



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT SIAYA**

**CIVIL SUIT NO E1 OF 2020**

**HON. ELISHA OCHIENG ODHIAMBO.....PLAINTIFF**

**VERSUS**

**BOOKER NGESA OMOLE.....DEFENDANT**

**JUDGMENT**

**Introduction**

1. By a plaint dated 24<sup>th</sup> September 2020, the plaintiff herein, **Hon. Elisha Ochieng Odhiambo** instituted this suit against the defendant **Booker Ngesa Omole** seeking the following orders:

- a) *A Permanent injunction restraining the defendant, his agents and or servants from publishing and circulating any articles or letters defamatory to the plaintiff in reference to the NG-CDF project at Masinde Primary School*
- b) *An order that the defendant do make a full and unqualified apology*
- c) *General damages*
- d) *Exemplary and aggravated damages*
- e) *Costs of the Suit*
- f) *Interest on (c), (d) and (e) above*

2. The plaintiff pleaded that he is a Member of Parliament for Gem Constituency whereas the defendant is a known owner, holder and administrator of Facebook page Booker Ngesa Omole. The plaintiff claims at paragraphs 4 and 5 of the plaint that on 2<sup>nd</sup> September 2020, the defendant falsely and maliciously published and posted or caused to be published and posted on various social media platforms a letter dated 23<sup>rd</sup> August 2020 which the defendant wrote to the plaintiff stating, materially:

*“To stop all the flagrant theft under your watch and stop the primitive accumulation of wealth. I had made several efforts to appeal to your conscience, that men are not respected by how much money they steal but the ideals they defended when entrusted in positions of service.”*

*“I was shocked to realize that you have used the project to account for funds of over Kshs. 1,000,000.00 at the CDF kitty. I have been informed that the CDF office managed to complete the 10% of works that were pending on the said project. It has been widely covered in the local press of your corrupt activities, so this did not get me by surprise. What I found wanting is the arrogance of the theft and your courage and the school head to try and cover the truth.”*

*“I would also like to remind you that you will be held personally responsible for your economic and criminal crimes.”*

3. The plaintiff further asserted that on the same day, he heard on Radio Ramogi FM the defendant giving an interview where the defendant repeated the same defamatory words of and concerning the plaintiff. The plaintiff claims further that by the said impugned words which he considers defamatory of him, the natural and ordinary meaning of the said words were understood to mean that the plaintiff:

- a) Was a beneficiary of fraudulently obtained funds from the project;
- b) Is an inhuman, selfish and a person with unbridled appetite for public funds;
- c) Is guilty of aiding and abetting the commission of criminal offences punishable under the law by imprisonment for which he should be punished;
- d) Lacks moral and integrity in which case he is unfit to hold his position as a Member of Parliament;
- e) Is not fit and proper person to serve as an opinion leader in the society;
- f) Is not a role model to his juniors as a human resource professional;
- g) Is a faceless conman;
- h) Is dishonest, negligent, inept and an incompetent professional.

4. According to the plaintiff, the defendant knew and ought to have known that the Constituency has a fund Manager and each project has a project management Committee formed that address any complains pertaining to the project; that the plaintiff does not handle any funds or manage projects of the CDF; that allegations of theft of public resources are reported to various government agencies such as Ethics and Anti-Corruption Commission and the CDF Board for Investigations.

5. The plaintiff further pleaded that the defendant's advocates in response to the demand letter by the plaintiff, in the letter dated 8<sup>th</sup> September 2020 acknowledged that the defendant was the author of the letter dated 23<sup>rd</sup> August 2020 and was the owner of the Facebook page that circulated the defamatory statements and posted an extract of the radio interview on social media.

6. The plaintiff therefore pleaded that his reputation and integrity had in consequence of the alleged defamatory statements published by the defendant been put to public question, had his credit and reputation injured, suffered considerable distress, agony, mental anguish, humiliation and embarrassment and brought into public scandal, odium and damaged his personal image for which he holds the defendant liable.

7. In support of his case, the plaintiff testified as PW1 and relied on his witness statement dated 24<sup>th</sup> September 2020 filed together with the plaint and whose contents were adopted as part of his evidence in examination in chief. He also produced several exhibits which included the letter dated 23<sup>rd</sup> August 2020, (PEX 1) printed screenshots from Facebook for Booker Ngesa Omole (PEX 2) and WhatsApp Group for WAGAI/GEM DIVISION messages extracts (PEX 3) and a Certificate of electronic evidence dated 24/9/2020, (PEX4) Letter from Head teacher for Masinde Primary School to NG-CDF dated 18th July 2019, (PEX5) Report by the County Works Officer dated 3<sup>rd</sup> June 2020 (PEX6) and letters dated 7<sup>th</sup> September 2020 (PEX 7) and 8<sup>th</sup> September 2020 (PEX8) respectively.

8. The defendant testified that he was a Member of Parliament for Gem Constituency and a Human Resource Professional, holds a Bachelor's degree in Education and a Master's degree in Organizational Development, a Diploma and Higher National Diploma from the Institute of Human Resource Institute.

9. The plaintiff stated that the defendant was his constituent and that in 2013, the defendant was a Parliamentary aspirant in the constituency of Gem.

10. According to the plaintiff, the defendant's letter dated 23<sup>rd</sup> August 2020 as allegedly posted on social media platforms and the interview the defendant had at Radio Ramogi FM on 3<sup>rd</sup> September 2020 where he claimed that he had written the said letter to the plaintiff and repeated the contents of the said letter in the interview was intended to incite members of the society against the plaintiff and that the allegations by the Defendant were malicious and false. It was therefore the plaintiff's testimony that he has been seriously injured in his character, credibility and social standing. He testified that as a Member of Parliament for Gem Constituency, his reputation had been put to public question by the defendant's words.

