



**Owino & 2 others v Ogemba & 2 others (Civil Suit 13 of 2018)
[2022] KEHC 10506 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 10506 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL SUIT 13 OF 2018
RPV WENDOH, J
JUNE 23, 2022**

BETWEEN

**ERNEST OMONDI OWINO 1ST PLAINTIFF
MBINGO ENTERPRISES 2ND PLAINTIFF
JANTO CONSTRUCTION COMPANY LIMITED 3RD PLAINTIFF**

AND

**PAUL OGEMBA 1ST DEFENDANT
STANDARD DIGITAL 2ND DEFENDANT
STANDARD GROUP 3RD DEFENDANT**

JUDGMENT

1. The plaintiffs, Ernest Omondi Owino, Mbingo Enterprises and Janto Construction Company Limited sued the defendants, Paul Ogemba, Standard Digital and Standard Group over alleged defamatory words published by the 1st defendant on the 2nd and 3rd defendants' print and digital platforms. The plaintiffs pray for: -
 - i. Punitive and aggravated or exemplary damages for libel.
 - ii. General damages.
 - iii. An apology in terms and text approved by the plaintiffs to be published in a manner as prominent as the offending article.
 - iv. A permanent injunction to restrain the defendant, servants and/or agents from publishing or continuing to publish articles defamatory to the plaintiffs now or in the near future.
 - v. Compensation for loss of future earnings.



- vi. Costs of this suit.
 - vii. Interest on (a) and (b) above.
 - viii. Any further relief the court deems fit to grant.
2. The plaintiffs were represented by the firm of H. Obach & Partners while the defendants were represented by the firm of Nyamurongi & Co. Advocates.
 3. The case proceeded to hearing on 7/6/2021. The 1st plaintiff testified as PW1 and called one witness, Diana Amanda Muma as PW2. The 1st defendant testified on his own and on behalf of the 2nd and 3rd defendant as DW1.
 4. At the close of the hearing, both parties filed their respective submissions. The plaintiffs filed their submissions dated 15/10/2021 on 19/10/2021 and the defendants filed their submissions dated 10/3/2022 on 16/3/2022.
 5. The plaintiffs' case is anchored on a plaint dated 28/11/2018. The genesis of the dispute is the publication by the defendants' on 8/11/2018 as follows: -
 - “Relief for Obado’s crony as court lifts freezing orders on account”
 - “A court has lifted orders freezing accounts of a businessman accused of being part of a ring that allegedly siphoned Sh. 2 billion from Migori County coffers...”
 - “The High Court had frozen the bank accounts of Mr. Ernest Owino and his three companies following an application by the anti - corruption commission...”
 - “Mr. Owino and his three companies - Janto Construction Company Limited, Marowa Stores Limited and Mbingo Enterprises Limited - told the court that they needed the money to do business.”
 - “Owino is said to be one of governor Okoth Obado proxies paid millions for supplying air...”
 6. The plaintiffs pleaded that the above words were false and maliciously, without consent from the plaintiff's and justifiable cause, authored, printed and/or published; in their natural and ordinary meaning; the said words meant and were understood to refer to the plaintiffs and to mean: -
 - a. The plaintiffs are working with the Governor of Migori County to pilfer funds.
 - b. The plaintiffs are thieves.
 - c. The plaintiffs are questionable and untrustworthy individuals and in particular the 1st plaintiff who uses his companies to siphon money from the said County without working or supplying anything.
 - d. The plaintiffs are persons with no moral standing in the society.
 7. It was further pleaded that the defendants ought to have known that the 1st plaintiff is the managing director of the 2nd and 3rd plaintiffs; that the defendants ought to have known that the 2nd and 3rd plaintiffs were registered before the County Government was established and have been in active business since then; that the defendants ought to have known that no evidence was/has been tabled by EACC proving that the plaintiffs and in particular the 1st plaintiff, siphoned money from Migori



