



**Boiwo v The Star Publication Limited & another (Civil Case  
1 of 2019) [2022] KEHC 11372 (KLR) (24 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11372 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KABARNET  
CIVIL CASE 1 OF 2019  
WK KORIR, J  
MAY 24, 2022**

**BETWEEN**

**FRANK KIPTOO BOIWO ..... PLAINTIFF**

**AND**

**THE STAR PUBLICATION LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**JOSIAH NYANDORO ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff, Frank Kiptoo Boiwo, is an advocate of the High Court of Kenya working and residing in Marigat, Baringo County. He practices in the style and name of Boiwo & Company Advocates.
2. The 1<sup>st</sup> defendant, The Star Publication Limited, is a limited liability company incorporated and registered in Kenya under the Companies Act. It is in the business of media and news whereby it undertakes news broadcast and newspaper print and circulation within the Republic of Kenya.
3. The 2<sup>nd</sup> defendant, Josiah Nyandoro, is the County Director of the National Environment Management Authority (NEMA) in charge of Baringo County.
4. In the plaint dated December 13, 2019, the plaintiff seeks the following reliefs:
  - a. General damages for defamation;
  - b. Aggravated damages for defamation;
  - c. An order that the defendant s do publish an unqualified apology through the same medium as prominently and in the same page and in similar manner as the offending article;
  - d. Cost of this suit;
  - e. Interest on a) and b) above at court rates;



- f. Any other relief that this Honourable Court may deem fit.
5. From the pleadings on record, the plaintiff's case is that the 2<sup>nd</sup> defendant caused the 1<sup>st</sup> defendant to publish an article defamatory of him at page 30 of the Star Newspaper of 5<sup>th</sup> September, 2019. The plaintiff complains that the article captioned "Baringo Lawyer Defies Nema Order And Builds Houses In Old Cemetery" is defamatory by innuendo in the contents of paragraphs 2 and 6 of the article. According to the plaintiff, the contents of the article implies that he is dishonest, capable of forging public documents, a criminal, of low moral standing, and a land grabber. Further, that he lacks integrity considering his standing in the society and the legal profession.
6. The specific words complained of in paragraph 2 of the article were that:
- "He excavated and exhumed human fossils from the "grabbed land". Boiwo then engaged masons in unlawfully putting up permanent structures at the 50 by 100 feet plot situated opposite Marigat Subcounty Hospital."
7. In regard to paragraph 6 of the article, the plaintiff complains of the following content:
- "He only submitted fake site architectural drawing stamped by a nameless Marigat Subcounty public health officer on August 2, 2019."
8. At the hearing, the plaintiff adopted his written statement dated December 13, 2019 and reiterated his case as captured in the plaint. He further stated that as a result of the publication, he has suffered loss of reputation. Further, that the publication was meant to tarnish his name. He refuted claims that he had presented fake documents with regard to the development of his plot. His evidence was that the lower court had, in a ruling delivered on July 16, 2019 in Kabarnet SPM ELC Case No. 10 of 2019, Baringo County Government v Frank K. Boiwo, held that he was a bona fide purchaser of the plot which was private land after its allocation to Jane Kamuren. The plaintiff therefore prayed for orders as in the plaint.
9. On cross-examination, the plaintiff testified that through the letter dated July 25, 2019, NEMA had acknowledged receipt of his environmental impact assessment report and indicated that it would review the same and communicate its findings in due course. He stated that NEMA had indeed advised him not to commence any development of the project until he received further communication.
10. Additionally, the plaintiff testified that through a letter dated August 15, 2021, NEMA informed him that there were requirements he was to meet prior to being granted approval. The letter also informed him that it was a criminal offence to commence construction without approval. The said letter was signed by the 2<sup>nd</sup> defendant.
11. When the plaintiff was referred to the architectural designs which he submitted to NEMA, he confirmed that the same did not have the name of the officer who stamped the document. The plaintiff agreed that he received a letter dated 16<sup>th</sup> November, 2019 from the 1<sup>st</sup> defendant informing him that it had published an apology on 15<sup>th</sup> November, 2019 as a sign of good faith. He, however, stated that the apology and the response came after the lapse of the 14 days' period he given the defendant s and that the apology was not done in the terms specified in his demand letter.
12. On re-examination, the plaintiff stated that the apology was not as per the demands he had issued regarding its manner, content and size. He further stated that he had asked for damages from the defendant s which he is yet to receive. The plaintiff stated that the apology failed to address the words he had identified as defamatory. He reiterated his position that the land was not grabbed as he had



produced documents in proof of ownership. His evidence was that he did not exhume any human fossils and the Sub-County Public Health Officer had not denounced the stamp on the architectural designs he had submitted to NEMA.