11. Further testimony by the plaintiff was that the defendant also posted or caused to be posted on his Facebook page and WhatsApp groups that deliberate of Gem Constituency matters and that the defendant's Facebook page has over 30,000 followers and that as a result, the plaintiff received several calls and texts from people inquiring from him about the defendant's malicious allegations. He maintained that the letter was highly defamatory of him and intended to incite right thinking members of the society against the plaintiff. According to the plaintiff, unless the defendant was restrained, the defendant was undeterred and would continue to publish defamatory statements of and concerning the plaintiff on social media in reference to the NGCDF project at Masinde Primary School.

12. The plaintiff further stated that following the defendant's publication of false and defamatory statements of him in social media, which was done without verification of the truth thereof, his constituents believe that he is a fraudster and is corrupt which leaves his reputation and political career in shambles, despite his explanation on his responsibility and mandate as an MP regarding NGCDF. The plaintiff reiterated the pleaded facts in the plaint as far as his reputation has suffered and how he has suffered loss and damage. He prayed for the orders sought in the plaint.

13. In cross-examination by Mr. Gitobu Imanyara advocate for the defendant and acting alongside Mr. Wandeto Wachira advocate, the plaintiff reiterated that the substance of the dispute was defamation occasioned by the defendant in a letter on social media as well as the defendant's interview on Ramogi FM. He further stated that as an MP, his esteemed position carries with it an expectation of criticism but

not abuse.

14. In re-examination by his counsel, the plaintiff reiterated that the defendant's statements were not constructive criticisms but defamatory. He stated that many people shared with him the details of the defendant's radio interview, the extracts of which he had not presented in court.

15. PW2 Seth Baraka Ochieng in his sworn testimony relied on his witness statement dated 3/11/2020. It was his further testimony that he was a resident of Gem Constituency and the Project Coordinator for Gem NG-CDF and that he was informed by his Fund Manager Mary Mwaki on 3/9/2020 that there were allegations in a letter circulating through social media that construction of the Administration Block for Masinde Primary School would have taken only Kshs. 100,000 to complete. He testified that immediately thereafter, the plaintiff's personal assistant from Nairobi Mr. William Ochieng Wambasi forwarded to the witness the said letter via WhatsApp and a link to the defendant's Facebook where the defendant had posted a video extract from a radio interview and upon listening to the audio interview and reading the letter, he concluded that the defendant was peddling falsehoods.

16. He testified that he denied the social media allegations as he had the records of requests for funds for completion of the project and that Gem NG-CDF had been released Kshs. 1,000,000 for the project which was utilized to complete the project after the Government/Public Works Engineer had given the school a report showing that the project required Kshs. 1,300,180. He stated that the defendant never inquired from NGCDF about anything concerning the project and the funds utilized to complete the same.

17. In cross examination, PW2 stated that Mary Mwaki was still employed as the Fund Manager and that the Public Works office existed in Siaya.

18. PW3 Samson Avid Mayienga a relative and constituent of the plaintiff in Gem and residing both in Nairobi and Gem testified and relied on his witness statement made on 3<sup>rd</sup> November 2020 that on the morning of September 2020, he was listening to Radio Ramogi when he heard the defendant giving an address on radio stating that he had spent his own money to build the administration block at Masinde Primary School only for the Plaintiff to take credit for the project yet only landscaping works costing not more than Kshs 150,000 was remaining. He further testified that the defendant claimed that the headteacher and the plaintiff herein had connived to steal the Gem NG-CDF money. That the defendant claimed that having sacrificed for the community and being an aspiring member of Parliament, he was saddened that his political opponent, the plaintiff had hijacked his project and stolen the money.

19. PW3 further testified that when he heard the news on Radio Ramogi FM of and concerning the plaintiff, he was downhearted as he had viewed the plaintiff as a man of high repute who even went out of his way to empower the community only to turn back and steal the money. He further stated that he later received a call from a friend in Nairobi Mr. Zakius Juma Andiwo who told PW3 that the people of Gem had elected a thief compared to the previous Member of Parliament who was a cheap criminal like the plaintiff herein.

20. It was PW3's testimony that the telephone call by Zakius struck him so he called the plaintiff to inform him of what he had heard in the media and the MP told him that the allegations were false as the County Works Officer had assessed the work and given a report that the project needed about Kshs **one million** in funds towards completion of the project. This witness was never cross examined on his testimony.

21. PW4 Hesbon Omondi the plaintiff's constituent and a freelance social media consultant testified that on 31<sup>st</sup> August 2020, he saw comments on a WhatsApp group for WAGAI/YALA DIVISION (GEM) when one Godrick of Telephone No. +254745117954, a social media blogger for the defendant herein whom he knew to be a supporter of the defendant herein posted a letter dated **21/8/2020** written by the defendant circulating on social media, claiming that the plaintiff was a thief who had stolen public funds. It was his testimony that he knew the plaintiff as an honest person so he shared the letter with the plaintiff.

22. PW4 further testified that on the morning of 3<sup>rd</sup> September 2020 while listening to Ramogi FM, he heard the defendant repeat the same words of the letter above stated and that made the witness believe the defendant owing to his bold assertions. On the same date, the witness saw a post on the defendant's Facebook Page with more than 30,000 followers, with the defendant informing his followers about the letter and its contents and he attached a voice recorded video which was part of his interview with Ramogi FM. PW4 stated that the defendant had further claimed that the plaintiff had connived with the he teacher of the School to steal the money.