- County and the defendants ought to have known that the 1st plaintiff is married with children and is a reputable businessman.
8. In support of their claim for exemplary damages, the plaintiffs averred that they would rely on the fact that the article was published in a prominent and sensational manner; that the alleged application to have the court lift the freezing orders on the accounts was because the plaintiffs have been unable to carry on business so long as the accounts were frozen and at the time of the publication, any association with Governor Obado was meant to disparage a person's character.
 9. The plaintiff further stated that it shall refer the court to the publication of the defendants in the Standard Digital and pleaded that the said words as published by the Standard Digital were defamatory and/or reckless disregarding as to whether or not they were defamatory and the Standard Digital having the material advantage to them by reason of such publication outweighed the prospects of material loss.
 10. The plaintiffs' stated that before publication of the said defamatory words, the plaintiffs enjoyed good social status and respect as an individual and business entities respectively in the society; that the said publication was malicious and calculated to injure, disparage and lower their esteem with the right - thinking members of the society in general and they have suffered mental anguish, psychological torture, distress and embarrassment. As a result of the aforesaid publication, they have lost businesses with their prominent clients.
 11. Ernest Omondi Owino testified as PW1. He adopted and relied on his witness statement filed on 4/12/2018, the list of documents dated 29/11/2018 (Exhibits No. 1-10) and the further list of documents dated 3/6/2019 (Exhibit No. 11). He reiterated the averments in the plaint.
 12. On cross examination, PW1 testified that it was true, that the Ethics and Anti – Corruption Commission obtained orders to freeze his accounts but through the ruling 8/11/2018 by J. Ongudi, the court lifted the orders which froze his accounts. Counsel led PW1 through the links where the alleged defamatory publications were made. The plaintiff answered in the affirmative the contents in the publication on the ruling of the court, in the links but denied that the statement "Owino is said to be one of governor Obado's proxies paid millions for "supplying air" was part of the court's ruling. That is what he considers defamatory.
 13. Diana Amanda Muma the Plaintiff's wife testified as PW2. She adopted her witness statement filed on 4/12/2018. She told the court that on 8/11/2018 at 8:00p.m, she received a call from a family friend who informed her of the standard digital newspaper and wanted to know if the contents were true. She confirmed from PW1 that indeed there was such publication; that the said publication has caused her pain and anguish and also the children who are taunted in school; that their standing in church is also affected; that the publication was ill timed and meant to injure them. On cross-examination, PW2 testified that she had been called by a friend and she did not read the newspaper contents by herself.
 14. The defendants filed a defence dated 27/1/2019. The defendants denied the specific allegations raised by the plaintiffs in their plaint. The defendants averred that in respect to the publication, the same was true in fact and substance and was fair comment and referred to Misc. Civil Application No. 79 of 2017 filed by the Ethics and Anti - Corruption Commission in which the 1st plaintiff was sued as the 2nd respondent, the 2nd plaintiff was sued as the 7th respondent and the 3rd plaintiff was sued as the 5th respondent. The plaintiffs were joined as parties to the aforementioned suit as being proxies to the Governor of Migori County, Mr. Okoth Obado, that the application stated that the plaintiffs as proxies were used to siphon millions of shillings from the Migori County Government without offering services and the accounts were frozen on the strength of orders obtained in the aforementioned application.