13. The 1<sup>st</sup> defendant filed its Statement of Defence dated January 21, 2020 on January 23, 2020 together with the supporting documents and witness statements.
14. The 2<sup>nd</sup> defendant did not enter appearance. Subsequently, and at the request of the plaintiff, interlocutory judgement was entered against him on March 13, 2020.
15. The 1<sup>st</sup> defendant admits that it published the article complained of by the plaintiff but that the contents of the article were true in fact and in substance and that the publication was made in good faith and in the public interest. The 1<sup>st</sup> defendant relied on the information surrounding the plaintiff's parcel of land and project and asserted that the plaintiff was not entitled to the reliefs sought and that this case ought to be dismissed with costs to the defendant s.
16. The 1<sup>st</sup> defendant called Joseph Kagongo, the author of the impugned article, as DW1. The witness adopted his written statement dated January 21, 2020. In his statement, the witness stated that the words and contents of the article complained of were true in fact and in substance and were made in good faith. He relied on the documents annexed to the Statement of Defence in support of his averment. DW1 further stated that as a sign of good faith, the 1<sup>st</sup> defendant had published an apology to the plaintiff in its newspaper of November 15, 2019. According to DW1, in view of the facts of the matter, the publication was not actuated by malice or bad faith but was as a result of legitimate public interest.
17. On cross-examination, DW1 conceded that it is good journalism to reach out to the other side in a story but in this case he did not indicate whether he reached out to the plaintiff prior to writing the story. He further stated that he had no evidence that the plaintiff indeed exhumed human fossils as indicated in the article. DW1 also stated that he believed that the architectural drawings were fake because they did not have the name of the public health officer who allegedly approved or stamped them. DW1 admitted that the article was published after the ruling in Kabarnet SPM ELC No. 10 of 2019 had been delivered confirming that the plot belonged to the plaintiff. DW1 testified that the alleged defamatory article was not given prominence as it was at page 30 of the newspaper which carries county news. His evidence was that the apology was given prominence as it was at page 2 of the newspaper which carries national news. Further, that the page in which the apology is published, and not the size of the apology, is what matters.
18. On re-examination, DW1 stated that the apology offered by the 1<sup>st</sup> defendant to the plaintiff was prominent although it did not indicate that whatever had been published was not true. He further stated that he had relied on the documents exhibited by the 1<sup>st</sup> defendant to write the story. DW1 testified that he was approached by stakeholders to write the story and he never doubted them.
19. Francis Mureithi Gatiru was called by the 1<sup>st</sup> defendant as DW2. He adopted his written statement of January 21, 2020. DW2 stated that he is a news editor with the 1<sup>st</sup> defendant. In summary, the witness stated that he read the story as well as the supporting documentations and found the same to be credible. Further, that he also exercised reasonable care prior to publishing the article.
20. On cross-examination, DW2 stated that even though there was no evidence of excavated human fossils, the statement was made as a result of the fact that work had started on the plot yet it was previously a cemetery. He also stated that despite the delivery of the court ruling confirming that the plaintiff was the owner of the plot in question prior to the publication of the story, he nevertheless went ahead to publish the story as there was a contestation after the ruling. The witness testified that the article



attributed the issue of the fakeness of the approval of the architectural design to the person who made the statement and the 1<sup>st</sup> defendant was therefore not at fault. DW2 stated that they didn't deem it necessary to consult the plaintiff as his views were already captured in the court documents and specifically the court ruling in the ELC matter. DW2 accepted that the published apology was not of similar prominence with the alleged defamatory story.

21. On re-examination, DW2 stated that an apology or correction is normally placed at page 2 of the newspaper. The witness testified that the statement that the architectural drawings had been signed by a nameless Marigat Sub-County Public Health Officer was attributed to the 2<sup>nd</sup> defendant. Further, that the article had referred to the existence of the ruling in the ELC case and also indicated the decision of the court.
22. Through his submissions filed on December 3, 2021, the plaintiff identified three issues for the determination by this Court. The first issue is whether the article published by the 1<sup>st</sup> defendant on 5<sup>th</sup> September, 2019 was defamatory. The plaintiff submitted that the said article met all the criteria of a defamatory statement. He relied on the definition of defamation provided in the 8<sup>th</sup> Edition of Black's Law Dictionary as well as the 4<sup>th</sup> Edition of Halsbury's Laws of England. Also cited as defining defamation is the decision of the Court of Appeal case of *SMW v ZWM* [2015] eKLR.
23. The plaintiff contended that the article by the 1<sup>st</sup> defendant met the essential elements of defamation as laid down by the Court of Appeal in *Wycliffe A. Swanya v Toyota East Africa & another* [2019] eKLR. The plaintiff further submitted that the publication should be considered in the context in which it was made which was to lower or injure his reputation.
24. The plaintiff submitted that in the plain and obvious language of the publication, the information relayed is that he is a criminal, lacks integrity, a thief, a dishonest person, a land grabber, a forger of public documents, and of low moral standing. This, according to the plaintiff, is confirmed by the claim that he had excavated and exhumed human fossils, that he had presented a fake architectural drawing and defied a NEMA order not to carry out the project. The plaintiff contends that the article was gross and outright defamatory and was made with the intention to disparage his reputation and expose him to hatred, ridicule, scandal, odium and contempt.
25. The second issue submitted on by the plaintiff is whether the publication of the article was malicious. On this issue, the plaintiff submitted that the 1<sup>st</sup> defendant was motivated by malice in making the publication since it neither bothered to ascertain the truth of the matter from him nor sought his version of the story. In this regard, the plaintiff relied on *Phineas Nyagah v Gitobu Imanyara* [citation not provided] to argue that evidence of malice can be found in the language of the publication. He also relied on the case of *Grace Wangui Ngenye v Wilfred D. Kiboro & another* [2009] eKLR to argue that the failure of the 1<sup>st</sup> defendant to verify the truthfulness of the words complained of before publication amounted to malice.
26. The plaintiff dismissed the 1<sup>st</sup> defendant's apology by submitting that the same was not as prominent as the defamatory article. Further, that the apology was an indication that the 1<sup>st</sup> defendant had realized its mistake. He also relied on the case of Hon. *Uhuru Muigai Kenyatta v Baraza Limited* [citation not provided] to submit that the law required the 1<sup>st</sup> defendant to establish the true facts if it was to successfully rely on the defence of justification or qualified privilege.
27. On the third issue as to the amount of general and aggravated damages to be awarded to him, the plaintiff relied on decided Kenyan and English cases to urge an award of Kshs. 20 million as general damages and Kshs. 2 million as aggravated damages. Further, that the defamatory article had been