23. According to PW4, the allegations by the defendant on his social media platforms and on radio Ramogi interview demoralized him as an unemployed youth because most people in Gem Constituency were struggling in poverty yet the people they had elected were stealing even the little money meant to improve their life skills such as education.

24. The witness met the plaintiff a week later and the plaintiff told him that the defendant's allegations were malicious, made with the intention of maligning the plaintiff and attack him politically and that he had believed the defendant's statements until William Ochieng the Personal Assistant of the plaintiff showed PW4 a report from Public Works assessing the cost of completion of the remaining works to be Kshs 1,300,580 and not Kshs 150,000 claimed by the defendant in his statements to the media.

25. At the close of the plaintiff's case, the defendant testified and called three witnesses in support of his case. The defendant Booker Ngesa Omole testified as DW1 and relied on his witness statement dated 20<sup>th</sup> November 2020. He denied the allegations made by the plaintiff that he had defamed the plaintiff. He stated that the plaintiff failed to provide any extracts of the alleged abuse on social media as well as transcripts of the radio interview.

26. It was the defendant's testimony that he knew the plaintiff as his opponent in the 2017 Gem parliamentary contest and that he lost to the plaintiff in the said elections. The defendant stated that he had complained to the plaintiff as a Member of Parliament that the plaintiff had misrepresented the use of NG-CDF funds. He testified that he had not spread any falsehoods against the plaintiff and admitted that the contents in paragraph 4 of the plaint related to a letter he had written to the plaintiff which letter was strictly between himself and the plaintiff. He denied publishing the letter adding that he first saw it on social media after the plaintiff sued him and circulated the letter with the pleadings alongside the restraining orders in this case to Siaya WhatsApp groups. He further testified that the building in contention was

constructed by himself and completed in 2014 before the plaintiff became the area Member of Parliament. He maintained that the Plaintiff's Facebook postings that NGCDF had constructed the Masinde Primary School Administration Block were false because the defendant is the one who constructed the building in question from its inception to completion and made payments towards construction of the said building. The Defendant produced as exhibits all his documents filed as Plaintiff Exhibits 1 to 9 as per the list of documents dated 20<sup>th</sup> November 2020 and these are: screenshots of plaintiff's Facebook post purporting construction of the Administration block; architectural contract and drawings; approved architectural plans; screenshots of text messages with head teacher Celestine Akoth; Contract, bill of quantities and invoice from Skyline Builders EA Ltd; payments to the architect, head teacher and contractor; screenshots of WhatsApp communication between the defendant and the plaintiff; screenshots of WhatsApp messages from the plaintiff's supporters; screenshots of plaintiff's Facebook posts owning NGCDF projects.

27. The defendant maintained that he singlehandedly spend over 1,500,000 in constructing the building in question under coordination of the school head Ms. Celestine Akoth and that he was shocked to learn from residents of Masinde area who alerted him of the allegations by the plaintiff that the NGCDF Team had constructed the building in question. He stated that he opened the building officially in 2014 and that as at that time the head teacher and teachers of the school moved in. Further, that what was remaining for completion was painting, landscaping and water connection.

28. The defendant further stated that when he carried out his own investigations, he discovered that the purported construction had gobbled up over Kshs 1 one Million of tax payers money and when he inquired from the plaintiff, the plaintiff referred him to one Seth an NGCDF official who did not give details of how much was spent and referred the defendant back to the area Member of Parliament. According to the defendant, he got fed up of the back and forth so he wrote to the plaintiff expressing his displeasure with what was a clear case of embezzlement of [public funds and only saw the letter circulating with injunctive orders, being circulated by the plaintiff's supporters celebrating their victory over the defendant as the court had banned him from addressing or demonstrating against the plaintiff.

29. According to the defendant, the plaintiff had made a habit of posting NGCDF projects as his own and that as a result, many residents who were not aware had told the defendant that they had thought that it was the plaintiff who had constructed the Administration Block at Masinde Primary School.

30. In cross examination by **Mr. Were Advocate for the plaintiff**, the defendant admitted that he was the author of the impugned letter dated 23<sup>rd</sup> August 2020 and admitted that he wrote telling the plaintiff to stop primitive accumulation of wealth, which is just banking money in the bank. He denied seeing with the plaintiff banking money and admitted that the word "primitive" cannot be a positive word. He stated that it was debatable as to whether referring to one as having primitively accumulated wealth is defamatory of one's character.

31. The defendant further stated that in the said letter, he had endeavoured to appeal to the plaintiff's conscience and that he was addressing the plaintiff on stealing of money. He admitted that in his evidence in chief he had testified that the said building had been completed in 2014 but that he had done 90% of the construction of the same. He stated that he could not provide any proof that the building was 90% completed.

32. The defendant in further cross examination stated that the letter he wrote talks of corrupt activities. He stated that he had no evidence of corruption by the plaintiff but admitted that he wrote about the plaintiff stealing in a very arrogant manner, adding that he had no evidence of the corruption of or the arrogance of the theft. The defendant further testified that he had said that the plaintiff's office should refund the lost public funds. The defendant denied any knowledge of whether the plaintiff handles funds.

33. The defendant also denied knowledge of whether the plaintiff was part of the NGCDF management team. He further stated that he threatened to undertake private prosecution against the plaintiff. The defendant further testified that he had no evidence that the Ethics and Anti-Corruption Commission had found the plaintiff culpable for the theft of public funds. On being referred to Defence exhibit 7 of WhatsApp messages, the defendant responded that he did not say that he had not done 100% and that he had said that he had handed over 100% completed building.

