



REPUBLIC OF KENYA



KENYA LAW
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Board of Governors, Upper Hill School & another v Nthenya & 19 others (Civil Case 465 of 2007) [2023] KEHC 24254 (KLR) (Civ) (27 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24254 (KLR)

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

CIVIL

CIVIL CASE 465 OF 2007

AN ONGERI, J

OCTOBER 27, 2023

BETWEEN

THE BOARD OF GOVERNORS, UPPER HILL SCHOOL 1ST PLAINTIFF

MICHAEL NGUNJU MUHIA 2ND PLAINTIFF

AND

DR. SAM NTHENYA 1ST DEFENDANT

DR. JOHN NGIGI 2ND DEFENDANT

**THE BOARD OF TRUSTEES, NAIROBI WOMEN'S HOSPITAL 3RD
DEFENDANT**

PAUL KINYUI CHURU 4TH DEFENDANT

MARGARET WANGECHI KINYUI 5TH DEFENDANT

RADIO AFRICA LTD T/S KISS 100 FM 6TH DEFENDANT

RADIO AFRICA LTD T/A CLASSIC 105 FM 7TH DEFENDANT

ROYAL MEDIA SERVICES LIMITED T/A CITIZEN RADIO ... 8TH DEFENDANT

ROYAL MEDIA SERVICES LIMITED T/A INOORO 9TH DEFENDANT

REGIONAL REACH LTD T/A KAMEME FM 10TH DEFENDANT

THE CITIZEN TV 11TH DEFENDANT

**KENYA BROADCASTING CORPORATION (K.B.C. RADIO) 12TH
DEFENDANT**

THE STANDARD LTD T/A THE STANDARD 13TH DEFENDANT

NATION MEDIA GROUP LTD T/A DAILY NATION 14TH DEFENDANT



EAST AFRICAN MAGAZINES LTD T/A DRUM MAGAZINE	15TH
DEFENDANT	
THE PEOPLE LTD T/A THE PEOPLE DAILY	16TH
DEFENDANT	
KENYA TELEVISION NETWORK (KTN)	17TH
DEFENDANT	
NATION MEDIA GROUP LTD T/A NATIONAL TELEVISION	
(NTV)	18TH
DEFENDANT	
KENYA BROADCASTING CORPORATION (CHANNEL 1	
TV)	19TH
DEFENDANT	
TIMES NEWS SERVICES T/A KENYA TIMES	20TH
DEFENDANT	

JUDGMENT

1. The two plaintiffs filed a plaint on 30/5/2007 which was amended on 28/5/2008 against 20 defendants stated above seeking the following remedies;
 - i. General damages for defamation.
 - ii. Exemplary, punitive and aggravated damages kshs.206,000.00
 - iii. An order for a permanent injunction prohibiting the defendants, whether by themselves, their servants and or agents or otherwise howsoever from publishing further defamatory articles concerning the plaintiffs in respect of the subject matter.
 - iv. An order for a suitable apology and retraction article given the same prominence as the defamatory articles.
 - v. Costs of this suit.
 - vi. Interest on (i), (ii) and (v) above at court rates.
 - vii. Such further or other relief as this honorable court may deem fit and just to grant in the circumstances of this case.
2. The plaintiff made averments in the amended plaint that during the period from 1st June 2006 to 16th June 2006, the Defendants by themselves and their agents/employees publicized and uttered in various media modes statements to the effect that a student had been sodomised in the Plaintiff's school premises, and that they allowed the act to take place and had attempted a cover-up.
3. That the said allegations were false, malicious and defamatory to the Plaintiffs, calculated to injure, discredit, intimidate and destroy the Plaintiff's personal and professional image as prominent members of the society and the school community.
4. That the Defendant had not verified the information, there were ongoing Police investigations, and the Publications were to enhance personal goals.
5. That the student had not made any public statement that he was sodomised in school and that he had a known mental condition necessitating his statements to be investigated and authenticated.



