



**Kitur v Nation Media Group Ltd (Civil Suit 335 of 2013)
[2023] KEHC 24090 (KLR) (Civ) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24090 (KLR)

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

**CIVIL
CIVIL SUIT 335 OF 2013**

**CW MEOLI, J
OCTOBER 26, 2023**

BETWEEN

RAPHAEL KITUR PLAINTIFF

AND

NATION MEDIA GROUP LTD DEFENDANT

JUDGMENT

1. The suit by Raphael Kitur, (hereafter the Plaintiff) against the Nation Media Group Limited (hereafter the Defendant) is founded on the tort of defamation. The Plaintiff seeks several reliefs including a permanent injunction restraining the Defendant by itself, servants, directors, editors and or employees or otherwise from publishing or causing to be published or continuing to publish any words or matters and statements concerning the Plaintiff which in any way or manner may be injurious or prejudicial to the Plaintiff. He also seeks general, exemplary, punitive and aggravated damages and an order compelling the Defendant to publish an apology, and costs of the suit.
2. The Plaintiff averred that the Defendant as publisher of the newspaper known as “The Daily Nation” published defamatory statements of and concerning the Plaintiff in the edition of September 18th 2012 in an article entitled “Ex-MP denies giving trader bad cheque”. That the Defendant’s action was motivated by ill will, malice and the publication was false and calculated to injure the Plaintiff and cause him pecuniary, political and moral damage; that by reason of the publication of the statements, the Plaintiff has been seriously injured in his credit and his reputation lowered in the eyes of right thinking members of the society, his peers, his constituents, friends, family, his political opponents and the community in general.
3. It was further averred that the effect of the publication of the aforesaid words has been to diminish the Plaintiff’s reputation as a respected former Assistant Minister, Member of Parliament and aspiring



Senator thus exposing him to public scandal, ridicule, odium, and contempt in the eyes of his clients, peers, right thinking members of society and all those who know him.

4. On 22.02.2016 the Defendant filed a statement of defence denying the key averments in the plaint and averred that the article as published consisted of an expression of opinion. Which comprised fair comment upon facts which were a matter of public interest; published under a sense of public duty and without malice towards the Plaintiff and in the honest belief to be true; and on a privileged occasion. In his reply to the Defendant's defence, the Plaintiff averred that the statement of defence as drawn is fatally defective and a sham nevertheless joined issues with the Defendant and reiterated key averments in his plaint.
5. During the trial, the Plaintiff testified as PW1. Having identified himself as a resident of Konoin, a former Member of Parliament (MP) for Konoin Constituency and a farmer living in Bomet, he proceeded to adopt his witness statement filed on 15.03.2013 as his evidence-in-chief. He equally produced the documents appearing in his list of documents filed on even date and supplementary list of documents filed on 04.10.2017 as PExh.1 - 4 being a Demand Note, copy of the Newspaper Article dated 18.09.2012, a copy of the Charge Sheet and a copy of his Identity Card, respectively.
6. It was his evidence that he lost his bid for the Senate seat in 2013 because of the article in question, which was used against him. That his campaign efforts were hindered as he was confronted with the material in the publication at each turn, occasioning him setbacks. He further denied having been arraigned in any court on any charges, asserting that the names appearing on the Charge Sheet and Identity Card produced in evidence did not tally. He denied that the name on the charge sheet was his and that his constituency was therein mentioned. He asserted that he was the MP, Konoin Constituency between 1997-2002. He complained that the Defendant did not seek his comments prior to publication of the article.
7. Under cross-examination, he reiterated that he was the MP Konoin Constituency between 1997-2002 but lost the seat in both in the 2007 and 2013 general elections. That in the latter election, he was a candidate for a senatorial seat but lost at the party nomination stage, adding that during the party nomination period, the article was photocopied and used against him by his political adversaries. He asserted that the eventual party nominee won the Bomet Senatorial seat in the general election. That two (2) years prior to the said election, he had declared his intention to contest the Bomet Senate seat and that because of the Defendant's article the electorate lost trust with him. He stated that some of them waved copies of the article whenever he tried to address them, despite his categorical denials on issuance of a bad cheque as stated in the article.
8. He confirmed that the article did not state that he had been convicted, or that he was a criminal, or corrupt, or committed an offence, only stating that he had committed an offence. He confirmed having filed several cases and being awarded damages against media houses that published the story. He denied that the present suit was filed to justify his political losses and confirmed that his demand letter sought not the right of reply but an apology. He reiterated that his name was tarnished because of the Defendant's publication. In re-examination, he confirmed that the other media houses sued by him in connection with their own publications had settled the damages awarded in his favour but the the Defendant never reached out to him despite the demand letter.
9. Bernard Kibet Koros testified as PW2. He too identified himself as a resident of Konoin, a farmer and businessman. Adopting his witness statement filed on 15.08.2013 as his evidence-in-chief, he stated during cross-examination that the article did not specifically assert that the Plaintiff was convicted of an offence. He confirmed awareness of other suits brought by the Plaintiff against other media houses concerning the same story and that he was a witness in the said matters. It was his evidence further that