- circulated in the entire East African region and the internet. He relied on *Mikindadi v Khangana & another* [2004] eKLR to submit that an award of general damages follows the cause.
28. In further support of the amount of damages sought, the plaintiff relied on the cases of *Samuel Ndungu Mukunya v Nation Media Group Ltd & another* [2015] eKLR and Hon *Martha Karua v Nation Media Group Ltd* [citation not provided] where general damages of Kshs. 20 million and Kshs. 8 million were awarded to the plaintiff s therein respectively.
  29. The plaintiff relied on the case of *Ken Odondi & 2 others v James Okoth Omburah T/A Okoth Omburah & Co. Advocates* [2013] eKLR and submitted that he has met the condition for the award of aggravated damages which is ordered against a defendant who acts out of improper motive by, for example, insisting on a flurry defence of justification or failing to apologize. The plaintiff justified his claim for aggravated damages by stating that the defendant s maliciously and recklessly published the offending words with the full knowledge of the ruling of 16<sup>th</sup> July, 2019, the minutes of the defunct County Council of Baringo which allotted the land to Jane Kamuren, and the sale agreement between him and Jane Kamuren. Further, that the defendant s did not retract the defamatory statements or offer a suitable apology.
  30. On his prayer that the defendant s should publish an unqualified apology, the plaintiff relied on the case of *J.P. Macharia v Wangethi Mwangi & Nation Newspapers Ltd* [citation not provided] and argued that the apology tendered was inadequate and he should be awarded Kshs. 1.5 million in lieu of an order for an unqualified apology.
  31. The 1<sup>st</sup> defendant filed submissions dated January 20, 2022 and highlighted four issues for the consideration of this court. On the first issue as to whether the article was defamatory of the plaintiff, it was submitted that the plaintiff did not discharge the burden of proof as required by section 107(1) of the *Evidence Act*, cap. 80. The 1<sup>st</sup> defendant relied on the cases of *Phinehas Nyagah v Gitobu Imanyara* [2013] eKLR; *Elisha Ochieng Odhiambo v Booker Ngesa Omole* [2021] eKLR; and *Selina Patani & another v Dhiranji V. Patani* [2019] eKLR to submit that the plaintiff ought to have adduced further evidence to substantiate the claim of injury to his person and integrity. The 1<sup>st</sup> defendant asserted that defamation is not about publishing falsehoods against a person and a plaintiff must show that the published falsehood disparaged his person.
  32. The 1<sup>st</sup> defendant referred to the evidence on record and argued that the information in the article was truthful. The 1<sup>st</sup> defendant submitted that even if the article entailed an element of defamation, then it had discharged its duty as regards the defence of justification. On the meaning of the defence of justification, the Court was referred to *Gatley on Libel and Slander* 12<sup>th</sup> ed., Sweet and Maxwell. Further reliance was also placed on the English case of *Fraser v Evans & others* [1969] 1 All E.R. C.A, where the Court held that there would be no wrong done if the issues published were true and in furtherance of free speech and public interest.
  33. Still pursuing its defence that the plaintiff had not established a claim of defamation against it, the 1<sup>st</sup> defendant argued that the plaintiff had not discharged the burden of proof because he solely relied on his evidence and testimony that he was defamed. It was submitted that the failure by the plaintiff to call a third party in support of the alleged injury to his reputation rendered his case unproved. The submission was supported by the decision of the Court of Appeal in *Selina Patani* (supra).
  34. Turning to the second issue as to whether its publication was actuated by malice, the 1<sup>st</sup> defendant 's submitted that the publication was done out of good faith and for legitimate public interest. The 1<sup>st</sup> defendant relied on the case of *Nation Newspaper Ltd. v Gilbert Gibendi* [2002] eKLR to submit that



- the plaintiff ought to have adduced evidence to prove malice on the part of the defendant s. Further, that negligence or rash on the part of the defendant s does not automatically amount to malice.
35. On the third issue of the sufficiency of the apology published on November 15, 2019, it was submitted that the apology as published mitigated any loss occasioned to the plaintiff . According to the 1<sup>st</sup> defendant , the apology was published promptly, made direct reference to the plaintiff , and indicated his side of the story as captured in his letter dated November 1, 2019 addressed to the 1<sup>st</sup> defendant .
  36. As to the nature and quantum of damages to be awarded to the plaintiff , if any, the 1<sup>st</sup> defendant argued that the plaintiff was not entitled to general damages as he had failed to prove all the elements of defamation. The 1<sup>st</sup> defendant relied on the cases of *Dr. Richard S. Kimanzi v Nation Newspapers Ltd* [2011] eKLR and *Benard Bifwoli v Simon Wetendu & 2 others* [2008] eKLR in support of the argument that in determining the damages to be awarded, the court ought to assess the actual harm caused to the plaintiff . The 1<sup>st</sup> defendant urged that in the absence of evidence adduced by the plaintiff to aid in such assessment, this Court should not award any damages.
  37. Finally, on the fourth issue concerning the issue of costs, the 1<sup>st</sup> defendant stated that costs follow the event. The 1<sup>st</sup> defendant concluded by asking this Court to dismiss the plaintiff ’s claim and award it costs.
  38. From the pleadings, the evidence and the submissions placed before this Court by the parties, I frame the following issues for the determination of this Court:
    - i. Whether the article published by the 1<sup>st</sup> defendant on September 5, 2019 was defamatory of the plaintiff ?
    - ii. If the answer to (i) is in the affirmative, whether the defence of justification is available to the 1<sup>st</sup> defendant ?
    - iii. Whether the apology dated November 15, 2019 mitigated the loss, if any, suffered by the plaintiff ?
    - iv. Whether the plaintiff suffered any loss or damage as a result of the publication, and if so, whether he is entitled to the reliefs sought?
    - v. Who should bear the burden of the costs of this suit?
  39. As a gateway to the analysis and determination of the identified issues, I will quote the Supreme Court of the United Kingdom in *Lachaux v Independent Print Ltd & another* [2019] UKSC 27 as follows:
 

“ The law distinguishes between defamation actionable per se and defamation actionable only on proof of special damage. But although sharing a common label, these are very different torts with distinct historical origins. Libel, which is always actionable per se, originated in the disciplinary jurisdiction of the ecclesiastical courts and the criminal jurisdiction of the Court of Star Chamber. The gist of the tort is injury to the claimant’s reputation and the associated injury to his or her feelings. Defamation actionable per se comprised, in addition to all libels, four categories of slander which were assimilated to libel on account of their particular propensity to injure the reputation of the claimant. These categories were (i) words imputing criminal offences, (ii) words imputing certain contagious or infectious diseases, and (iii) words tending to injure a person in his or her office, calling, trade or profession.”