6. That the Plaintiff's independent Doctors had been denied access to the student for purpose of examining him and investigations carried out by the Plaintiff's investigator ruled out the incident as impossible in the circumstances.
7. That the student had been released from the hospital without the need for corrective surgery and the Plaintiff had been forced to hire a private detective at the cost of KShs. 206,000 for the investigation and preparation of the report which they claimed a refund.
8. The Plaintiffs thus claim for exemplary, punitive and aggravated damages for defamation, and a permanent injunction against the Defendants jointly and severally, restraining them from publishing any further defamatory articles on the subject matter.
9. The defendants filed their statements denying the plaintiffs' claim. The 6th, 7th, 8th, 9th and 11th Defendants made two applications to court seeking to have the plaintiffs' suit against them struck out for reasons that the amended plaint failed to disclose a cause of action against them.
10. The application was allowed in the ruling dated 2/11/2009 and the 6th, 7th, 8th, 9th and 11th defendants were removed from the suit.
11. The suit against 12th and 19th defendants was also withdrawn. At the time of the hearing only the 1st, 2nd and 3rd defendants proceeded with the suit.
12. There were other Defendants who did not participate in the case. This court will decide the case in respect of the 1st, 2nd and 3rd Defendants only. This case proceeded by viva voce evidence.
13. The plaintiffs' evidence in summary is as follows;

PW 1 Evans Gaturu, an advocate of the High Court of Kenya adopted his statement dated 22/5/2018 as his evidence in chief.
14. He stated in his statement that he was the Chairman of the Plaintiff's School's Parents' Teachers Association in 2006 when the defendants caused defamatory statements pertaining to sodomy in the school.
15. He had issued a statement to Nation Media concerning the allegations. The school had procured a private investigator to independently ascertain the truth or otherwise of the allegations and the findings had been that the sodomy had not taken place.
16. On 9th June 2006, he had accompanied Dr Maurice Wambani to examine the student who had been the alleged victim of sodomy but he was denied access to him. The school was shunned after the Publications.
17. He testified that he was the P.T.A chairman of the 1st Plaintiff school when the alleged sodomy happened and there had been media reports on the same without any medical examination of the alleged victim.
18. The publications had devastating effects on the school to a point where the Principal advised students not to wear school uniform outside the school compound to avoid being lynched.
19. Further that the school team had to be withdrawn from competing in Rwanda. School enrolment in the year 2007 dropped.



20. He said that the publications had started on 6th June 2006 and the School sign board and dormitory's photograph had been captured on the newspaper. Various leaders had addressed the issue in their press conferences.
21. PW 1 said that a report was made by the Standard newspaper on 12/6/2006. They did investigations and found it was a hoax. The school sent Dr Maurice Wambani to examine the boy but he was denied access.
22. PW 1 said that there was no sodomy in the school. He said the school hired a private investigator called Cazanje private investigators who made a report on the incident.
23. In cross examination PW 1 said he got appointed as a member of the Board of Governors at Upper Hill school in 2007. He said after the matter was reported in the media, it solicited a lot of public interest and leaders.
24. PW 1 said according to him, there was no medical report relating to sodomy. He said Dr Ambani made a statement saying he was unable to prepare a medical report.
25. PW 2 Michael M Muya who was the principal of Upper Hill Secondary School and has retired adopted his statement dated 14/5/2015 as his evidence in chief.
26. PW 2 said he was the Principal of the Plaintiff School in the year 2006 when the defendant published defamatory statements concerning sodomy in the school.
27. He had admitted the alleged victim to the school without a medical record or transfer letter. On 29th May 2006, he had conversed with the 4th Defendant who had visited the school after being informed that his son was unwell.
28. On 31st May 2006 he had received a call from the 1st Defendant informing him that the student had been sodomised at the school and thereafter a call from Kilimani Police station confirming a report on the same issue.
29. Thereafter he met the first Defendant who confirmed that he and two other Doctors had found that the student had indeed been sodomised.
30. He saw the student but did not talk to him. Later he hired a private investigator who ascertained that no sodomy had taken place in the school. He also sent a psychologist and a Doctor to analyze the student but they were denied access.
31. On 7th June 2006, he wrote to the Provincial Director of Education informing them of the defamatory remarks made against the school.
32. On 15th June he met the student leaving hospital and spoke to him when the student said that he was unaware about what was happening.
33. He further said that the Defendants did not verify the information before publication. No allegations of sodomy had ever been made against the school since he had become its Principal in 1995.
34. He also said that the Publications were false and unsubstantiated. The school was shunned afterwards those publications were made.
35. In his oral evidence in court, PW 2 said the student was a son of a senior education officer. He was admitted at Upper Hill Secondary School from another school.