he bought four (4) newspapers on 18.09.2012 and having read the articles, cautioned the Plaintiff that the publications would affect his political standing and reputation.

10. He asserted having been the Plaintiff's chief -campaigner in 2012 and that the Bomet Senate nominations were in April-May 2012. That while he did not believe the contents of the article, the electorate of Konoin constituency expressed reluctance in voting for the Plaintiff given the article and that the Plaintiff's opponents used the article to discredit him. That he warned the Plaintiff that the article would adversely affect his political fortunes, and he indeed lost the nominations for the senatorial seat. PW2 concluded by stating that while he was aware of the Plaintiff's election losses in 2002 and 2007, he did not know the cause. He attributed the Plaintiff's loss in the Bomet Senatorial seat in 2013 to the Defendant's publication.
11. The Defendant opted not to call any evidence at the trial.
12. At the close of the trial, the parties filed written submissions. The Plaintiff's submissions addressed the twin issues of liability and damages. Addressing liability, counsel first restated the pleadings and evidence at the trial court. Relying on the decisions in *Trust Bank Ltd v Paramount Universal Bank Ltd & 2 Others* Nairobi HCCC No. 1243 of 2001 *Samuel Mukunya v Nation Media Group Ltd* [2015] eKLR, *J.P. Machira v Wangethi Mwangi & Another* HCCC No. 1709 of 1996 and *Godwin Wachira v Okoth* [1977] eKLR inter alia, counsel argued that the Defendant not having adduced evidence at the trial, the Plaintiff's evidence was uncontroverted or unchallenged. Therefore, the Plaintiff had established all the necessary ingredients in proof of defamation.
13. On quantum, counsel reiterated that an action premised on defamation essentially seeks to compensate a person for the harm occasioned to the claimant's reputation as no apology, retraction or withdrawal could completely undo the harm done or the hurt caused by a defamatory publication. That in assessing damages, the court ought to consider the claimant's position and standing in society; the mode and extent of publication; the apology offered; and the timing thereof. He reiterated evidence that at the material time, the Plaintiff was a former Assistant Minister vying for the Bomet Senatorial seat and that the article referred to the Plaintiff by his previous position in parliament, leaving no doubt as to the identity of the subject of the article despite the Defendant having failed to confirm in advance with the Plaintiff whether he was the person arraigned in court.
14. Counsel maintained that the Defendant's actions were actuated by malice and had never apologized for the said publication. Moreover, asserting that the publication was not of public interest and was false, based on the material tendered in evidence. Citing decisions in Hon. *Chirau Ali Mwakwere v Nation Media Group & Another* [2009] eKLR, *Samuel Mukunya* (supra), *J.P. Machira* (supra) and *Francis Xavier Ole Kaparo v Standard Limited & 3 Others* [2010] eKLR counsel submitted that the court ought to award general damages in the sum of Kshs. 12,000,000/-; aggravated damages in the sum of Kshs. 5,000,000/-; exemplary damages in the sum of Kshs. 2,000,000/-; and Kshs. 2,000,000/- in lieu of an apology. The court was thus urged to grant the reliefs sought by the plaintiff with costs and interest.
15. Submissions by counsel for the Defendant equally addressed the twin issues of liability and damages. Submitting on the question whether the published words were defamatory of the Plaintiff, counsel contended that article comprised an expression of opinion and are a fair comment and fair information upon facts which were a matter of public interest. Alternatively, the said words were published under a sense of public duty and without malice towards the Plaintiff and in the honest belief that the same was true.
16. It was further submitted that a statement is only defamatory if it has a defamatory imputation to a hypothetically reasonable person. That nowhere in the impugned article was it stated that the Plaintiff is corrupt, unscrupulous, untrustworthy, a criminal, should be shunned or in any other way treated