40. The Kenyan law likewise appreciate the damage that can be caused to one's reputation and trade by careless publication and dissemination of injurious falsehoods. The Kenyan Constitution does indeed appreciate the importance of reputation by stating at article 33(3) that in "the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others".
41. The first issue to be considered by this court is whether the article published by the 1<sup>st</sup> defendant on September 5, 2019 defamed the plaintiff. The plaintiff's case is that the publication was defamatory in its title, and at paragraphs 2 and 6. The words complained of by the plaintiff have already been reproduced in this judgement. According to the plaintiff, the words had the effect of portraying him as a land grabber, a forger of public documents, a corrupt advocate, dishonest, a criminal, a person lacking integrity and of low moral standing. The plaintiff further argues that his reputation as an advocate with 13 years in practice has suffered. Further, that the publication has caused him mental anguish, psychological torture, distress and embarrassment. The plaintiff contends that the apology offered by the plaintiff was insufficient and not proportionate to the defamatory article.
42. The 1<sup>st</sup> defendant on the other hand argues that the article was not defamatory to the plaintiff because it was based on the documents availed to them by the office of the 2<sup>nd</sup> defendant. Further, that the article was a factual reporting of a matter of public interest and a reflection of the true position of the matter in question. The 1<sup>st</sup> defendant also contends that in the event the words used in the article are found to be defamatory, then the defence of justification under the *Defamation Act*, whose ingredients it has met, will come to its aid. The 1<sup>st</sup> defendant additionally asserts that it offered adequate apology to the plaintiff prior to the institution of the suit.
43. The case of *Phinehas Nyagah v Gitobu Imanyara* [2013] eKLR, has been relied upon by both parties to outline the elements of defamation. In that case the Court stated the elements of defamation thus:

" 16. Defamation is a tort and is defined as the publication of a statement which, tends to lower a person in the estimation of right thinking members of the society generally or which tend to make him be shunned or avoided. The defamatory statement is one which has tendency to injure the reputation of the person to whom it refers by lowering him in the estimation of the right thinking members of society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike and disesteem and typical examples are an attack upon the moral character of the plaintiff attributing to him any form of disgraceful conduct such as crime, dishonesty, cruelty and so on. Publication is the communication of the words to at least one other person other than the person defamed. Publication to the plaintiff alone is not enough because defamation is an injury to one's reputation and reputation is what other people think of a man and not his own opinion of himself. An action for defamation is essentially an action to compensate a person for the harm done to his reputation. Defamation is not about publication of falsehoods against a person; it is necessary to show that the published falsehood disparaged the reputation of the plaintiff or tended to lower him in the estimation of right thinking members of society generally. An injurious falsehood may not necessarily be an attack on the plaintiff's reputation. The words must be maliciously published and malice can be inferred from a deliberate or reckless or even negligently ignoring of facts. See *J P Machira Vs. Wangethi Mwangi and Nation Newspapers Civil Appeal No. 179 of 1997.*"



44. Also relevant to the definition of defamation is the holding in *Joseph Njogu Kamunge v Charles Muriuki Gachari* [2016] eKLR that:

“The elements of the tort of defamation are that the words must be defamatory in that they must tend to lower the plaintiff’s 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.

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

45. In *Wycliffe A. Swanya v Toyota East Africa & another* [2009] eKLR, the Court of Appeal listed the ingredients of the tort of defamation as follows:

“For the purpose of deciding a case of defamation, the Court is called upon to consider the essentials of the tort generally and to see whether these essentials have been established or proved. It is common ground that in a suit founded on defamation the plaintiff must prove:-

- “(i) That the matter of which the plaintiff complains is defamatory in character.
- (ii) That defamatory statement or utterance was published by the defendant s. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.
- (iii) That it was published maliciously.
- (iv) In slander, subject to certain exceptions, that the plaintiff has suffered special damage.”

See *Kenya Tea Development Authority Limited v. B. O. Masese & Company Advocates*, (ibid unreported) and *Mikidadi v. Halfan & Another* [2004] 2 KLR 496 at page 503.

Words uttered by a party against another amount to slander if they are published and intended to disparage that person in his office, profession, calling, trade or business held or carried on by him, (see section 3 of the *Defamation Act*).”

46. In order for a claimant in a case of defamation to succeed, the four elements stated in the cited decisions must be established. The question is whether the plaintiff herein has established those four ingredients. There is no dispute about the first element as to whether the words complained of were published by the defendant s. The words which allegedly came from the mouth of the 2<sup>nd</sup> defendant were broadcast to the whole world by the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant did not challenge the plaintiff’s case by filing a defence, and the 1<sup>st</sup> defendant admits publishing the words.