36. PW 2 said Dr Nthenya (the 1st defendant) called him and told him the student had been sodomised. PW 2 told the 1st defendant to call him the following day but instead, police called him and told him the matter had been reported.
37. PW 2 said the student had been admitted at Nairobi Women Hospital which was owned by Dr Nthenya. Dr Nthenya initially refused to allow PW 2 to see the student.
38. PW 2 said he engaged Dr Wambani to examine the student but he was denied access to carry out the examination on the student.
39. PW 2 said he wrote letters to senior officials. He said Hon. Beth Mugo Assistant Minister called Dr Nthenya to organize a meeting.
40. PW 2 said a meeting was called and the father of the student apologized for the false allegation of sodomy. He said Dr Nthenya did not utter a word.
41. He said as a result of the false allegations, the mean grade for the school dropped. He said he had raised the mean grade from 5.5 to 8.
42. PW 2 said the school is founded on Christian values. He said school workers, teacher and the students at the school were shunned after the Publication.
43. He said the student was picked from school by his father and he made the allegation at the time he was being picked. PW 2 said there was no evidence to prove sodomy.
44. In cross examination, PW 2 said Dr Nthenya was a neighbour at his home and that they were friends. He said the student was picked by his parents. At the time of being picked, he told the boarding master that he was being called a “homo” by the other students.
45. PW 2 said he retired in 2008. He said in cross-examination that his name and the name of the school are not mentioned in the Articles titled “Sodomy the role of teachers” and “Lying evil that refuses to go”.
46. He said in paragraph 10(iv) of the amended plaint he was referring to the Article published on 13/6/2006 titled “Homosexuality in schools, a wakeup call”.
47. PW 3 Peter Ochieng Orero who was the principal of the school from 2008 to 2017 adopted his statement dated 14/5/2018 as his evidence in chief.
48. PW 3 said he came to the school after the incident had occurred. PW 3 told the court what was told after he joined the school as the principal after PW 2 left.
49. PW 4 Maurice Okumu Onyango adopted his statement dated 21/8/2018 as his evidence in chief.
50. He said stated in the said statement that he was the Boarding Master of the Plaintiff’s school in the year 2006 when the defendants made defamatory remarks concerning sodomy in the school.
51. On the evening of 28th May 2006, the alleged victim approached him and told him that other students had been calling him a homosexual and that on one night, certain students had been in his bed, and he woke up, they ran away.
52. He said a condom had been found under his bed the morning after. He called the father the next day and informed him that his son was unwell, and he came to pick up his son for medical examination.
53. He further said that the student had never made any report regarding his health to the administration until the night of 28th May 2006 and he never informed him of any sodomy that had occurred. The school has been shunned since the Publications were made.