- differently as alluded to by the Plaintiff. Citing the decisions in *Wycliffe A. Swanya v Toyota East Africa Ltd & Another* [2009] eKLR, *Kudwoli & Another v Eureka Educational & Training Consultants & 2 Others* Civil Case No, 126 & 135 of 1990 and *Jessica Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 Others* [2017] eKLR counsel argued that the entire publication ought to be contextualized before a conclusion can be reached that it was defamatory.
17. Counsel submitted that malice is a subjective element that must be established as a fact by admissible evidence lacking in this instance. Here relying on the case of *Helen Makone v Francis Kabos & Another* HCCC No. 2869 of 1997, *Nation Newspaper Limited v Gibendi* [2002] 2 KLR, *K L v Standard Limited* [2014] eKLR, *Simeon Nyachae v Lazarus Ratemo Musa & Another* [2007] eKLR and *Ndungu Njoroge & Kwach Advocates & Another v Standard Limited & 2 Others* [2012] eKLR.
 18. Regarding the Plaintiff's reputation, counsel emphasized that PW2 in his evidence admitted that he did not believe the contents of the article upon reading it. And that, there being no other evidence of how the article tarnished the Plaintiff's reputation, the claim ought to fail. That there was no correlation between the Plaintiff's failed Senatorial nomination bid and the said publication. Further there was no evidence of grave public ridicule, scandal, odium, and contempt experienced by the Plaintiff in the eyes of the right-thinking member of society adduced in court noting that the Plaintiff indicated that he is still active in politics notwithstanding the impugned article. The decision in *SMW v ZWM* [2015] eKLR was cited in support of the foregoing.
 19. Concerning damages, counsel stated that the Plaintiff failed to prove his claim on a balance of probability as such the suit ought to be dismissed. In the alternative and without prejudice to the foregoing, it was argued that the award of damages is not intended to enrich a party but to restore the said party to the position he/she was in prior to the injury. Further the award ought to be fair and restrained, the court considering the damage the article complained of had on the Plaintiff's reputation. The cases of *John v MGN Limited* [1996] 2 All ER 35 and that in *Jones v Pollard* (1997) EMLR as cited in *Margaret Wanjiku Kariuki v Nairobi Star Publication Limited* [2016] eKLR were cited in that regard.
 20. It was further emphasized that the Plaintiff was already awarded damages in respect of the same cause of action, and it would lead to unjust enrichment for this court to award him further damages. Counsel citing the decisions in *Raphael Kitur v Standard Group Limited* [2016] eKLR, *Raphael Kitur v The People Media Group Limited t/a The People* [2017] eKLR, *Jakoyo Midiwo v Nation Media Group & Another* [2018] eKLR, *Royal Media Services Limited & Another v Jakoyo Midiwo* [2018] eKLR, *Ken Odondi & 2 Others v James Okoth Omburah t/a Okoth Omburah & Co. Advocates* [2013] eKLR, *Musikari Kombo v Royal Media Services Limited* [2018] eKLR and Hon. Bishop Margaret Wanjiru Kariuki v Nation Media Group Limited [2021] eKLR urged an award of Kshs. 200,000/- as adequate general damages.
 21. Finally, placing reliance on Gately on *Libel and Slander* tenth Edition at Pg. 246-250, *Halsbury's Laws of England* on Libel and Slander, 4th Ed., and re-issue Vol. 28 Pg. 127 Para. 248, the English decision in *Manson v Associates Newspaper Ltd* (1965) 2 ALL E.R 945 at Pg. 960 and *Hezekiel Oira v Standard Ltd & Another* [2016] eKLR, counsel asserted that the *raison d'être* for exemplary and aggravated damages was to punish a Defendant for its misconduct where the conduct of such Defendant exacerbated the injury caused to the Plaintiff. That in the instant matter the Plaintiff did not demonstrate financial gain obtained by the Defendant from the publication and or that the Defendant's conduct compounded injury upon the Plaintiff. The Defendant took the position that this is not a suitable case for the award of both exemplary and aggravated damages.