47. Any doubt as to whether the 1<sup>st</sup> defendant was the publisher of the alleged defamatory words is banished by the fact that the 1<sup>st</sup> defendant has indeed acknowledged owning the newspaper in which the article was published. DW1 also admitted to being an employee of the 1<sup>st</sup> defendant and that he wrote the article. DW2 introduced himself as a news editor with the 1<sup>st</sup> defendant and that he reviewed the article and authorized its publication. The plaintiff has therefore established on a balance of probabilities that it is the defendant s who published the words he claims to be defamatory.
48. The second ingredient is whether the words tend to lower the plaintiff’s reputation in the estimation of right thinking members of society or whether they cause the plaintiff to be shunned or avoided by other persons. I will consider this issue without considering whether the publication was truthful because the issue of the truthfulness or otherwise of the words contained in the publication will be determined when considering the third element as to whether the publication was laced with malice.
49. The plaintiff’s complaint is anchored on the use of the words “excavated and exhumed human fossils from grabbed public land” at paragraph 2 and “submitted fake architectural drawings” at paragraph 6 of the article. The 1<sup>st</sup> defendant on its part responded with regard to the wordings at paragraph 2 that the choice of words was a result of the fact that there was an ongoing construction which included excavation of an existing cemetery. DW1 and DW2 admitted that they did not have evidence of excavation of human remains. They, however, stressed that it was obvious that the excavation of a cemetery will result in the digging up of human remains.
50. In my view, the words complained of, as contained in paragraph 2 of the article, are defamatory in their ordinary sense. This is more so in the absence of evidence to support those assertions. The same can be said of the caption that “Baringo Lawyer Defies NEMA Order And Builds Houses In Old Cemetery.” The title and paragraph 2 used sensational words meant to move emotions and attract the attention of readers. In doing so, the 1<sup>st</sup> defendant threw the reputation of the plaintiff to the dogs. Any reader of the article would be forgiven for perceiving the plaintiff as a heartless charlatan who does not respect the rule of law despite his 13 years in legal practice. The words were thus defamatory and cannot be defended in any manner. The plaintiff was thus subjected to ridicule in the eyes of those who knew him.
51. The 1<sup>st</sup> defendant’s defence in regard to the words in paragraph 6 is that it quoted the 2<sup>nd</sup> defendant verbatim. The 1<sup>st</sup> defendant seems to suggest that even though the words were defamatory in nature, it should be excused for innocently reporting what was said by the 2<sup>nd</sup> defendant. First of all, it is my finding that the words used in paragraph 6 of the article were defamatory of the plaintiff as they painted him as a criminal, dishonest and without morals. On the defence by the 1<sup>st</sup> defendant, it goes without saying that it is the one which let the world know what the 2<sup>nd</sup> defendant had said about the plaintiff. It published the information and it cannot turn around to blame somebody else for the contents it published. It shares the blame with the 2<sup>nd</sup> defendant for what was reported. Had the 1<sup>st</sup> defendant declined to publish the defamatory words uttered by the 2<sup>nd</sup> defendant, this suit may not have been instituted.
52. The third element is whether the publication was made out of malice. The plaintiff argued that the infringing publication was made out of malice because the 1<sup>st</sup> defendant did not reach out to him to seek clarification. The plaintiff also argued that malice could be proved from the words themselves as held in *Phinebas Nyagab v Gitobu Imanyara* [2013] eKLR. The 1<sup>st</sup> defendant on its part submitted that the article was published out of good faith and in furtherance of public interest.
53. As per section 107 of *Evidence Act*, cap. 80, the plaintiff, even if desirous of the court to infer malice in a statement, was required to produce evidence that leads to the conclusion that there was malice on the part of the defendant s. The 1<sup>st</sup> defendant’s case is that the publication was done in good faith in



the public interest. The 1<sup>st</sup> defendant produced assorted documents which allegedly formed the basis of the story. A casual perusal of the documents produced by both sides in this case points to the fact that the plot in question, though previously a public cemetery, had been formally allocated to one Jane Kamuren by a legitimate public body. Jane Kamuren then sold the plot to the plaintiff. The plaintiff sought approval of his architectural designs, and in his own words, personally obtained the go-ahead from the Marigat Sub-County Public Health Officer.

54. Without cross-checking the documents which were available to it, the 1<sup>st</sup> defendant went ahead and reported that the plaintiff had a fake approval of his architectural designs. DW1 admitted that he was aware of the Court ruling in the ELC case which had rejected an application for injunction by the County Government of Baringo. The court was of the view that a preliminary consideration of the documentation disclosed that the plot in question belonged to the plaintiff. The failure by the 1<sup>st</sup> defendant to carefully consider the information in its possession before publishing the story can only imply that the publication was driven by malice. This, notwithstanding the evidence of DW1 that he had never met the plaintiff and had no malice against him but was only driven by the public good. Public good also extend to the protection of the reputation of others.
55. Another point for consideration on the issue of malice is the failure by the 1<sup>st</sup> defendant to reach out to the plaintiff to hear his side of the story. On this issue, the 1<sup>st</sup> defendant's response is that they relied on the ruling in the ELC matter. Indeed, the ruling highlights the case of the plaintiff. However, I do not think that the same was sufficient in light of the bundle of papers that had been given to the 1<sup>st</sup> defendant by the 2<sup>nd</sup> defendant's office. During the hearing, it also became apparent that the plaintiff was not privy to some of the letters that were in the possession of the 1<sup>st</sup> defendant. In my view, the failure to reach out to the plaintiff stinks of malice. The 1<sup>st</sup> defendant in this instance accepted to be used by unsuccessful parties in the ELC matter to further litigation in the court of public opinion. The 1<sup>st</sup> defendant instead of allowing the aggrieved parties to explore the avenues provided by the law to challenge what they believed to be an unpalatable decision fell into the trap of the alleged stakeholders who have now left it to face the music alone.
56. In finding that malice can be read from the failure of the 1<sup>st</sup> defendant to get the plaintiff's side of the story, I am persuaded by the holding in *Phinebas Nyagah* (supra) that:
- “Malice may also be inferred from the relations between the parties before or after publication or in the conduct of the defendant in the course of the proceedings.... The failure to inquire into the facts is a fact from which inference of malice may properly be drawn.”
57. The 1<sup>st</sup> defendant also argued that by offering an apology, it showed lack of malice. My understanding of section 12(2) of the *Defamation Act*, Cap. 36 is that the defence that a publication was done without malice can only suffice if an apology for the libel is immediately published and at the time of filing the defence, the defendant has made a payment into court by way of amends. There is no evidence on record that the 1<sup>st</sup> defendant fulfilled this condition. It is therefore my finding that the existence of malice on the part of the 1<sup>st</sup> defendant has been established by the plaintiff.
58. Before I wrap up this part of the judgement, I will consider the argument of the 1<sup>st</sup> defendant that the plaintiff's case was not proved because he did not call a third party as a witness. The 1<sup>st</sup> defendant's argument is premised on the Court of Appeal holding in *Selina Patani* (supra) that:
- “27. The evidence on record is the testimony by the 2<sup>nd</sup> appellant that her boss read the letter. The alleged boss was never called to testify. No other third party was called to testify as to the publication and injury to reputation. As to whether