34. He further stated that he was being told to stop attacking the plaintiff in the WhatsApp messages. Further, the defendant stated that he had evidence that the community did 10% of the construction work through labour provision. He stated that the money he used for construction of the project did not go into the school's bank account but admitted that schools had their own accounts. He denied having a completion certificate or certificate of occupation and safety for the occupation of the building. He stated that he had no evidence that the plaintiff sent goons as per his witness statement. He stated that the contract was signed in two legs but that leg was not documented and that he trusted the school's head. He stated that he had no document to show the total cost of the completed building and further, that the money he was paying out for construction was kept in his office safe. Referred to the letter written by his advocate to the plaintiff's advocate dated 8/9/2020, he stated that the said letter talked of 90% of the building completion and 10% which latter did not refer to landscaping Concerning the cheques for Kshs 300,000, allegedly paid into the account of Celestine, he stated that he had no evidence that that money left his bank account and was credited into that of Celestine the School head. he added that he investigated privately and wrote to EACC which was investigating the matter and that the plaintiff had recorded a statement with EACC.

35. The defendant admitted that in 2013 and 2017, both him and the plaintiff vied for area MP and that in 2017 he lost to the plaintiff. He admitted testifying against the plaintiff in favour of Jakoyo Midiwo in an election petition but denied that he stated attacking the plaintiff after the said election petition was dismissed. The defendant maintained that he did not hold any press conference or demonstrations in Yala or Kisumu against the plaintiff.

36. He stated that the plaintiff had claimed that NGCDF had constructed the building in question at Kshs 1,000,000 yet the building in question had already been completed. The defendant finally stated that he had no evidence that the plaintiff was involved in theft of the funds but that he had evidence of fraud on the part of the plaintiff as per PExhibit 1 which claims that the plaintiff owned the project.

37. On being asked whether he had led demonstrations against the plaintiff from Kisumu to Siaya Court on 2/2/2021, the defendant denied, saying that he did not because he had received restraining court orders but that since the said orders had lapsed, he was free to demonstrate

and that he had led one the previous week in Nairobi. He stated that the letter that he authored could only have reached the public through the author or the recipient.

38. On being reexamined by the defence counsel Mr. Gitobu Imanyara, the defendant reiterated his testimony in chief that the letter dated 23/8/2020 was addressed to the plaintiff and maintained that it was not copied to anyone. He denied sharing it out with or to any social media.

39. DW2 Ambrose Ofafa, an architect and a director at EcoArch Solutions Limited an architectural firm testified adopting his witness statement dated 20/11/2020 and stated that the defendant contracted him to design the administration block at Masinde Primary School which work he did and submitted the designs to the County for approval then he supervised the building construction by a contractor from its commencement until completion and handed over to the defendant and the school. He was then paid for the work. He added that he witnessed the handing over of the building which construction was commenced in 2013 and completed in 2014 during which period, the plaintiff was not an MP. He stated that he was later in October 2020 contacted by the defendant who briefed him that the plaintiff was claiming that NGCDF had completed the construction, which allegation he also saw on the plaintiff's Facebook and he was shocked.

40. In cross examination by Mr. Oruenjo Advocate for the plaintiff, DW2 stated that the defendant was his High School Classmate and further, that he could not estimate how much the building cost and that he supervised the contractor. He further stated that he was supervising the contractor-Skyline contractors and that he did not issue any certificate at all the stages of construction and that he was paid a total of Kshs. 80,000 by the defendant. He further stated that he never issued a Certificate of Occupation as the same was to be obtained by the school. He denied that the building was only 90% complete and maintained that the building was completed on 24/5/2014. He could not tell how much money was expended on the construction.

41. DW3 Nyaramba Jacob Mark Odiwuor a mechanical engineer adopted his witness statement dated 20th November 2020 and testified on behalf of his Company, Skyline Builders EA Ltd to the effect that in 2014 he was contracted by the defendant to complete the construction of the administration block that the defendant was building at Masinde Primary School which work he did and completed and handed it over to the defendant. The witness stated that after several briefings, the contractor signed an agreement on 7/2/2014 and he embarked on the work which involved roofing, ceiling and allied works. He then raised an invoice of Kshs 1,200,000 and was paid and the balance was paid in May 2014. He stated that the defendant informed him that the project was moving too slow and there was poor record keeping for the project. Further, that the building was supervised by the architect and the Siaya County Officials made supervisory visits to the site. He stated that they send a representative who attended the handing over of the completed building to the defendant and the School. He produced copy of his contract document with the defendant as DWex 4.

42. In cross examination by Mr Oruenjo advocate for the plaintiff, DW3 stated that the construction had started when he took over the works after the foundation, existing walls and internal and part of the ring beam were done and that he did the roof and plastering and other completion works. He stated that he was paid by the defendant in stages and that although the contract provided for raising of certificates of payment, he did not raise any, and that he raised valuations before being paid. He confirmed that he received payments in the form of cash and at times he used his own money and got reimbursed.

43. DW3 denied any knowledge of the Ministry of Public Works visiting the School and estimating the cost of completion of the building to be Kshs one million.

44. He stated that he was aware that at the time he was exiting the site, there were some works pending and that they had not painted the foundation, done curtains, pelmet boxes and technically, furnishing. He denied being present during the handover of the building or sending any representative of his company to attend the launch. He stated that in total, he was paid Kshs 1.2 million.

#### **Plaintiff's Submissions**

45. Parties counsel filed written submissions. It was submitted On behalf of the plaintiff, reiterating the pleadings and evidence adduced by the plaintiff and his witnesses that the letter dated 23<sup>rd</sup> August 2020 and posted on the defendant's Facebook page and WhatsApp groups by the defendant were so defamatory of the plaintiff, referring to him as a thief who had accumulated wealth primitively, was arrogant and dishonest, and that a reasonable bystander who read them concluded that the character, person, office and standing of the plaintiff was defamed. The plaintiff's counsel submitted that this was the case as was evidenced in the testimony of PW3 Samson Avid Mayienga.