22. The court has considered the evidence on record and the parties' respective submissions. The key issue for determination is whether the Plaintiff has proved his case on a balance of probabilities and if so, the appropriate awardable damages. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. 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....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.”

23. So far as the tort of defamation is concerned, the rationale behind the law of defamation was spelt out by the Court of Appeal in *Musikari Kombo* (*supra*):

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

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

24. Actions founded on the tort of defamation bring out the tension between private interest and public interest. While 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, sub-Article (3) states that “In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others”. Article 34 guarantees the freedom of the media while Articles 25 and 31 protect the inherent dignity of every person and the right to privacy. These rights are reinforced by the provisions of the *Defamation Act*.

25. Contemplating these competing rights Lord Denning MR stated in *Fraser v Evans & Others* [1969] 1 ALL ER 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.”

26. In *Selina Patani & Another v Dhiranji V. Patani* [2019] eKLR the Court of Appeal held 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. In that case, the Court of Appeal stated that:

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



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

27. There is no dispute in this case regarding ingredient (iii) above as the Defendant readily admits to publishing the article in question however disputes the remaining ingredients. Thus, the issues in dispute are whether the statements in the article referred to the Plaintiff; whether the articles as published is defamatory and false; or whether the defence of privilege, fair comment, and justification as pleaded are available to the Defendant. The court proposes to deal with the foregoing questions concurrently.

28. The undisputed facts can be briefly stated as follows. The Plaintiff is former MP for Konoin Constituency in Bomet County who at some point during his political career served as an Assistant Minister in the Government of Kenya. On 18.09.2012 the Defendant published an article stating that a former MP Konoin Constituency, Raphael Kitur, was arraigned in court for offences relating to issuance of a bad cheque. It is apposite to set out in extenso the contents of the articles complained about.

29. The print article produced as PExh.2, as published by Defendant on 18.09.2012 in “The Daily Nation” newspaper read as follows:

“Ex-MP denies giving trader bad cheque.

A former MP was yesterday charged with issuing a bad cheque. Konoin’s former MP Raphael Kitur is accused of issuing Sh450,000 bad cheque to businessman John Maina Muraguri at a Nairobi hotel on June 6, last year. He denied the charge and was released on cash bail of Sh100,000. The case will be heard on October 5.” (sic)

30. Firstly, the court must determine whether the alleged defamatory statements in the articles were stated of the Plaintiff. The Plaintiff by his evidence vehemently affirmed that the statements in issue were published of and concerning him. Pointing out that the questioned publication described and mentioned him by name and previous position as MP Konoin Constituency as such was undoubtedly about him. This fact was not controverted by the Defendant whose defence rested on privilege, fair comment, and justification. Upon a perfunctory review of Pexh.2, this court is satisfied that the article and alleged offending statements therein referred to the Plaintiff, thereby settling ingredient (ii).