15. It was further contended by the defendants that the publication was made in public interest as Misc. Application No. 79 of 2017 was made in a bid to recover public funds; that the defendants have a right to publish all and any information relating to corruption regardless of the persons involved; that corruption whether by public or private entities is a matter of public interest and the right to information by the public.
16. The defendants further contended that the plaintiffs' case was poorly pleaded, misconceived and offends mandatory substantive provision of law governing pleadings and ought to be struck out and/or dismissed with costs.
17. Paul Ogemba testified as DW1. He adopted his witness statement filed on 14/10/2019 as his evidence in chief and the list of documents dated 27/1/2020 (Exhibit No. 1-6). DW1 testified that he is a journalist working with the Standard Group and he was the author of the publication in the Standard Digital of 8/11/2018 from page 79-80.
18. On cross-examination, Counsel for the plaintiffs' led him through the various court documents in relation to the Ethics and Anti - Corruption case against the plaintiffs. DW1 testified that he was a court reporter and he relied on applications, rulings and judgements when making his reports. Counsel for the plaintiffs' led him through the various documents in relation to the Ethics and Anti - Corruption case against the plaintiffs. He admitted that on the allegations that the ruling did not state that the companies siphoned two billion for Migori County. He further stated that in reporting not everything can be recorded verbatim due to lack of space and that he did not report verbatim when he stated that the plaintiffs allegedly supplied air but he contextualized the ruling to fit in the space. He stated that the ruling exonerated the plaintiffs and he reported what was in the ruling.
19. On re-examination, Counsel for the defendants also took him through the various court documents in the Ethics and Anti - Corruption Case. DW1 justified the contents of the articles by making reference to the Ethics and Anti - Corruption Case No. 79 of 2017 in which the names of the plaintiffs' appeared as respondents. He testified that some of the words used in the article were derived from the wordings used in the pleadings in the Case No. 79 of 2017.
20. The plaintiffs' filed their submissions on 19/10/2021. The plaintiffs submitted that the words published in The Standard Digital on the 8/11/2018 were defamatory in the sense that they linked the plaintiffs to Migori Governor Okoth Obado's graft scandal and were part of the companies allegedly used by Migori County Governor to siphon funds from the County coffers. It was contended that the publication was malicious and it has occasioned the plaintiffs' name to be tarnished and further subjected them to embarrassment and economic loss.
21. It was further submitted that the defendants were aware of the fact that the Anti - Corruption case in Misc. Application No. 79 of 2017 was investigated and the said allegations were never proved which caused the Ethics and Anti - Corruption Commission to drop the charges against the plaintiffs and they were allowed to access their frozen accounts.
22. The plaintiffs submitted that the said publication cannot be said to be fair comment the defendants were well aware when the investigations on the plaintiffs had stopped and charges against them dropped. The defendants knew the matter had already been dealt with and they published the defamatory article only at the time Governor Okoth Obado was charged with the murder of one Sharon in a criminal case; that the statement that the 2nd and 3rd plaintiffs were used to siphon 2 billion, linked them to Governor Obado's murder case without verifying whether or not they were legally registered or who the directors were. The plaintiffs submitted that as a result of the malicious



- publication, they have been subjected to embarrassment which has led to serious economic loss. It was further submitted that even after discovering the error, there was no apology published immediately.
23. On whether they are entitled to damages, the plaintiffs submitted that they are entitled to damages because, as a result of the aforesaid publication, they have lost business with prominent clients and they have been subjected to economic loss.
 24. On their part, the defendants submitted on six (6) issues for determination.
 25. The first issue is on whether the article published on 8/11/2018 was defamatory of plaintiffs. It was contended that the witness summoned by the plaintiff (PW2) was incompetent as she testified to reports about persons who told her they had read an article about the plaintiff. Hence, the evidence tabled by PW2 was hearsay in nature as PW2 had not read the article herself. She had no basis at all for forming an opinion that the article was defamatory that she did not read it herself and therefore her evidence was without probative value. It was also submitted that the plaintiff was not a competent witness to testify on his own character and reputation because defamation must occur in the eyes of right standing members of the society and not in one's eye.
 26. On the second issue, the defendants submitted on whether the words published in paragraph 8 of the plaint were maliciously published and whether the meanings assigned to them in paragraph 9 of the plaint are true, it was submitted that the mere fact that words published of the plaintiff are untrue and sensational does not render them defamatory. The defendants defended their position by submitting that the impugned article was based on a ruling of a court of law in Miscellaneous Civil Application No. 79 of 2017. In addition, it was submitted that the plaintiffs were not sued in ACEC No. 32 of 2018 and it does not render the publication defamatory; that it is not a requirement that the truth of every allegation be proved by the defendants. The reading of the article shows that it agrees with the ruling of 8/11/2018 as the court lifted freeze orders on the plaintiffs' accounts.
 27. On the use of the words "Governor Obado's crony" it was submitted that the word "crony" means "friend" or "acquaintance" according to the dictionary meaning; that the 1st plaintiff did not deny being a friend or acquaintance of Governor Obado neither did he plead in his plaint any defamatory meaning to the words.
 28. Further to the foregoing, the defendants submitted that the printed publication of the online version supports the view that the defendants were simply informing the public about the ruling of the court; that there is no evidence that the 1st defendant deliberately synchronized the publication of the article to coincide with the trial of Governor Obado for murder and corruption; that it was a pure coincidence that at the time of the publication, there was an ongoing trial of Governor Obado for murder.
 29. On whether the words were fair comment and in public interest, it was submitted that the 1st defendant published the words on the day that the ruling was delivered and therefore, they were true as at the time of the publication and the mere fact that the plaintiffs were not charged did not water down the defence of 'fair comment'. It was stated that the 1st defendant as a journalist was accredited to the judiciary and he took all necessary measures to obtain the ruling so he could publish correct information. There was no ill will or spite established which can be an inference that the defendant deliberately, recklessly or even negligently ignored the facts.
 30. The defendants contended that words in the article which did not form part of the ruling were shown to have been contained in the affidavits filed by the EACC in Misc. 79 of 2017; that the words in the article supplied the context in which the ruling was delivered so that the public would better understand the story.