46. Counsel for the plaintiff submitted that the defendant had conceded in his evidence in court that he had published the impugned statements and that all the ingredients for the tort of defamation had been established by the plaintiff. Reliance was placed on **Musikari Kombo v Royal Media Services Limited [2018] eKLR** where the court stated that the law of defamation was concerned with the protection of an individual's character and provided for what need to be proved by a claimant to succeed in a defamation suit. The plaintiff also relied on the cases of **S M W v Z W M [2015] eKLR** and that of **Joseph Njogu Kamunge v Charles Muriuki Gachari [2016] eKLR**

47. It was further submitted that the defendant failed to produce any evidence to back his allegations that the remaining works on the administration block would have cost Kshs. 100,000 as he had alleged and that therefore, his defence of justification and truth could not arise. On this point the plaintiff relied on the cases of **Joseph Njogu Kamunge (supra)** and that of **Phineas Nyagah v Gitobu Imanyara [2013] eKLR**.

48. The plaintiff's counsel further submitted that the defendant was not justified in making the pronouncements that he made in his letter of 23<sup>rd</sup> August 2020 and that the said pronouncements were false, malicious, negligent and or reckless. Further, it was submitted on behalf of the plaintiff that the said pronouncements lowered him in the estimation of right thinking members of the society as was evidenced from the telephone calls that he received as soon as the pronouncements were made by the defendant on radio Ramogi. That the manner in which the publication was done was for personal gain and a tool for political mileage by the defendant. That the defendant had not established any truth in his statements and that it was upon the defendant to adduce evidence of truth of the defamatory matter as published, which in this case, he

had failed to do so. Reliance was placed on Joseph **Njogu**(supra) case citing the Uhuru Muigai **Kenyatta vs Baraza Limited** case that defamatory statement is presumed to be false unless the defendant proves its truth and that the burden of proving truth is on the defendant.

49. On damages awardable, it was the plaintiff's further submission that he ought to be granted aggravated and/or exemplary damages as the said statements made by the defendant were actuated by malice and caused ruin to the plaintiff's reputation. Reliance was placed on several **Johnson Gicheru v Andrew Morton** & another cited in **Njogu Kamunge v Charles Muriuki Gachari [2016]e KLR** Section 16A of the Law of Defamation Act was also relied on and **Arthur Papa Odera v Peter O. Ekisa [2016]eKLR**. The plaintiff thus sought an award of Kshs. 20,000,000 as he was a Member of the National Assembly, A human Resource practitioner and a Christian. The plaintiff relied on the case of **Miguna Miguna v Standard Group Limited and 4 Others [2017] eKLR** citing **Johnv MG Limited [1997]QB 586** where the court awarded the plaintiff a total of Kshs. 6,000,000 in general damages and aggravated damages as well as the case of **Samuel Ndung'u Mukunya v Nation Media Group Limited & Another [2015] eKLR** where this court awarded the plaintiff, an advocate of the High Court Kshs. 20,000,000.

50. Regarding costs, it was submitted that the same should be granted to the plaintiff in the interest of justice and fairness.

#### **Defendant's Submissions**

51. It was submitted on behalf of the defendant that the plaintiff had not established its claim against the defendant to the legal standard and that even if the letter in question was defamatory of the plaintiff, or that it was published by the defendant, it was true and amounted to a fair comment on a matter of public interest. Further, that contrary to the alleged defamation by the plaintiff, there was no infringement on the plaintiff's reputation as there was no evidence adduced by the plaintiff or any of his witnesses that the defendant published the allegedly defamatory letter. The defendant's counsel relied on several cases among them-**Thomas v CBC [1981]4 WWR citing the writings by Gatley on Libel and slander**. On the definition of defamation, **Salmond on Torts, 7<sup>th</sup> Edition** and **Martha Karua v Moses Kuria [2017]e KLR** pointing to defamation being or involving a false derogatory statement made against a person without lawful justification. Further reliance was placed on **John Ward v The Standard Limited [2006] e KLR** on the ingredients of defamation and **George Mukuru Muchai v The Standard Ltd HCC NO. 2539/1997** on the most important ingredient of defamation case being the effect of the spoken or written words in the mind of third parties about a complainant and not how he or she feels the words portray him or her.

52. It was the defendant's contention in submissions that he pleaded to saying the truth and that he demonstrated that he constructed the administration block for the school whereas the plaintiff failed to adduce any evidence showing that it was built using NG CDF funds.

53. The defendant filed supplementary submissions in which he reiterated that the plaintiff failed to prove how the alleged letter infringed on his reputation. It was the defendant's submission that those willingly serving in public office must accept that service comes with certain expectations as was stated in the case of **New York Times v Sullivan 376 US 254 [1964]** a case which establishes that an alleged publisher is not liable for publishing pertinent facts on a public figure.

54. The defendant further relied on the Court of Appeal case of **Royal Media Services Limited & Another v Jakoyo Midiwo [2018] eKLR** where the court held that damages are not awardable to a public official for defamatory falsehood relating to his official conduct unless he proves "actual malice", that the statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false.