31. On whether the words referring to the Plaintiff were defamatory and or false, the articles employed words and phrases such as “former MP” “charged with issuing” “accused of issuing” “bad cheque” and “released on a cash bail”. The article was brief. Nonetheless, the court in reading the article in a wholesome manner as urged by the Defendant, finds the gist of the article to be that Raphael Kitur (the Plaintiff), who was a former Member of Parliament for Konoin Constituency was arraigned in court for issuing a bad cheque. The article further states that the Plaintiff having been arraigned denied the charges and was released on a cash bail of Kshs. 100,000/-.

32. By his written witness statement, the Plaintiff asserted that he was not the person charged as alleged and that prior to publication, he had declared his intention to vie for the Bomet senatorial seat. That the publication greatly and negatively affected his chance of getting elected as senator.



33. The Plaintiff also produced a copy of the charge sheet (PEXh.3), that bore the two counts and respective particulars as follows:

“Cheating Contrary to Section 315 of the Penal Code“. Raphael Kipkirui Kitur:

On the 6th day of June 2011 at InterContinental Hotel Nairobi, within Nairobi County, by means of fraudulent tricks obtained Kshs.200,000/= from John Maina Muraguri by falsely pretending that you could incorporate him in your business of supplying diaries and calendars to the Kenya Medical Training Institute a fact you knew to be false”

“Issuing a bad cheque contrary to Section 316A (1)(a) as read with Sub-Section 4 of the Penal Code.

Raphael Kipkirui Kitur:

On the 6th day of June 2011, at InterContinental Hotel Nairobi, within Nairobi County, issued a certain Cheque No. 000029 for Kshs. 450,000/= to John Maina Muraguri drawn on account No. 0296xxxxxx of Raphael Kipkurui Kitur at Equity bank Limited Mama Ngina Branch knowing that the account had insufficient funds”.

34. In support of his case, the Plaintiff produced a copy of his Identity Card (PEXh.4) indicating his name to be “Raphael Kiprono Arap Kitur” and not Raphael Kipkirui Kitur named in PEXh.3 as an accused person. The Plaintiff assiduously disputed the truth of publication in his pleadings and evidence stating that he was not arraigned before any court for the offence of issuing a bad cheque and that he did not know John Maina Muraguri, the purported complainant. The Defendant, despite pleading justification among other defences, did not adduce evidence to demonstrate the truth of the contents of the said statements as published in the Defendant’s newspaper, lending credence to the Plaintiff’s assertions that the publication was indeed false in so far as it associated the Plaintiff with the reported arraignment.

35. Regarding what comprises defamation, Gately on Libel and Slander 6th Edn. states that; -

“A man commits the tort of defamation when he publishes to a third person words (or matter) containing an untrue imputation against the reputation of another”.

36. A defamatory statement is defined in Halsbury’s Laws of England 4th Edition Vol. 28 paragraph 10 as:

“.... a statement which tends to lower a person in the estimation of right-thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business”.

See also the Court of Appeal definition of a defamatory statement in SMW v ZWM (2015) eKLR.

37. The Court stated in Elizabeth Wanjiku Muchira v Standard Ltd [2011] eKLR that whether a statement is defamatory or not is not so much dependent on the intentions of the defendant but on the “probabilities of the case and upon the natural tendency of the publication having regard to the surrounding circumstances. If the words published have a defamatory tendency it will suffice even



though the imputation is not believed by the person to whom they are published.”-Clerks & Lindsell on Tort 17th Edition 1995-page 1018.”

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

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

“In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand them in a defamatory sense.”

39. Also, in *Onama v Uganda Argus Ltd* (1969) EA where the East African Court of Appeal stated as follows:

“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”.