31. On the issue of general damages, the defendants submitted that evidence of loss of reputation is imperative and relied on the findings of the court in *Nation Newspapers Ltd vs Gilbert Gibendi* (2002) eKLR; that in the instant case, no credible evidence of loss of reputation was furnished to the court with respect to the 1st plaintiff that there must be a foundation for the claim and the plaintiff must lead evidence of such actual damage to his reputation and aver that it is not enough to allege defamation and that a nominal award of Kshs. 100,000/= would be sufficient to make even in the event of a dismissal since the court is obliged to assess damages which will be relevant on appeal.
32. On the award of punitive and aggravated damages, it was submitted that there was no evidence of recklessness in that the defendants did not care to establish the truth. The impugned article was inspired by a ruling delivered on the same day it was published. The defendants asked the court to dismiss the suit with costs.
33. Having considered both the plaintiffs' and defendants' case, the witness testimonies, the submissions on record, the case precedents and texts relied upon by both parties. The two issues for determination are: -
- a. Whether the publication of 8/11/2018 was defamatory of the plaintiffs.
 - b. What reliefs if any, are the plaintiffs are entitled to.
34. There are two types of defamation, libel and slander. An action for libel is in the permanent form through writings and other forms of publication. Whereas slander is conveyed through a verbal way of expression. The defamation suit before this court, is libelous in nature.
35. The legal underpinning of defamation is found in the *Constitution of Kenya*, 2010 and the *Defamation Act* Cap 36 Laws of Kenya.
36. Article 33 of the Kenyan *Constitution* provides for freedom of expression. However in exercise of that freedom, every person should have regard and respect for the rights and reputation of others. In the case of *Phineas Nyagah v. Gitobu Imanyara* (2013) eKLR Odunga, J. had the following to say on the issue: -
- “...Under Article 32(1) of the *Constitution*, it is clear that every person has the right to freedom of conscience, religion, thought, belief and opinion and further provides that the freedom to express one's opinion is a fundamental freedom. Under Article 33 (1)(a) every person has the right to freedom of expression, which includes freedom to seek, receive or impart information or ideas. However, clause (3) provides that in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others. This, in my view, is the constitutional fulcrum of the law of defamation. Accordingly, the law of defamation is not just anchored on a statutory enactment under the Law of *Defamation Act* but has been given a constitutional underpinning as well. In a claim predicated on the tort of defamation the Court is therefore under a duty to balance the public interest with respect to information concerning the manner in which public affairs are being administered with the right to protect the dignity and reputation of individuals.”
37. There is no express definition of the word defamation in the *Defamation Act* Cap 36 but the same can be derived from various legal texts.

The *Black's Law Dictionary 11th Edition* at page 525 defines defamation as “Malicious or groundless harm to the reputation or good name of another by making of a false statement to a third person.”



