. As stated in *Hezekiel Oira v Standard Limited & Another* [2016] eKLR the successful claimant in a defamation cause must tender evidence not only that the publication complained of bore falsehoods, but also that the published words tended to lower



her reputation, causing right thinking members of society to shun or avoid her or to treat her with contempt.

53. The 1<sup>st</sup> Respondent was the only witness who testified in support of her case. Defamation involves imputations that tend to cause injury to the reputation of a person, and a successful plaintiff must demonstrate the injury to her reputation or standing as part of the ingredients of defamation, and not merely rely on her own estimation of herself and the effect of the defamatory statements to that estimation.

54. In *SMW v ZWM* (2015) eKLR, the Court of Appeal observed that: -

15. Black's Law Dictionary 8th Edition defines defamation as the act of harming the reputation of another by making a false statement to a third person. (emphasis added). A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right-thinking members of society generally or if it exposes him/her to public hatred, contempt, or ridicule or if it causes him to be shunned or avoided: see *Gatley on Libel and Slander* (10th edition). A plaintiff in a defamation case must prove that the words were spoken /written; that those words refer to him/her; that those words are false; that the words are defamatory or libelous and that he/she suffered injury to reputation as a result. ...

19. The trial judge had considered the testimony of witnesses with a view to assessing their credibility and at no point did any of the Appellant's witnesses at trial consider the appellant to have been defamed by the contents of the letter. The witnesses who testified at trial constitute and pass the ordinary reasonable man test as they were not only neighbours but also people known to the disputants. There was no evidence of any public ridicule, hatred or even shunning experienced by the appellant.

The appellant had only testified at the trial court that he felt shy to interact with some of his friends in tea farming. The appellant appears to have had an apprehension of defamation on himself ostensibly based on how he himself considered his standing in the society. That is not what defamation is in law. The appellant himself further testified before the trial court that nothing had changed in his dairy farming business. Moreover, despite being a tea farmer in Gatundu, he had since relocated to his Karen home at the time of these proceedings where the chances of any possible defamation of him became slimmer based on the existing solitary and liberal lifestyle adopted by urbanites. As elucidated earlier, the test to be applied is that of the reasonable ordinary man, not the appellant or the respondent..." (Emphasis added).

55. The above holding was reiterated in Patani's case (*supra*), where the same Court stated that: -

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 2nd 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 appellant's 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 appellant's 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)

See also *Daniel N. Ngunia v K.G.G.C.U. Limited* (2000) eKLR and *Hezekiel Oira v Standard Limited & Another* (2016) eKLR.

56. Similarly in this case, the 1<sup>st</sup> Respondent did not tender evidence through a third party that the words in the article complained of caused or had the tendency to cause injury to her reputation by way of public ridicule, hatred or even being shunned, or that it tended to lower her esteem in the mind of right-thinking members of society. While the article in question may appear barely flattering to the 1<sup>st</sup> Respondent, the test to be applied is that of the reasonable ordinary man; it is not the 1<sup>st</sup> Respondent's view of herself that matters, as stated in *Musikari Kombo* (supra). Hence, the 1<sup>st</sup> Respondent failed to prove that the statements in the article were defamatory of her.
57. Equally, the court is doubtful that the 1<sup>st</sup> Respondent established the falseness of the statements, and especially regarding whether the alleged paramours related with her during coverture. The 1<sup>st</sup> Respondent asserted that claims of infidelity with scores of men during marriage were false. Reading the article, beyond general allusion, the only express reference to infidelity during marriage was the alleged intimacy with a "Kamiti inmate". The Appellants' defence as I understood it was that the statements in the article were true in so far as they comprised an accurate report of court proceedings, and not that the allegations therein were factual. The distinction is important.
58. Regarding a defence of justification and absolute privilege as raised by the Appellants, the Court held in *Uhuru Muigai Kenyatta V Baraza Leonard* [2011] eKLR that:-
- "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."
59. The court has reviewed the response and documentation filed in the divorce proceedings by the 2<sup>nd</sup> Respondent and said to be the basis of the Appellants' impugned article. Reading both side by side, it appears that, although salaciously spiced up, the article is a relatively accurate report of the pleadings of the 2<sup>nd</sup> Respondent in the divorce proceedings. In fairness, the article also includes allegations made in the 1<sup>st</sup> Respondent's pleadings against the 2<sup>nd</sup> Respondent. Despite not appearing to carry imputations of a sexual kind, these allegations are not entirely flattering of the said Respondent either.
60. The statements in the article regarding the amorous life of the 1<sup>st</sup> Respondent before and during marriage seem to refer to the 1<sup>st</sup> Respondent's confession to her former husband, being evidence produced in court during the divorce proceedings through the 2<sup>nd</sup> Respondent's pleadings. The article itself captures the foregoing fact by stating that "Angela Mwihi had innocently emailed a confession to Gachanja when they broke but made up for the first time".
61. In the excerpts of the emails in question DExh.1 & DExh.2, apparently innocently written to the 2<sup>nd</sup> Respondent by the 1<sup>st</sup> Respondent prior to the marriage, the 1<sup>st</sup> Respondent sets out in detail her previous relationships with other men. The 2<sup>nd</sup> Respondent seems to have attempted to use the said