#### **Analysis & Determination**

55. I have considered the pleadings herein by the plaintiff and the defendant as well as the evidence adduced by the plaintiff and his witnesses as well as the defendant and his witnesses and the documentary evidence produced by both parties in support of their respective positions. I have equally considered the written submissions filed by both parties' counsel including the supplementary submissions by the defence counsel. The parties herein filed a joint list of agreed issues for determination as follows:

*i. Whether the defendant's publications concerning the plaintiff was defamatory of the plaintiff?*

*ii. Whether the said publications were true in fact and substance or whether the same were false, malicious, negligent and/or reckless?*

*iii. Whether the defendant was justified to make the said publications in its form, manner and style?*

*iv. Whether the said publication disparaged and discredited the plaintiff's reputation and injured his character and exposed him to hatred, ridicule, scandal, odium or contempt?*

*v. Whether the said publications exposed the person of the plaintiff to danger or jeopardy?*

*vi. Whether the general and aggravated damages are payable in the circumstances of this case and if so, how much?*

*vii. Whether the plaintiff is entitled to an injunction sought*

*viii. What is the appropriate order as regards the costs of this suit?*

56. Adopting the issues framed above, I now proceed to determine them in line with the fundamentals of defamation. Before I do that, it is important to note that The burden of proof lies with the Plaintiff to prove his case on a balance of probabilities as stipulated in Section 109 of the Evidence Act which provides that the burden of proof lies with that person who wishes the court to believe in its existence and that he who asserts a fact must prove, as stipulated in Section 107 of the Evidence Act.

57. Under section 107 of the Evidence Act, Cap 80 Laws of Kenya, the burden of proof lies on he who asserts and in this case, the burden of proving that the alleged material was published and were defamatory lay on the plaintiff.

58. From the onset and from the issues as framed and filed by consent, there is a presumption that there was publication of the statements subject of this suit. However, this court is under a duty to determine, from the evidence adduced by the plaintiff and defendant and their respective witnesses, whether there was publication and whether the publication, if established, was defamatory of and concerning the plaintiff.

59. However, where the defendant pleads the defences of justification, truth and fair comment in the public interest, then the burden of proof lies on him to prove, on a balance of probabilities, that the matters complained of by the plaintiff are true, justified and fair comment and in the public interest.

60. On the first issue as framed, of whether the defendant's publications concerning the plaintiff was defamatory of the plaintiff, In **Miguna Miguna v Standard Group Limited & 4 others** [2017] eKLR, the Court of appeal stated as follows regarding defamation, and I have no reason to differ:

*“Speaking generally a defamatory statement can either be libel or slander. Words will be considered defamatory because they tend to bring the person named into hatred, contempt or ridicule or the words may tend to lower the person named in the estimation of right-thinking members of society generally. The standard of opinion is that of right-thinking persons generally. The words must be shown to have been construed or capable of being construed by the audience hearing them as defamatory and not simply abusive. The burden of proving the defamatory nature of the words is upon the plaintiff. He must demonstrate that a reasonable man would not have understood the words otherwise than being defamatory. See Gately on Libel and Slander (8th edition para. 31).*

*The ingredients of defamation were summarized in the case of John Ward V Standard Ltd , HCCC 1062 of 2005 as follows:-*

*".....The ingredients of defamation are:*

*The statement must be defamatory.*

*The statement must refer to the plaintiff.*

*The statement must be published by the defendant.*

*The statement must be false."*

61. In **Halsbury's Laws of England**(Supra), a defamatory statement is defined as :

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

62. In **Phinehas Nyaga vs Gitobu Imanyara** [2013] eKLR it was held that defamation was not about publication of falsehoods against a plaintiff but rather, the plaintiff must show that the published falsehood disparaged his reputation and lowered him in the estimation of right thinking members of the society generally.

63. In **SMW vs ZVM** [2015] eKLR , the Court of Appeal held that in determining the words for purposes of defamation, the court does not employ legal construction but that the words complained of must be construed in their natural and ordinary meaning.

64. In the case of **Newstead vs London Express Newspaper Ltd** [1940] 1 KB 377 [1939] 4 ALL ER 319, it was held as follows:-

*“Where the plaintiff is referred to by name or otherwise clearly identified, the words are actionable even if they were intended to refer to some other persons. It is not essential that the plaintiff must be named in the defamatory statement; where the words do not expressly refer to the plaintiff they may be held to refer to him if ordinary sensible readers with knowledge of the special facts could and did understand them to refer to him.”*

65. Thus, to prove defamation, the claimant must establish or demonstrate that the matter complained of was defamatory in nature, that the defamatory statement was uttered to someone else other than the person who was said to have been defamed and that the defamatory statement was published maliciously.

66. In other words, 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. 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.

67. 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. In **Ann Wairimu Njogu vs Radio Africa Limited [2017] eKLR**, it was held that malice also had to be inferred from the alleged defamatory statement. In addition, the defamatory words must be shown to have been published by the defendant. (See the case of **James Njagi Joel v Junius Nyaga Joel [2020] eKLR**).

68. Applying these principles to the facts of the present case in resolving the issue as framed, it is the plaintiff's case that the defendant is the known author of the letter dated 23/8/2020 addressed to the plaintiff herein and further, that equally, the defendant is the owner, holder and administrator of Facebook page named "**Booker Ngesa Omole.**" This piece of evidence as adduced by the plaintiff against the defendant was never controverted. The plaintiff also produced in evidence the WhatsApp screen shots and certificate of electronic evidence showing that the words complained of, being content extracted from the letter of 23/8/2020 and authored by the defendant, were published to several other people in the **Wagai/Yala Division** whatsapp Group by one Godrick and the said words as posted were lifted from Booker Ngesa Omole Facebook web page where the defendant claims that he "**was exposing flagrant theft and misappropriation of public resources in Gem Constituency under watch of Elisha Ochieng Odhiambo MP over Kshs 1,000,000 has been stolen in the Masinde Primary School Administration Case, the School Headmistress Madam Celestine Omolo Akoth has been intimidated not to talk to the media. Herself is party to the fraud. The MP has been calling the media houses to threaten them of a legal suit instead of safeguarding the public interest.**"

69. Albeit, as submitted by the defendant's counsel, Godrick was not called by the plaintiff as a witness and or the telephone number under his name proven to be one for Godrick, the words which were published in the WhatsApp group of Wagai/Yala Division were lifted from the defendant's Facebook page which has his name and photograph and the defendant did not disown that Facebook page.