The learned authors in P.H. Winfield, *A Textbook of the Law of Torts, the 5th Edition* at page 72 define defamation as “the publication of a statement which tends to lower a person in the estimation of right - thinking society generally; or which tends to make them shun or avoid that person.”

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.”

38. The Court of Appeal in *SMW vs ZWM* (2015) eKLR stated: -

“A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right-thinking members of the society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided.”

39. The foregone crystallizes the position that defamation is a publication which tends to injure the reputation of a person in the eyes of right-thinking members of the society and in particular cause him/her to be treated with contempt, hatred, ridicule, fear and dislike. The typical examples are attack on the moral and professional conduct of a person by associating them with disgraceful, dishonorable conduct which normally would not be expected of a right-thinking member of the society.

40. For an action of defamation to stand, the publication to the plaintiff alone is not sufficient but the same should be on a widely circulated platform as it is not an injury to one's reputation alone but to what other people think of the person and not his opinion. Defamation is not merely publication of falsehoods but it is necessary to show and prove that the published falsehoods disparaged the character of a person. It therefore follows that publication is an essential and necessary element in defamation. Injurious words may not be defamatory but it is necessary to demonstrate that they were published maliciously by the author negligently ignoring important facts prior to the publication. A published defamatory word is what would ordinarily constitute a libel.

41. Therefore, the essential elements of the tort of defamation are:

- a. The words must be defamatory in that they tend to lower a person's reputation in the eyes of right - thinking members of the society.
- b. The words must refer to the particular person.
- c. The words must be malicious.



42. Turning to the facts before me, the plaintiffs' case is anchored on the publications made by the defendants in their digital media platform on 8/11/2018 titled "Relief for Obado's crony as court lifts freezing orders on accounts." The words in the publication are as follows: -
- "A court has lifted orders freezing accounts of a businessman accused of being part of a ring that allegedly siphoned Sh. 2 billion from Migori County coffers..."
- "The High Court had frozen the bank accounts of Mr. Ernest Owino and his three companies following an application by the anti - corruption commission..."
- "Mr. Owino and his three companies - Janto Construction Company Limited, Marowa Stores Limited and Mbingo Enterprises Limited - told the court that they needed the money to do business."
- "Owino is said to be one of governor Okoth Obado proxies paid millions for supplying air..."
43. It is the plaintiffs' contention that the said words being published the same time when Migori County Governor Okoth Obado's criminal case had started, inferred that he had relations with the said Governor which lowered his reputation and caused him economic loss. The plaintiff further contended that after investigations by the Ethics and Anti - Corruption Commission, they did not find him guilty of any charges and therefore unfroze his account; hence, the publication was not justified.
44. The defence on the other hand, justified the publication as one of the right to information by the public as this was a matter of public interest. DW1 testified that in making the publication, he relied on the application and rulings made in the Ethics and Anti - Corruption case of the plaintiffs in Misc. 79 of 2017.
45. I have considered the said Anti-Corruption case, Misc. Application No. 79 of 2017 (Exhibit No. 1) in the defendants' further list of documents and the application dated 27/11/2017 and filed evenly. The 1st plaintiff, 2nd plaintiff and 3rd plaintiffs herein were named as the 2nd, 5th and 7th respondents respectively. The application was filed by the Ethics and Anti - Corruption Commission (The Commission). The Commission asked the Court to make among others orders prohibiting transfer of money from several accounts two of them, account numbers 1160197689416 and 1160197689416 being in the name of the 1st plaintiff; account number 1132259770 in the name of the 3rd plaintiff; account number 1160297749370 in the name of the 2nd plaintiff all of them held at Equity Bank Limited in Migori Branch.
46. The Commission in its grounds alleged that the respondents in that application were proxies of the Governor of Migori County Mr. Okoth Obado. The Commission further alleged that it was investigating allegations that public officers in the County of Migori in collusion with private contractors engaged in a fraudulent scheme to embezzle public funds through inflated or fictitious procurement contracts; that upon doing preliminary investigations it was observed that a sum of 2.215 billion was paid to companies associated to the proxies of the Governor of Migori County Mr. Okoth Obado the 1st plaintiff being named as one of them.
47. On 23/10/2018, the plaintiffs herein filed an application against the Ethics and Anti - Corruption Court asking that the preservation orders issued by the Court on 27/6/2018 freezing their bank accounts and properties be lifted.
48. By a ruling dated 8/11/2018, the trial Court discharged the preservation orders it made on 30/11/2017 and extended on 21/6/2018 since the 6 months period which it had given the Commission to conclude