the appellants character and reputation was destroyed, there is no evidence on record from a third party stating that as a result of reading the impugned letter, the appellants reputation and standing in society was injured. It is in this context that we agree with the learned Judge that a person's own view about his/her reputation is not material in a claim for defamation; there must be evidence from a third party to the effect that the standing and reputation of the claimant has been lowered as a result of the defamatory publication. In the absence of third party evidence, we find no error of law on the part of the Judge in arriving at the determination that the appellants did not prove their claim for defamation."

59. The said decision cannot come to the aid of the 1<sup>st</sup> defendant because from the facts of the cited case, there was no evidence presented to the Court that the defamatory letter complained of had been publicized and read by a third party. In the instant case, the information had been publicized and disseminated to the whole world and anybody who knew the plaintiff had been made aware of the allegations against him. In summary, I find the article published by the 1<sup>st</sup> defendant defamatory against the plaintiff.
60. The question that calls for the determination of the Court at this stage is whether the 1<sup>st</sup> defendant has successfully established the defence of justification. The 1<sup>st</sup> defendant's position is that even if the published words were defamatory of the plaintiff, the article is protected by the defence of justification. This assertion was disputed by the plaintiff. The defence of justification is provided for under section 14 of the *Defamation Act*, cap. 36 as follows:
- "In any action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the reputation of the plaintiff having regard to the truth of the remaining charges."
61. In *J. P. Machira T/A Machira & Co Advocates v East African Standard Ltd* [2001] eKLR, the Court while dismissing the defendant's defence of justification stated as follows:
- "A defendant is permitted to plead justification only where it is clear that the allegations he made and are complained of are true in fact or substantially so. He cannot be allowed to set out a version of a statement which differs materially from that complained of and justify that version. For him to rely on justification he must accept the plaintiff's version of the statement, or a statement which is in substance identical with the plaintiff's version... Terminologically, "justification" as used in the law of defamation, means "truth". The defence calls for the defendant demonstrating that the defamatory imputation is true. He cannot get away with it by saying that he believed that the matter complained of was true."
62. In this case, the 1<sup>st</sup> defendant's defence of justification falls for two reasons. First, the basis of the offending words was not proved to be true. Second, the failure on the part of the 1<sup>st</sup> defendant to get the plaintiff's side of the story negated the benefit of truth from the matter. Still on that trajectory, the 1<sup>st</sup> defendant's argument that it only intended to merely impart information to the general public on a matter of public interest holds no water. The 1<sup>st</sup> defendant could have succeeded with this defence if the caption and the contents of the article were neutral. The article complained of does not pass muster for neutrality as it was meant to voice the one sided view of people DW1 referred to as stakeholders.



63. I now turn to the question as to whether the apology published on November 15, 2019 mitigated the loss suffered by the plaintiff. It is the plaintiff's case that even though the 1<sup>st</sup> defendant did indeed publish an apology, the same was not as per the terms he had demanded. Further, that the apology was not as prominent and on the same page as the offending article. In response, the 1<sup>st</sup> defendant argued that according to their internal rules, apologies were to be published on page 2 of the newspaper. The 1<sup>st</sup> defendant also argued that the apology was made in good faith upon receiving the plaintiff's complaint about the article. It was also argued that the said apology captured the name of the plaintiff and his version of the story.
64. The question would then be whether the apology was proper. Thereafter, I will consider whether it mitigated the loss suffered by the plaintiff. As to whether the apology was proper, the 1<sup>st</sup> defendant contends that the apology was published upon receipt of the demand letter from the plaintiff.
65. The fact that an apology was published and the contents of that apology are not in dispute. There is also no dispute that the offending article was published in page 30 while the apology was published at page 2. The plaintiff is also correct that the space covered by the apology was smaller than that taken by the defamatory article.
66. Wannes Vandebussche in his article: *Rethinking Non-Pecuniary Remedies for Defamation: The Case for Court-Ordered Apologies* published in the *Journal of International Media and Entertainment Law* 2021, pages 109-170, conceptualizes what an apology should entail as follows:
- “Although scholars do not fully agree on what a true apology should entail,<sup>39</sup> reference is often made to the basic definition of Lazare: “an encounter between two parties in which one party, the offender, acknowledges responsibility for an offense or grievance and expresses regret or remorse to a second party, the aggrieved.”<sup>40</sup> Yet apology theorists regularly include two additional elements: an action component (which implies an offer to repair) and an articulation of forbearance (which is a commitment to change future behavior).<sup>41</sup> Subsequently, when an apology is introduced in the legal arena, it is subject to the boundaries of the law. On the one hand, this comes down to a tightening of the scope of the apology, because a judge cannot compel emotions or heartfelt feelings.<sup>42</sup> On the other hand, this means that the adjudicator, rather than the apologizer, has the power to determine how and where it should be provided (spoken or in writing, in private or in public).<sup>43</sup> The exact wording obviously depends on the circumstances of the case. In theory, an apology order is comprised of four components: an affirmation or acknowledgment of fault; an expression of regret, remorse or sorrow; a willingness to repair; and a promise to adapt behavior in the future.”
67. A perusal of the plaintiff's letter dated 1<sup>st</sup> November, 2019 indicates that he required an apology and not the right of reply that is provided for in section 7A of the *Defamation Act*, cap. 36. In that case, the standards set in section 7A(2), (3) and (4) were not applicable. It is therefore my finding that the apology dated November 15, 2019 was proper and adequate in the circumstances of this case as it referred to the news item complained of, the plaintiff and remorse.
68. That a properly tendered apology should mitigate the loss suffered by the claimant is confirmed by section 16 of *Defamation Act* which provides as follows:
16. (1) In any action for libel or slander the defendant may, after giving notice of his intention so to do to the plaintiff at the time of filing or delivering the plea in such action, give evidence in mitigation of damages that he made or offered an apology to the plaintiff, in respect of