information during the divorce proceedings to cast the 1<sup>st</sup> Respondent in a bad light, as often happens between spouses embroiled in acrimonious divorce causes. Overall, therefore there is a modicum of accuracy, balance, and fairness in the article, as envisaged by paragraph 2 of the Code of Conduct for the Practice of Journalism, despite that admitted fact that the direct views of the 1<sup>st</sup> Respondent were not sought prior to publication of the article.

62. Regarding the defence offered to the media under Section 6 of the Defamation Act provides the provision states that; -

“ A fair and accurate report in any newspaper of proceedings heard before any court exercising judicial authority within Kenya shall be absolutely privileged:

Provided that nothing in this section shall authorize the publication of any blasphemous, seditious, or indecent matter.”

63. Recently the Court of Appeal in *J.P. Machira t/a Machira & Company Advocates v Mwangi & another* (Civil Appeal 175 of 2019) [2023] KECA 228 (KLR) addressing itself to defence of privilege in section 6 and 7 of the Defamation Act observed that;-

39. Besides the general defences applicable to all actions in torts, such as, limitation, consent, accord and satisfaction, previous judgment, etc., the three special defences available in an action for defamation, under the common law, are (a) justification (or truth), or (b) privilege, absolute or qualified, and, (c) fair comment.....

40. 'Privilege' is used here in the sense of an excuse or immunity conferred by law on statements or communications made on certain occasions called 'privileged occasions'. A privileged statement, therefore, is one which is made in such circumstances as to be exempt from the rule that a man attacks the reputation of another at his peril.

41. 'Privilege' is of two kinds: (a) absolute and (b) qualified. A statement is said to be absolutely privileged when it is of such a nature that no action will lie for it, however false and defamatory it may be, and even though it is made maliciously, that is to say, from some improper motive. These cases are at the opposite extreme from the ordinary cases of unprivileged defamation. When a statement is not privileged, it is actionable, however honest its publication may have been; but if it is absolutely privileged it is not actionable, however dishonest its publication may have been.

42. The publications complained of in this case were in respect of judicial proceedings. Section 6 of the Defamation Act provides as follows:

6 ...

43. Section 7 of the act provides for qualified privilege of newspapers as follows:

7 ...

44. Part 1 of the schedule to the act lists statements privileged without explanation or contradiction as follows:

1 ...

2. A fair and accurate report of any proceedings before a court exercising jurisdiction throughout any part of the Commonwealth subject to a separate legislature, or of any proceedings before a court-martial held outside Kenya under any written law.