40. The Plaintiff asserted that the words in the subject article of 18.09.2012 were defamatory in their natural and ordinary meaning, by imputing as it did that, he was inter alia corrupt, unscrupulous, untrustworthy, a person who does not pay his debts, a criminal and an individual who should be shunned by members of the public. PW2 testified that having read the article, he perceived and informed the Plaintiff that the publications would affect his political standing and reputation. PW2 further stated that while he did not believe the truth of the statements in the article, some constituents of Konoin constituency had expressed distrust of the Plaintiff due to the publication which was exploited by the Plaintiff’s opponents to counter his senatorial bid.

41. The Defendant argued that PW2 clearly did not believe the contents of the article and there being no other evidence of how the article tarnished the Plaintiff’s reputation, the claim ought to fail. Besides, there was no co-relation between the Plaintiff’s failed senatorial nomination bid and the publication. The former argument does not hold water. In *Elizabeth Wanjiku Muchira* (*supra*) the Court of Appeal citing Clerks & Lindsell on Tort 17th Edition 1995-page 1018 held that 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. PW2 while not believing the contents of the article evidently perceived the article as having a defamatory tendency on the Plaintiff’s reputation and a threat to his political career. Whether indeed the article caused the Plaintiff’s political debacle at the senatorial contest is difficult to tell. Suffice to say that in its plain meaning, the article had a defamatory tendency, whether it was believed by the people to whom it was published, or not.

42. Additionally, the said publication was not covered by fair comment and qualified privilege. First, the publication referring to the Plaintiff was passed off as factual. Here, the defence of fair comment is unsustainable because the basic facts upon which such comment could have been premised were indeed false. A comment based on falsehood cannot qualify as fair comment. See *Nation Media Group Ltd. v Alfred N. Mutua* [2017] eKLR.



43. As regards the defence of justification premised on Section 14 of the Defamation Act, it was held by the Court in Uburu 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.”

44. As earlier noted, the Defendant opted not to call any evidence to support their defence of justification, instead submitting that the impugned article did not state that the Plaintiff was corrupt, unscrupulous, untrustworthy, a criminal, should be shunned or in any other way treated differently. The averments raising the defence of justification were disputed by the Plaintiff in his reply to defence.

45. The evidential burden of proving the defence of justification material times lay with the Defendant but it failed to discharge the same. The Supreme Court in Gatirau Peter Munya v Dickson Mwenda Kitbinji & 3 Others [2014] eKLR while discerning the question of legal and evidential burden held inter alia.

“The person who makes such allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue”.

46. The Plaintiff further testified that the Defendant acted maliciously inter alia by failing to seek his comments prior to publication of the article and refusing to make a retraction and apology for the publication. The Code of Conduct for the Practice of Journalism made under the Media Council Act provides that; -

“Accuracy and fairness

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

47. No evidence was offered by the Defendant demonstrating their compliance in this instance with the Code of Conduct for the Practice of Journalism and or that the publication was made without any malice and or bias. In Phineas Nyagah v Gilbert Imanyara [2013] eKLR the court held that:

“Malice here does not necessarily mean spite or ill will but recklessness itself may be evidence of malice. Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts.

.... malice may also be inferred from the relationship between the parties before or after the publication or in the conduct of the defendant in the course of the proceedings. Court



should however be slow to draw the inference that a defendant was so far actuated by improper motives as to deprive him of the protection of privilege unless they are satisfied that he did not believe that what he said or wrote was true or that he was indifferent to its truth or falsely.”

48. Reviewing all the available material, this court is of the view that the Defendant acted in a reckless and malicious manner by erroneously associating the Plaintiff with the subject arraignment without first verifying the true facts. Or obtaining a comment from the Plaintiff prior to publication. The court finds that the Plaintiff has proved his case on a balance of probabilities and that the Defendant is therefore liable for defamation.
49. Concerning damages, the court has considered the parties’ respective submissions. The purpose of awarding general damages in a libel action is to compensate the plaintiff for the damage done to his reputation, and the court has wide discretion, depending on the peculiar circumstances of the case before it. See *CAM v Royal Media Services [2013] eKLR*. The Court of Appeal in *Evans Gicheru v Andrew Morton & Another* [2005] eKLR adopted factors to guide assessment of damages for defamation from *Jones v. Pollard* [1997] EMLR 233 as follows: -
- “(i) The objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published, and any repetition.
 - (ii) The subjective effect on the plaintiff’s feelings not only from the prominence itself but from the defendant’s conduct thereafter both up to and including the trial itself.
 - (iii) Matters tending to mitigate damages, such as the publication of an apology.
 - (iv) Matters tending to reduce damages, and (v) Vindication of the plaintiff’s reputation past and future.”