its investigations had lapsed. The court further observed that there was a separate suit filed in ACEC Civil Case No. 32 of 2018 and the applicants in the application before the court were not part of the aforementioned civil suit.

49. The alleged libelous publication was published by the defendants on 8/11/2018, the same date when the discharge orders were made. I need not reproduce the impugned publication. From the wordings of the publication, the following can be deduced to be its meaning in the eyes of reasonable and right-thinking members of the society: -
- a. There were proxies to the Migori County Governor Mr. Okoth Obado who were said to be assisting in siphoning at least 2 billion from the Migori County coffers.
 - b. The accounts where the alleged siphoned money were transferred were frozen.
 - c. The 1st plaintiff together with his companies' accounts were initially frozen but they asked the court to lift the freezing orders to enable them do business.
 - d. The 1st plaintiff was one of the alleged proxies of the Governor.
 - e. The beneficiaries of the money did not actually carry out the businesses intended for the money.
50. The Supreme Court of Canada in a persuasive case, *Grant v Torstar* (2009) 3 SCR 640 SCC 61 outlined the principles which the court should follow when considering a defamation claim as follows: -
1. The defamatory statement must be read in context of the publication as a whole.
 2. Public interest is not synonymous with what interests the public.
 3. An individual's reasonable expectation of privacy must be respected in this determination.
 4. It is enough that some segment of the community would have a genuine interest in receiving the information on the subject.
 5. The subject matter must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens or one to which considerable public notoriety or controversy has attached.
 6. The public has a genuine stake in knowing about many matters ranging from science and the arts to the environment, religion and morality.”
51. Reading the applications before the Ethics and Anti - Corruption Court Misc. 79 of 2017, Notice of Motion Application dated 23/10/2018 and the resultant rulings and orders of 27/6/2018 and 8/11/2018 as a whole, there is nothing to imply that the plaintiffs were not named as part of the proxies of the Migori County Government in the aforementioned court documents.
52. In fact, paragraph 3 of the application by the Commission referred to the companies which 2.515 billion was paid to, were close associates and proxies of the Governor of Migori, Mr. Okoth Obado and the 1st plaintiff was named as one of the persons.
53. The question is whether the publication by the defendants is one of fair comment and public interest or qualified privilege as pleaded by the defendants. The *Black's Law Dictionary (supra)* at page 713, defines 'fair comment' as follows: -

“A statement based on the writer's or speaker's honest opinion about a matter of public concern. Fair comment is a common law defence on the tort of libel or slander. For a



statement to be considered a fair comment, it must be based on facts truly stated, it must be free from the imputation of corrupt or dishonorable motives on the part of the person whose conduct is criticized, and it must be the honest statement of the writer's or speaker's real opinion."

54. The court in *Jacob Mwanto Wangora v Hezron Mwando Kirorio* (2017) eKLR quoted with approval the text in *Peter Carter - Rucks Treatise on Libel and Slander* where the learned authors stated as follows:

"To state accurately and clearly what a man has done and then to express an opinion is comment which cannot do any harm or work injustice. For the defence of fair comment to succeed it must be proved that the subject matter of the comment is a matter of legitimate public interest; that the facts upon which the comment is based are true and that the comment is fair in the sense that it is relevant to the facts and in the sense that it is expressed of the honest opinion of the writer. A writer is not entitled to overstep those limits and impute sordid motives not warranted by the facts."