54. PW 4 produced the report made by one Casanje Private Investigators, which report he had requested. He confirmed that the author of the report is now deceased. The production of the report was objected and the Court overruled and found it admissible under Section 33(b) of the *Evidence Act*.
55. PW 4 said at the time of the incident, he was teaching Chemistry at the school and he was also the boarding master.
56. PW 4 said on the material day which was a Sunday, he checked the school and all was well. When he was going to his house a student followed him and told him the other students were calling him a “homo”. He wanted to talk to the preacher who had preached to them that day.
57. PW 4 said the boy looked unstable and disoriented. When PW 4 asked him what had happened, he could not speak clearly. He said he found a condom on his bed.
58. PW 4 said the father of the student took him away. He said one week later he was called to Nairobi Women Hospital and when he went there he found the boy who was sedated and tied to the bed. PW 4 said the boy was walking when he left Upper Hill Secondary School.
59. PW 4 said the matter was investigated. He said the investigator asked him questions. He said they went to the dormitory where the boy was allegedly sodomised. He said his bed was in the middle of the dormitory.
60. PW 5 Dr Maurice Wambani Prepared two reports dated 9/6/2006 and 14/6/2006 respectively. He said he was denied an opportunity to examine the student.
61. PW 5 said he talked to Dr Adari. He said there was no evidence of sodomy. He said it was difficult to effect sodomy because there had to be a fight by the victim.
62. PW 5 said sodomy was different from homosexuality. He said in homosexuality there had to be consent while sodomy there was no consent.
63. In cross examination PW 5 said there was anorectal trauma. He said he talked to Dr Adari the consultant surgeon. He said the student was sedated. He said he would examine a patient who is sedated but the parents of the student refused to give him permission to examine the child.
64. The defendants called one witness DW 1 Dr Samuel Nthenya Maina who is also a first defendant. DW 1 adopted his statement dated 15/9/2020 as his evidence in chief.
65. He said in his written statement that on 30th May 2006, a student was admitted at Nairobi Women’s Hospital having been brought by the parents.
66. The patient reported that he had been sodomised in school and the latest episode had been the previous day. He feared that he may have contracted HIV.
67. He said that a physical examination showed that he had indeed been sodomised. He was interviewed by several media stations where he gave his opinion on the patient’s state of health as well as general remarks on the sexual offenses bill based on his professional assessment.
68. He further said that the comments were not made out of malice as they were factual, based on the report made by the student and the medical examination. The matter was also of great public interest.
69. In his oral evidence in court DW 1 said he is the founder and CEO of Nairobi Women Hospital and also Gender Violence Recovery Centre. (GVRC)



70. DW 1 said the victim was taken to Nairobi Women Hospital looking weak and traumatized. The student said he had been sexually assaulted at school.
71. DW 1 said the student was examined by Dr Adari a senior surgeon after he was admitted by Dr Wachira. The student had hallucinations.
72. DW 1 said Dr Adari examined the student and found the injuries on page 8 of the report. He found the sphincter was wide open and lacerations and cuts around the anal sphincter. He further said that the sphincter was lax.
73. DW 1 said the reason Dr Wambani was denied access was that he did not have access rights and the student was a minor and Dr Wambani required the consent of the parents.
74. DW 1 denied that he published defamatory words. He said at the time the incident occurred there was a sexual offences bill that was being debated.
75. DW 1 also said the parents had reported the Sodomy to the media and DW 1 was asked to state the condition of the student. He also said the student was sedated to facilitate examination which was done under anesthesia due to the pain.
76. In cross-examination DW 1 said 4 doctors examined the student and further that he was sedated before talking.
77. DW 1 also said in cross-examination that out of the three cases of survivors of sexual violence 100% were cases of sodomy.
78. The Parties filed their submissions as follows:
79. The Plaintiffs submitted that ten publications containing defamatory statements were broadcasted, printed and uttered by the Defendants which referred to the Plaintiffs and no one else.
80. Further that the said statements were said in ignorance of the actual facts and without the Defendant's due diligence, making them false. The Defendants had not tendered any evidence to demonstrate that they had verified the veracity of the information that was the subject of the Publication. The Publication was neither fair comment nor was it made in a privileged occasion.
81. The Plaintiff referred to the finding in the matter of *Abdi Mohamed Faran v Nairobi Star Publication Ltd & another* (2015) eKLR where the Court held that:

“. . .The Defendant did not in any way try to verify the information acquired from the report. The defendant did not also adduce evidence to support the allegations . . .The Defendants did not tender any evidence to show the steps taken to check the veracity of the information published. In my view, the publications were an unconfirmed lie which in evidence is malice.”
82. The Plaintiff submitted that the 1st to 5th Defendants has denied the request to have the student examined by an independent medical personnel and the school's counselor and that even the medical Examination conducted by the 1st to 3rd Defendants on the Student had not revealed evidence of sodomy. The 1st to 5th Defendants had also refused to record statement or participate in the Plaintiff's investigations of the alleged practice of sodomy in the school.
83. The Plaintiff contends that the Publication lowered the image of the school, teachers and school leadership and since then, the school has been shunned by the Public. They relied on the Court's



decision in *Joseph Njogu Kamunge v Charles Muriuki Gachari* (2016) eKLR where the Court held that:

“A statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule or contempt or which causes him to be shunned or avoided or has a tendency to injure him in his office, profession or calling. The ingredients of defamation are: -

- i. The statement must be defamatory;
- ii. The statement must refer to the Plaintiff;
- iii. The statement must be Published by the Defendant; and
- iv. The statement must be false.”

84. The Plaintiff also relied on the Court’s finding in the matter of *Ernest Omondi Owino v Felic Olick & 2 others* (2021) eKLR where the Court and that:

“In deciding whether or not a statement is defamatory, the court must first consider what meaning the words could 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.”

85. On the quantum of damages, the Plaintiff submitted that they are entitled to an award of general, aggravated, exemplary and punitive damages for their damaged reputation due to the Defendants’ malice, carelessness and negligence. The Plaintiffs referred to the matter of *Christopher Ndarathi Murungaru v John Githongo* (2019) eKLR where the Court awarded Kshs. 27,000,000 and the matter of *Samuel Ndung’u Mukunya v Nation Media Group Limited & another* (2015) eKLR where the Court awarded Kshs. 20,000,000 for defamation as well as the costs of the suits.

86. The Plaintiffs submitted that seventeen years had passed since the defamatory statements were done and an apology would have no effect on the damaged reputation of the Plaintiff. They prayed for damages in lieu of an apology.

87. The Plaintiff prayed for an aggregate amount of Kshs. 130,000,000 in damages.

88. The 1st, 2nd and 3rd Defendants submitted that the statements made by the 1st Defendant were true as they referred to his patient’s condition after medical examination, and could not be seen to impute any malice.

89. Further, that the remarks regarding the Sexual Offenses Bill in relation to the sodomy incident amounted to fair comment made on a matter of Public Interest. They quoted *Halsbury’s Laws of England* Fourth Edition Vol. 28, page 42, para 81 which defines the Defense of Justification to mean: the words complained of were true in substance in fact.

90. The Plaintiffs had admitted to calling the 4th Defendant to school to pick his son who was unwell and who had reported that someone had come into his bed at night and other students had started calling him a homosexual.

91. The Plaintiff’s witness had also admitted that the student had seemed unwell as he was incoherent, confused, and fearful and had requested to talk to a Counsellor and Pastor. The Plaintiff’s witness, Mr. Okumu had also admitted that when the 4th Defendant was informed that the student had intimated that he had been sodomised and he had recommended medical examination.