the words complained of, before the commencement of the action or, where the action was commenced before there was an opportunity of making or offering such apology, as soon thereafter as he had such opportunity.

- (2) In any action for libel or slander the defendant may give evidence in mitigation of damages that the plaintiff has recovered damages, or has brought actions for damages, for libel or slander in respect of the publication of words to the same effect as the words on which the action is founded, or has received or agreed to receive compensation in respect of any such publication.
69. It is my view that section 16(1) recognizes the fact that where a defendant offers an apology, the same is considered as a mitigating factor while awarding damages. The apology therefore counts for something otherwise it would serve no purpose for an offending party to offer an apology when such an apology will amount to nothing.
70. Before I take leave of this issue, I will briefly address the plaintiff's claim that the apology was not on the same page and was not given prominence as the offending article. On this issue, DW1 stated in cross-examination that the size of the apology doesn't matter because what really matters is the page on which the apology is carried. His evidence was that page 2 in which the apology was published carries national news. The evidence of DW1 was echoed by DW2 who told the Court during re-examination that apologies are normally carried on page 2 of the publication.
71. DW1 and DW2 should know as they are the experts in the area. Their point finds solid support in an article written by Peter Mwaura titled: Reader's guide on how to spot bias in the news of the presidential race. In the article published in the Daily Nation of November 26, 2021, the author lists sources of bias in reporting and states that one of them is:
- “The third is placement. Where a story is placed in the newspaper influences what a person thinks about its importance. If it is on the front page, it's thought to be more important than those buried inside. Editors influence what readers think is important by placement.”
72. From the evidence of the defence witnesses and the cited comment, it is reasonable to agree with the 1<sup>st</sup> defendant that an article buried deep at page 30 of a newspaper is not likely to attract the same attention as an apology placed on the second page of the same newspaper. The apology was thus adequate and sufficient to draw the attention of any person interested in the affairs of the plaintiff to the news item the apology was referring to. What was important is that the 1<sup>st</sup> defendant had accepted that some of the contents of the news item in question were erroneous.
73. The issue at this point in this judgement is whether the plaintiff suffered any loss as a result of the impugned publication and if so, whether he is entitled to the reliefs sought. On the issue of damages, section 16A of Defamation Act provides as follows:
- In any action for libel, the court shall assess the amount of damages payable in such amount as it may deem just:
- Provided that where the libel is in respect of an offence punishable by death the amount assessed shall not be less than one million shillings, and where the libel is in respect of an offence punishable by imprisonment for a term of not less than three years the amount assessed shall not be less than four hundred thousand shillings.
- [Emphasis supplied]
74. The plaintiff submitted that upon finding that the 1<sup>st</sup> defendant is liable for defamation, the Court should award him general, aggravated and special damages. The special damages are said to be in lieu



of an apology. The 1<sup>st</sup> defendant on its part argued that the plaintiff did not prove any loss or damage suffered and if he is to be awarded anything, then he should only get nominal general damages and not any of the other claimed damages. In support of the assertion that the plaintiff is not entitled to any damages at all, the 1<sup>st</sup> defendant cited the reasoning in *Selina Patani* (supra) at paragraph 26 that:

“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.”

75. In the instant case, the plaintiff stated that he is an advocate of the High Court and has practiced law for 13 years. Perhaps, better guidance on the kind of loss suffered and the damages to be awarded in the circumstances of this case is found in the Court of Appeal’s pronouncement in *Miguna Miguna v Standard Group Limited & 4 others* [2017] eKLR that:

“The learned Judge also held that the appellant had failed to prove his “good character” and that the appellant was wrong to assume that the trial court would take judicial notice of who the appellant was. This was not a fair finding at all.

The appellant testified before the trial Judge that he was an Advocate of the High Court of Kenya; that he was a Barrister at Law in Canada; that he was a Certified Mediator, Publisher and Commentator who earned a living by offering consultancy services to clients in Kenya and abroad. This evidence was not challenged in any way at all by the respondents. The appellant did not have to prove any of that evidence through production of any documents or certificates at all in the absence of a requirement by the respondents to do so. The appellant’s profession or standing should have been questioned by the respondents. We have perused the record and did not see any evidence of such challenge or requirement by the respondents. In that case, the trial Judge should have taken that evidence as given - that the appellant was an Advocate of that court and that he held the other positions that he stated to hold. Holding otherwise as the trial court did was wrong in the circumstances.”