70. The plaintiff asserted in his plaint that on 2<sup>nd</sup> September, 2020, the defendant falsely and maliciously published and posted or caused to be published and posted on various social media platforms a letter dated 23<sup>rd</sup> August 2020 concerning the plaintiff in the words reproduced above.

71. However, in his witness statement, he cited 3<sup>rd</sup> September 2020. PW3 cited 34<sup>rd</sup> September as the date when he heard the defendant being interviewed by Ramogi FM station and so does PW3 and PW4 say that the date when the defendant was being interviewed by Ramogi FM station was 3<sup>rd</sup> September, 2020. According to the defendant in his submissions, there are contradictions in the evidence of the plaintiff and that in the absence of the audio recording of the said interview, then the plaintiff has not proved that there was any interview.

72. Indeed there are contradictions on the dates in the Plaint, the written statement by the plaintiff and his evidence in chief and that of his witnesses. Similarly, Hesbon Omondi in his statement referred to the letter dated 21<sup>st</sup> August 2020 which the defence took issue with in submissions, although all other evidence by the plaintiff and the defendant himself and the actual letter as produced in evidence is dated 23<sup>rd</sup> August 2020. The question is whether those contradictions are material and therefore fatal to the plaintiff's case. Witnesses. In criminal matters as was stated in **Twehngane Alfred vs. Uganda [2003] UGCA 6**,:

***“With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.”***

73. In civil cases, however, the standard of proof is that of on a balance of probabilities and not on beyond reasonable doubt as is the case with Criminal cases.

74. The plaint was drafted by the plaintiff's advocate and the advocate did not seek to amend it. The witness statements of the plaintiff and his witnesses all state that the defendant was interviewed on 3<sup>rd</sup> September 2020. In my humble view, the contradiction is curable under Section 100 of the Civil Procedure Act which empowers the court to amend any pleading to rectify a minor defect or error in any proceeding in a suit for purposes of determining any question or issue raised therein. It is my finding that the error is curable under section 100 of the Civil Procedure Act. The error did not occasion any failure of justice.

Furthermore, the Court of Appeal in **Peter Njoroge Kamau v Attorney General [2017] eKLR** (GBM Kariuki, Sichale and Ole Kantai JJA) had this to say regarding such contradictions in dates in civil cases

***“ On 24<sup>th</sup> March 2016, the Resident Magistrate delivered judgment in the suit in which he found that the dates given in evidence on the shooting of the appellant were inconsistent; that the inconsistency “cast doubt on the claim” and that “looked at as a whole (the doubt) (sic) is quite material to the claim.”***

***7. The learned Resident Magistrate proceeded to find that the appellant had “failed to establish the matters pleaded.” Said the Magistrate in his judgment:-***

***“There is simply no evidence before me to demonstrate that the plaintiff (appellant) was as he stated shot (sic) on the 28.10.2007 (sic) without which evidence there is no purpose in proceeding further to determine whether indeed he was as claimed shot by the police.”***

***The decision of this Court in the case of Erick Onyango Ondeng versus Republic [2014] eKLR to support the proposition that not every contradiction or particulars as to time and date of a happening of an event warrants rejection of such evidence, unless such contradictions are grave and affect the main substance of the case.***

***The learned Judge went on to deal with the issue of discrepancies relating to the date of the shooting and arrived at the conclusion that “it is not clear when the shooting took place. The documents in support of the claim also points (sic) to different dates....”***

***Moreover, although it does not now arise in view of what we have stated above, the issue of conflicting evidence on the shooting did not, ipso facto, mean that no shooting took place. This being a civil and not a criminal matter, the standard of proof would be on balance of probabilities. The fact that a witness does not remember precisely when injury was sustained or inflicted does not mean that no injury was suffered.***

75. Applying the above principle to this case, I find that the contradictions stated by witnesses regarding dates are not material and neither are they fatal to the plaintiff’s case. They are curable by this court invoking and I hereby invoke section 100 of the Civil Procedure Act and allow an amendment to the dates where indicated 2<sup>nd</sup> September 2020 shall read 3<sup>rd</sup> September 2020 and where stated 21<sup>st</sup> August 2020 shall read 23<sup>rd</sup> August 2020 as far as the evidence on radio Ramogi interview and the date of the letter in question addressed to the plaintiff by the defendant are concerned.

76. According to the plaintiff, the letter dated 23<sup>rd</sup> August 2020 was posted on various social media platforms and its contents were repeated in an interview on Ramogi Radio FM interview by the defendant and was defamatory, false, reckless and malicious and that after the contents complained of were posted on the Wagai/Yala Division WhatsApp group, the plaintiff received several calls from his constituents and friends seeking clarifications over the allegations made in the said letter and as per the radio interview which the defendant held at Ramogi FM, where he repeated the same highly defamatory words and that the said Radio Station reaches a very wide audience in the country and particularly the plaintiff’s constituents.