92. That upon admission in hospital, the student had disclosed that he had been sodomised on several occasions in school which he had reported in school. Medical examination had revealed injuries consistent with sexual trauma. The parents of the student had authorized the hospital to give a media interview.
93. The 1st, 2nd and 3rd Defendants submitted that the publications were based on true facts, and were thus not defamatory. Further, they contended that the hospital did not have an obligation to investigate whether the sodomy had happened in the school or not.
94. The 1st, 2nd and 3rd Defendants also contended that the report commissioned by the school, which has ruled out that the sodomy happened in the school could not be relied on as they had claimed that the author had since died, and no other person had been called to be cross examined on it.
95. They questioned the veracity of a report prepared by only one person, and bearing statements that had not been signed by their makers. The report itself was not signed or dated off by the author. The Plaintiffs had also produced a different report when the one on record was challenged, raising questions of authenticity.
96. Further, the Plaintiff had admitted that the Doctor they had commissioned to carry out an independent examination on the student was denied access at the hospital since the student was a minor and he could not have been examined without the consent of the parents.
97. The said Doctor, Dr Wambani had advised against subjecting the minor to further psychological trauma by subjecting him to further examination and had suggested that he be let to heal first before further examination.
98. The 1st, 2nd and 3rd Defendants further submitted that the publications that are subject of this suit were not actuated with malice. They relied on the decision in Civil Appeal No 42 of 2014: [*Joseph Njogu Kamunge v Charles Muriuki Gachari*](#) (2016) eKLR where the Court held that:

“ . . . the words must be malicious. Malicious 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 that the defendant knew the words complained of were false and did not care to verify can be evidence of malice.”
99. They submitted that no reasonable cause of action had been disclosed against the 2nd and 3rd Defendants as the Plaintiff does not particularize any words uttered by them.
100. On the question of damages, the 1st, 2nd and 3rd Defendants submitted that where malice is not proved, general damages are substantially mitigated. The Plaintiff's claim of Kshs. 206,000 special damages had also not been proved.
101. They submitted that the Plaintiffs were not entitled to the reliefs sought as the Defendants made statements based on fact. They urged the Court to dismiss the Plaintiff's case against the 1st, 2nd and 3rd Defendants with costs.
102. I have carefully considered the evidence adduced in this case, a summary of which I have given above. It is the duty of the plaintiffs to prove their case to the required standard which is on a balance of probabilities.
103. The issues for determination in this case are as follows;
 - i. Whether the 1st, 2nd and 3rd defendants are liable for defamation against the plaintiffs.



- ii. Whether the 1st, 2nd and 3rd defendants have a valid defense against the plaintiffs' claim.
- iii. Whether the plaintiffs are entitled to the remedies they are seeking against the plaintiffs.
104. On the issue as to whether the 1st, 2nd and 3rd defendants are liable for defamation against the plaintiffs, the plaintiff's evidence was that during the period from 1st June 2006 to 16th June 2006, the Defendants by themselves and their agents/employees publicized and uttered in various media modes statements to the effect that a student had been sodomised in the Plaintiff's school premises, and that they allowed the act to take place and had attempted a cover-up.
105. Further, that the said allegations were false, malicious and defamatory to the Plaintiffs, calculated to injure, discredit, intimidate and destroy the Plaintiff's personal and professional image as prominent members of the society and the school community.
106. The 1st, 2nd and 3rd Defendants did not deny that they published the statements in as alleged. Their defence was that the statements were true and that they made general comments regarding the Sexual Offences Bill and situations that called for the specific legislation including the incidence that had happened in the Plaintiff's school.
107. In the matter of *Joseph Njogu Kamunge v Charles Muriuki Gachari* [2016] eKLR the Court held that:
- “The elements of the tort of defamation are that the words must be defamatory in that they must tend to lower the plaintiffs reputation in the estimation of right minded persons in the society or they must tend to cause the plaintiff to be shunned or avoided by other persons. In other words, the words complained of must be shown to have injured the reputation, character or dignity of the plaintiff. Abusive words may not be defamatory per se. The words must be shown to have been construed by the audience as defamatory and not simply abusive. The burden of proving the above is upon the plaintiff to demonstrate that a reasonable man would not have understood the words otherwise than being defamatory.” . . . Reputation is an integral and important part of the dignity of the individual and once besmirched by an unfounded allegation ones reputation can be damaged forever, especially if there is no opportunity to vindicate one's reputation. (emphasis added)
108. In the case of *John Edward v Standard Ltd* the court stated as follows:-
- “A statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule, or contempt or which causes him to be shunned or avoided or has a tendency to injure him in his office, profession or calling. The ingredients of defamation are:-
- The statement must be defamatory.
 - The statement must refer to the plaintiff.
 - The statement must be published by the defendant.
 - The statement must be false.”(emphasis added)



109. In *Hon. Uburu Muigai Kenyatta v Baraza Limited* (2011) eKLR, Rawal J (as she then was) observed that the information that causes the defamation, will be assumed to be untrue until the defendant proves otherwise. The learned judge stated:-

“...While taking the defence of justification or qualified privilege in the 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.....”