76. Guided by the cited decision, I find that it was not necessary for the plaintiff to call independent witnesses to corroborate his assertion that he is an advocate of longstanding. Indeed, the 1<sup>st</sup> defendant did not challenge the plaintiff’s trade and length of practice.

77. In *Wachira Waruru & another v Margaret Wachira* [2018] eKLR, the Court of Appeal outlined the principles guiding the award of damages in defamation proceedings as follows:

“...The court will take into account, in assessing the level of damages whether the author or publisher of a libel material could have, with due diligence verified the libelous story; whether he was reckless or negligent. See *Standard Limited V G.N Kagia t/aKagia & Company Advocate*, Civil Appeal No.115 of 2003.

Secondly, in assessing damages for injury to reputation, the most important factor is the gravity of the libel; the more closely it touches the plaintiff’s personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of publication is also very relevant: a libel published to millions has a greater potential to cause more damage than a libel published to a handful of people. Further, the successful party in a defamation action is entitled to recover such sum in general compensatory damages as will compensate him for the wrong he has suffered.



Aggravated damages, on the other hand, will be awarded against a defendant who acts out of improper motive, actuated by malice. See the English case of *John v MGM Ltd* (1997) Q.B 586 applied with approval in *Johnson Evan Gicheru v Andrew Morton & Another*, Civil Appeal No. 314 of 2000. In *Mohamed Jabane V Highstone T. Olenja* (1986) [Vol. 1] KAR 982 the Court of Appeal emphasised that in considering the award of damages, each case will depend on its own facts; that the awards must not be excessive and must take into account the need to avoid escalation of insurance premiums; that comparable injuries should attract comparable awards; and that damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford.”

78. The Court of Appeal in *Miguna Miguna* (supra) also stated the factors to be taken into account in assessing damages in defamation claims as follows:

“This court as recently as June 2, 2017 discussed in detail factors to consider in awarding damages for defamation. That was in *Nation Media Group & Another v Hon. Chirau Ali Makwere C.A. No. 224 of 2010 (ur)*. The Court cited Tunoi, J.A. in *Johnson Evan Gicheru* (supra) where guidelines in assessing damages were set out as stated in the case of *Jones v Pollard [1997] EMLR 233*:

1. 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.
2. 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.
3. Matters tending to mitigate damages, such as the publication of an apology.
4. Matters tending to reduce damages.
5. Vindication of the plaintiff’s reputation past and future.”

79. Having stated the applicable law guiding the award of damages, the question would then be; what is reasonable as general damages in this case? The Court of Appeal in *Ken Odondi & 2 others v James Okoth Omburah t/a Okoth Omburah & Co. Advocates* [2013] eKLR set aside an award of Kshs. 7,000,000/= as general damages made to an advocate and substituted the same with Kshs. 4,000,000/= . In *Kalya & Co. Advocates v Standard Limited* [2002] eKLR, the High Court awarded Kshs. 9,000,000/= as general damages and Kshs. 2 million as aggravated damages. In *Wachira Waruru* (supra) the Court of Appeal reduced awards of Kshs. 8,000,000/= and Kshs. 2,000,000/= in general and aggravated damages to Kshs. 4,000,000 and Kshs. 500,000/= respectively. In the already cited case of *Miguna Miguna*, the Court of Appeal set aside the order dismissing the appellant’s claim and awarded him general damages of Kshs. 5,000,000/= and Kshs. 1,000,000/= as aggravated damages. All the cited cases were decided not so long ago and they establish the trend of awards in claims similar to the one made by the plaintiff herein.

80. Guided by the cited decisions of the Court of Appeal, Kshs. 4,000,000/= would be an appropriate award as general damages. However, as already stated in this judgement, an adequate apology that is properly tendered in good time mitigates the loss of the plaintiff . In this case, I have found the 1<sup>st</sup> defendant’s apology appropriate and adequate and I therefore half the proposed amount of Kshs. 4,000,000/= . As such, the plaintiff is therefore awarded Kshs. 2,000,000/= as general damages. This



award is made against the two defendant s jointly and severally and shall attract interest at court rates from the date of judgement till payment in full.

81. As regard the claim for aggravated damages, I find that as held *John v MG Limited* [1997] QB 586 (as cited in *Miguna Miguna* (supra)), such an award can only be made in circumstances as follows:

“Aggravated damages will be ordered against a defendant who acts out of improper motive e.g. where it is attracted by malice; insistence on a flurry defence of justification or failure to apologize”.

82. The prompt and unreserved apology by the 1<sup>st</sup> defendant would knock the claim for aggravated damages off the deck of the damages awardable to the plaintiff . The 1<sup>st</sup> defendant ’s behavior both before the litigation and during the trial does not attract an award for aggravated damages.

83. As already clearly indicated in this judgement, the 1<sup>st</sup> defendant has already tendered what this Court finds to be an adequate apology. The question of asking the 1<sup>st</sup> defendant to make another apology or pay special damages in lieu of such an apology does not therefore arise. The plaintiff ’s claim for aggravated and special damages therefore fails.

84. As for costs, the same follow the event. From the case law cited in this judgement, it cannot be said that the plaintiff expected an award of damages of over Kshs. 20 million. His decision to file his claim before this court was ill-advised as the claim squarely fell within the jurisdiction of a Chief Magistrate’s Court and there is such a Court in Kabarnet. The defendant s should not be made to carry the burden of the plaintiff ’s decision. In the circumstances the plaintiff will have the costs of the litigation from the defendant s to be taxed at subordinate court rates.

**DATED, SIGNED AND DELIVERED AT KABARNET THIS 24<sup>TH</sup> DAY OF MAY, 2022.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**