55. On the defence of qualified privilege, Section 6 of the *Defamation Act*, Cap 36 states: - "A fair and accurate report in any newspaper of proceedings heard before any court exercising judicial authority within Kenya shall be absolutely privileged: provided that nothing in this section shall authorize the publication of any blasphemous, seditious or indecent matter."

56. Gatley on *Libel and Slander, 12th Edition* at page 531 - 532 discussed the statements in which the defence of qualified privilege would apply as follows: -

- a. Communications of private nature between the maker of the statement and the recipient.
- b. Reports made to the public at large of certain matters of legitimate concern to them. For example proceedings of courts or parliament.

57. Further, in *Halsbury's Laws of England 4th Edition Reissue Vol. 28* at Para 109 it was stated as follows: -

"...the law affords protection on certain occasions to a person acting in good faith and without any improper motive who makes a statement about another person even when that statement is in fact untrue and defamatory. Such occasions are called occasions of qualified privilege. The principal categories of qualified privilege are:

1. Limited communications between persons having a common and corresponding duty or interest to make and receive the communication,
2. Communications to the public at large, or to a section of the public, made pursuant to a legal, social or moral duty to do so or in reply to a public attack.
3. Fair and accurate reports, published generally, of the proceedings of specified persons and bodies...."

58. The defendants pleaded the right of information to the public led to the publication. *Gatley on Libel and Slander (supra)*, the learned author categorized the approach of determining matters of public interest into two: -

- a. The first approach is that matters of public interest are matters which are expressly or impliedly submitted to public criticism or attention.



- b. The second approach is that the public has a legitimate concern in matters or events which the claimant might even be seeking to keep from the public gaze, or which have taken place in contexts formerly regarded as private.
59. On the second rule, the learned author referred to the United Kingdom Supreme Court case of *Spiller and another (Appellants) v Joseph and others (Respondents)* [2010] UKSC 53 which it was held: -
- "Whenever a matter is such as to affect people at large, so that they may legitimately be interested in or concerned at what is going on or what may happen to them or to others: then it is a matter of public interest on which everyone is entitled to make a fair comment."
60. It is common notoriety that corruption incidences have risen in this county in the recent past. The money which is being pilfered from various coffers comes from the tax - payers. It is of course of great interest to the public to identify those who are allegedly involved in stealing the public funds to avoid among others; appointing, electing and/or entrusting them to hold public offices in the future. It is not deniable that they may be cleared of the alleged charges but until then, it is important that the public gets to know such individuals and the outcome of their cases, to serve as an example in future to deter such unethical behaviour. The case Misc 79 of 2017 was one of public interest.
61. The plaintiffs also submitted that the said publication was malicious. Is it then proper to conclude that the publication was malicious? The case of *Phineas Nyagah (supra)* eKLR is relevant where the court held: -
- "Malice here does not necessarily mean spite or ill will but recklessness itself may be evidence of malice. Evidence of malice maybe 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. Courts 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."
62. The Court of Appeal in *Raphael Lukale v Elizabeth Mayabi & Another* (2018) eKLR dealt with the issue of malice and recklessness in the following manner: -
- "Malice can be inferred from a deliberate or reckless ignoring of facts. 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 relations between the parties before or after the publication or in the conduct of the defendant in the course of the proceedings. See *Godwin Wachira v Okoth*(1977) KLR 24 and *J P Machira v. Wangethi Mwangi*, Civil Appeal No. 179 of 1997."
63. Having considered all the above cited decisions and legal excerpts and the publication made on 8/11/2018 in the 3rd respondent's digital platform, together with the court documents in the Anti-Corruption Case, I am of the view that the impugned publication was not intended to be malicious. The 1st defendant may not have lifted the wordings of the court documents verbatim, but the "journalistic" language used therein, does not portray a malicious intent.
64. For instance, in the pleadings, it is alleged that the plaintiffs received money for "fictitious" procurement contracts. In the alleged defamatory article, it stated that the 1st (plaintiff) is said to be



one of the proxies of the Migori County Governor who is said to have “supplied air”. On cross - examination the 1st defendant testified that if contextualized, ‘supplying air’ means the same thing, as ‘fictitious’.