110. Where the Plaintiff proves that the publication passes the test of lowering the image of the Plaintiff among right thinking members of society, the burden shifts to the Defendant to prove that the Publication was based on truth.

111. I find that it is true that if a school is known to have incidences of sexual abuse of its students, that school is likely to be shunned among right thinking members of society.

112. A school is supposed to be an institution of learning where students should be assured of their safety and their wellbeing.

113. In the Present case however, the defendants made statements based on the report of the student about what happened to him while at the school and medical examination that revealed that the Student had indeed been sodomized.

114. I find that these statements were factual. While indeed the publications by the Defendants would be defamatory if untrue, I find that the Defendants have demonstrated that the publications were indeed justified and in public interest

115. There is evidence by PW 4 Maurice Okumu Onyango who was the boarding master at the time, that the student had made a verbal complaint to him and requested to talk to a counsellor or a pastor.

116. Further, that in his assessment the student was disoriented and that even further he took responsibility to call the parent to the student for treatment.

117. I disagree with the Plaintiffs’ argument that the facts were unverified since the were based on the Professional report of the 1st Defendant and two other medical Doctors. It is the plaintiff’s duty to ensure and assure the safety and wellbeing of learners while in the institution of learning.

118. The plaintiff’s Report countering those facts was not presented to Court by the author, it is unsigned, the maker was not cross examined on it, and it does not prove that the student who claimed that he had been sodomized in the Plaintiff’s school was lying.

119. On the issue as to whether the 1st, 2nd and 3rd defendants have a valid defense against the plaintiffs’ claim, I find that the 1st Defendant explained that in his media interviews, he had made general comments regarding the Sexual Offenses Bill and situations that called for the specific legislation including the incidence that had happened in the Plaintiff’s school.

120. In the matter of *Jacob Mwanto Wangora v Hezron Mwando Kirorio* [2017] eKLR, the Court of Appeal was persuaded by the authority from the Supreme Court of Appeal Canada, the court in *Wilradeolia v Simpson* [2008] SCC 40 which set out the requirements for the fair comment defense:

- “(a) The comment must be on a matter of public interest.
- (b) The comment must be based on fact.



- (c) The comment though it can include inference of fact must be recognizable as a comment.
- (d) The comment must satisfy the following objective test could any person honestly express that the opinion on the proved facts.
- (e) Even though the comment satisfies the objective test, the defence can be deflated if the plaintiff proves that the defendant was actuated by express malice.”(emphasis added).

121. The Defense of Fair comment can only fail if it was actuated by malice. The Plaintiff has also not demonstrated any malice in the statements of the Defendants, meant to malign the reputation of the school, the staff or the Board of Management. It is clear that statistics of sexual assault provided by the 1st Defendant were important to share in the discussions concerning matters of Public interest.

122. I find that there is evidence that the student was sexually assaulted and that the 1st Defendants interviews with the media amounted to Fair Comment.

123. In the circumstances the 1st, 2nd and 3rd defendants are not liable to pay the plaintiffs’ any damages.

124. I find that the defendants have a valid defense of justification and Fair Comment.

125. The plaintiffs are not entitled to the special damages either.

126. The plaintiffs’ suit is dismissed for want of evidence with costs to the 1st, 2nd and 3rd defendants.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 27TH DAY OF OCTOBER, 2023.

A. N. ONGERI

JUDGE