45. A reading of the above provisions leaves no doubt that to be absolutely privileged, the publication complained of must report be(a)a newspaper report of proceedings heard before any court exercising judicial authority within Kenya; and (b) the newspaper report must be “fair and accurate.”
46. The Black’s Law Dictionary, 10th Edition defines proceeding as follows:
- “Proceeding is a word used to express the business done in courts... may include in its general sense all steps taken or measures adopted in the prosecution or defence of an action, including the pleadings and judgment... the term proceeding may include – (1) the institution of the action; (2) the appearance of the defendant; (3)all ancillary or provisional steps, such as arrest, attachment of property, garnishment, injunction, ... (4) the pleadings; (5) the taking of testimony before trial; (6) all motions made in the action...” (emphasis added)
47. The excerpt reproduced earlier from the Halsbury’s Laws of England (supra) states as follows “absolute privilege attaches not merely to proceedings at the trial, but to proceedings which are essentially steps in judicial proceedings including statements in pleadings and witness statements. (Emphasis added)
48. To be privileged, the statements must be “fair and accurate” although it need not be verbatim and should convey to its readers the substance of what has taken place in court because this is the reason for the privilege. Interpretation of ‘fair and accurate’ in relation to report of court proceedings as provided in section 6 of the Defamation Act requires the court to consider all of the circumstances of the case, including the following non- exhaustive list of circumstances-
- a. an abridged court report will be privileged provided that it gives a correct and just impression of the proceedings,
  - b. if the report as a whole is accurate, a slight inaccuracy or omission is not material,
  - c. if a report contains a substantial inaccuracy it will not be privileged,
  - d. it is not sufficient to report correctly part of the proceedings if, by leaving out other parts, a false impression is created, and
  - e. a report assuming a verdict, before any verdict has been delivered, is not privileged.
49. As Lord Devlin stated in *Lincoln v Daniels* [1962] 1 QB 237 at 257, the privilege attaches to everything that is said in the course of proceedings by judges, parties, counsel and witnesses, with such protection extending to the contents of documents submitted as evidence. Absolute privilege extends to everything that is done from the inception of the proceedings onwards and includes all pleadings and other documents brought into existence for the purpose of the proceedings.
50. Case law such as *Khasakhala v Aurah* (1995-1998) 1 EA 112 and leading writers such as *Gatley on Libel & Slander* 8thEd. pg 265 para 264 are clear that to meet the “fair and accurate” standard, it is not necessary that a report of court proceedings provides a word-for-word account, and a well-grounded summary, even with slight inaccuracies, that provides an overall account, will be acceptable; but that significant inaccuracies that give a false impression, or prejudice a verdict before a verdict has been given will fail the “fair and accurate” standard. The report must be fair and impartial, although it need not be verbatim, and should convey to its



readers the substance of what has taken place in court as if they had been present, since this is the reason for the privilege.”

64. In conclusion, whether innately false or not, it seems to the court that the statements published in the Appellants’ article as derived from court pleadings in the divorce case between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, could well pass as statements made on an occasion of absolute privilege. That said, in the absence of proof by the 1<sup>st</sup> Respondent of a key ingredient of defamation, namely, that the statements were defamatory of the 1<sup>st</sup> Respondent, her entire case crumbles. In the circumstances, it is the court’s considered view, the trial court erred in finding that the 1<sup>st</sup> Respondent had discharged her burden of proof and liability established against the Appellants.
65. The impugned judgment cannot stand. Consequently, the appeal is allowed by setting aside the judgment of the lower court as against the Appellants. The court substitutes therefor an order dismissing the 1<sup>st</sup> Respondent’s suit in the lower court. In view of the nature of the dispute and the circumstances in which it arose, the Court will direct that each party bears its own costs both on this appeal and in the lower court.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 10TH DAY OF AUGUST 2023.**

**C.MEOLI**

**JUDGE**

In the presence of

For the Appellants: Mr. Okiring

For the 1st Respondent: Mr. Nyanjera h/b for Mr. Mwagombo

C/A: Emily