65. The concise *Oxford English Dictionary 12th Edition* defines fictitious as ‘not real or true, imaginary or invented. The dictionary meaning of the word fictitious is relating to or having a characteristic of fiction or imagery. This also means expecting to see something but the same is not there in its real sense because it was not actualized. It is common knowledge that ‘air’ cannot be seen, heard or felt. I am of the opinion that the contextualization of the word “fictitious” to “supplying of air” did not fundamentally alter the meaning of the words used in the courts ‘pleadings’ as to impute malice on the defendants. The same words are not utterly beyond or disproportionate to the facts before the court.
66. I am also of the view that for the plaintiff to allege that, the publication was meant to link the plaintiffs to the on - going murder of Sharon too is far - fetched. The publication was made on 8/11/2018, the same day when the ruling in Misc. 79 of 2017 was delivered by J. Ong’udi. The plaintiffs have not led any evidence before this court to show when the hearing of Sharon’s murder case commenced and/ or when it was published and the relationship however remote, it had to the present publication. In addition, there is nothing in the publication of 8/11/2018 where the murder of Sharon was mentioned. The defendant made a fair and true comment on the ruling of the court.
67. The plaintiffs also pleaded that the publication was malicious since there was no evidence tabled by the Commission that they siphoned money from the Migori County Government. From the documents filed in court, there was no express order acquitting the plaintiffs of the alleged corruption case. Rather due to the laxity of the Commission, in conducting the investigations, the court rightly discharged the freezing orders. The 1st defendant is not an investigating officer to have known the extent of the investigations by the Commission. He simply relied on court proceedings as a journalist accredited to the judiciary to inform the public of what had transpired in the case, a case that was of great public interest as it touched on alleged theft of public funds. The publication was in context with the pleadings because it clearly stated:-“Owino is said to be one ...” it meant it was an allegation, not that it was proved or established that Owino was actually supplied air. The defendant merely captured the allegations made in the application freezing the accounts for supplying fictitious goods / services.
68. PW1 called his wife PW2 as a witness who stated that as a result of the publication, their children have been taunted at school and they have also suffered ridicule in church and society at large. PW2 however did not read the article but heard from another that the article existed. The plaintiff did not call any other witness who could testify to the fact that the plaintiff’s character and reputation were lowered in the eyes of right standing members of the society. It was the duty of the plaintiff to adduce such evidence from a third party. There is a host of case law that a plaintiff must prove that his character was damaged as a result of the publication. In *George Mukuru Muchai vs. The Standard Ltd* HCC 2539 / 92 the court held:-

“In my view, the most important ingredient in a defamation case is the effect of the spoken or written words in the mind of third parties about the complaint and not how he /.she himself /herself feel the words portray about him/her.”

69. In *Hezekiel Oira vs. Standard Ltd & Another* (2016) eKLR, the court said at paragraph 179

“I have no doubt that defamatory words would do exactly that to any person who is defamed. Nonetheless, in defamation cases, the plaintiff is under a duty to adduce evidence to show that any of the right thinking members of the society generally who read the article viewed him differently or that they knew the plaintiff prior to the publication to be a person who



was incapable of being linked to the impugned publication and that after the publication, the publication gave them a different picture of who the plaintiff was known to be and that therefore the publication tended to make them shun or avoid or ridicule the plaintiff.”

70. Further to the above, even if the court was to find that the words were defamatory; the plaintiff never endeavoured to prove any economic loss he suffered as a result of the defamatory words. He alleged that the publication had caused them loss of important clients.
71. From the foregone and having considered the evidence on record, I find that the plaintiff has not proved that the impugned Publication by the 1st defendant was defamatory and I hereby dismiss the claim with costs to the Respondents.

Dated, Delivered and Signed at Migori this 23rd day of June, 2022.

R. WENDOH

JUDGE

Judgement delivered in the presence of

Ms Otieno for the Plaintiffs.

Mr. Nyamurongi for the Defendants.

Nyauke Court Assistant.