See also *John v MGM LTD* (1997) QB 586.

50. No doubt the libel in this case was grave and touched on the Plaintiff’s personal integrity, honour, and reputation as a former a former Member of Parliament (MP) for Konoin Constituency, former Assistant Minister, politician, and farmer in Bomet. The publication had potentially a wide reach among readers of the “The Nation Newspaper”. But the Plaintiff’s claim that the article cost him the Bomet Senatorial bid appears remote. Besides, arraignment in court for a criminal offence is not synonymous with a conviction an accused person enjoying the presumption of innocence until proven guilty. That said, it appears that the Defendant has to date not retracted the publication or tendered an apology to the Plaintiff.
51. All considered, the proposed sum of Kshs. 12,000,000/- as general damages appears excessive in comparison with awards made in the decisions cited by the Plaintiff, some of which are distinguishable on material facts. Further, the court notes that some of the decisions relied on by the Plaintiff relate to the same cause of action herein. These decisions are merely persuasive to this court.
52. Equally, decisions cited by the Defendant were not readily comparable with the instant case and the proposed sum of Kshs. 200,000/- as general damages appears excessively low. Further earlier awards in favour of the Plaintiff, while relevant only as a reference point and arising from the same cause of action, were against other media houses hence independent causes. In the court’s view, considering all the relevant matters, an award of Kshs.1,200,000/- in general damages is adequate compensation for the Plaintiff’s injury.



53. Regarding exemplary damages, these are awarded as deterrent to the wrong doer and potential like-minded tortfeasors. It was held in the case of *John v MGM LTD (supra)* that: -

“Exemplary damages can only be awarded if the Plaintiff proves that the Defendant when he made the publication knew that he was committing a tort or was reckless whether his action is tortuous or not, and decided to publish because the prospects of material advantage outweighed the prospects of material loss...if the case is one where exemplary damages can be awarded the court or jury should consider whether the sum which it proposes to award by way of compensatory damages is sufficient not only for the purposes of compensating the Plaintiff but also for the purpose of punishing the Defendant.”

54. In *Mansion v Associated Newspapers LTD* (1965) 2 ALL ER 954 at 957 the English court stated that exemplary damages may be awarded: -

“In a case in which a newspaper quite deliberately published a statement which it either knows to be false or which it publishes recklessly, carelessly, whether it be true or false.”

55. The gravity of the contents of the publication herein called for prior verification of facts by the Defendant. The failure by the Defendant to verify facts resulted in the mistaken identity of the person involved in the arraignment reported in the article. The Plaintiff is thus entitled to exemplary damages assessed at Kshs. 300,000/-. The Court declines to award of aggravated damages as no basis has been laid to warrant such award.

56. In the result, judgment will be entered for the Plaintiff against the Defendant jointly and severally in the total sum of sum of Kes.1,500,000/- (One Million Five Hundred Thousand) made up of the sum of Kshs. 1200,000/- as general damages and exemplary damages assessed at Kshs. 300,000/- (Three Hundred Thousand). The Plaintiff is also awarded the costs of the suit and interest from the date of judgment. Concerning other reliefs sought in the plaint, the Court doubts whether more than a decade since the impugned publication, orders by this court to restrain the Defendant or to compel them to render apology or for the retraction of the article would be efficacious or appropriate. These reliefs are declined.

DELIVERED AND SIGNED AT NAIROBI ON THIS 26TH DAY OF OCTOBER 2023.

C.MEOLI

JUDGE