77. On the part of the defendant, the plaintiff failed to prove that the defendant published the aforementioned words and that in the event that he did publish them, the plaintiff in his position as Member of Parliament must in other words be open to criticism and further that the plaintiff failed to prove actual malice in the defendant’s alleged publication. The defendant in his submissions also contended that the people who called the plaintiff or send him the alleged broadcasts or published letter were not called as witnesses. However, the evidence by Hesbon Omondi a member of the WAGAI/YALA DIVISION WhatsApp Group for years, and having known one Godrick as a close supporter and social media blogger for the defendant was clear that not only read the said letter as posted but on 3<sup>rd</sup> September 2020 he heard the defendant being interviewed by Ramogi FM and he repeated the contents of the said letter. The same witness read on the defendant’s Facebook page of more than 30,000 followers, the defendant informed his followers about the letter he had written to the plaintiff and its contents and he attached a voice recorded video of part of the interview. The witness at para 8 of his statement says that he got from the assertions by the defendant that the plaintiff was a this and had connived with the school head teacher to steal public funds.

78. The sworn testimonies of the plaintiff and his witnesses PW3 and PW4 all pointed to the defendant as the author of the letter dated 23<sup>rd</sup> August 2020. The defendant himself admitted as much and stated that he wrote the letter to the plaintiff personally although he never copied it to anyone else but that he also saw it in social media after he had send it to the plaintiff on WhatsApp and calling him-the plaintiff. In cross-examination, the defendant stated that he had no evidence to show that the plaintiff was corrupt or was stealing arrogantly. He further stated that he had no evidence of loss of public funds. He however stated that he had reported to EACC and that the plaintiff had recorded a statement with EACC. This court observes that in the defendant’s advocate’s letter responding to the plaintiff’s counsel’s demand letter, the defendant’s advocate copied the response to EACC.

79. All said and done, there is sufficient evidence to show that the contents of the letter dated 23<sup>rd</sup> August 2020 were published by the defendant to his Facebook page and to WAGAI/YALA DIVISION WhatsApp group. There is also sufficient evidence that the defendant was interviewed by the Ramogi FM and he repeated contents of the said letter. Although the audio recording of the interview was not produced in evidence, the same was heard by the plaintiff and his witnesses. Albeit Ramogi FM and Godrick were not joined to this suit, their non-joinder is not fatal to this suit as they were only used by the defendant to publish and publicize his letter. With regard to Ramogi FM, the radio station only interviewed the defendant and he proceeded to tell the listeners what he had to say of and concerning the plaintiff. There is no evidence that Ramogi FM on their own accord broadcast the contents of the letter in issue.

80. I find no evidence adduced by the defendant to show that the plaintiff received any funds from NGCDF in the name of going to construct the Administration Block at Masinde Primary School and that he misapplied the said monies and claimed that he had used it on the said project. The fact of the plaintiff who is merely the patron of the Fund claiming that NGCDF had completed the building is not the same as the plaintiff receiving money from NGCDF and purporting to have used it to construct the building in question. I find no truth or justification in the defendant’s allegations that imputed theft of public funds on the part of the plaintiff.

81. The plaintiff produced the social media Facebook page account in the name of the defendant Booker Ngesa Omole together with certificate of electronic evidence where the defendant stated that ***“the Communist Party of Kenya through the office of the Vice Chairperson Booker Ngesa Omole, espouses Flagrant theft and misappropriation of public resources in Gem Constituency under the watch of Elisha Ochieng Odhiambo, member of Parliament, Over Kshs 1,000, 000 has been stolen in the Masinde Primary School Administration case, the school headmistress Madam Celestine Omolo Akoth has been intimidated not to talk to the Media, herself she is a party to the fraud. The MP has been calling the media houses to threaten them of legal suit instead of safeguarding the public interest.”***

82. Further, the plaintiff produced screenshots from the defendant’s Facebook Account stating: ***The communist Party of Kenya stand with the Gem People to oppose flagrant theft in Gem Constituency under the watch of Elisha Ochieng Odhiambo. We call on all Kenyans to escalate the offensive! The big demonstration will be held on Monday, September 28<sup>th</sup>! Drive the thieves out!*** The defendant further posted on his Facebook page what he called ***“...day 2, Flagrant theft in Gem Constituency must end! All Public Leaders including Elisha Ochieng Odhiambo should protect and guard the public resources!”*** On Day 3, the defendant on the same Facebook page published ***“Anti-corruption Campaigns in Gem, Siaya, Elisha Ochieng Odhiambo, Gem Member of Parliament should be arrested, tried and jailed!”***

83. Although the defendant denied publishing the letter dated 23<sup>rd</sup> August 2020 which was addressed to the plaintiff, the plaintiff produced the Screenshot of the WAGAI/YALA DIVISION WhatsApp Group where the said letter was posted in PDF format by one, Godrick of telephone number +254745117954 on 31<sup>st</sup> August 2020. It is headed: “**Letter to Gem Member of Parliament**”. In addition, the writings from the defendant’s Facebook page alleging misapplication of NGCDF funds by the plaintiff were posted on the WAGAI/YALA DIVISION WhatsApp group by the same Godrick, now claiming that Ramogi FM and the Communists PARTY of Kenya through the defendant’s office exposes Flagrant theft and misappropriation of public resources in Gem Constituency under the watch of the plaintiff herein stated above.

84. I reiterate that the Facebook accounts contain the defendant’s photograph and name and he did not disown the same. Neither did he controvert the plaintiff’s evidence that the Facebook account that some of the contents of the letter dated 23/8/2020 appeared in was his.

85. The testimony of PW3, a constituent of the plaintiff as well as his relative, which testimony was not controverted by the defence as the witness was not cross examined was that in early September 2020, he heard the defendant being interviewed by Radio Ramogi and that during the said interview, the defendant stated how he had spent his money building the administration block of Masinde Primary School and that after his sweat, the plaintiff went and claimed credit for what the defendant had done and that the defendant said during the said interview that the plaintiff had connived with the head teacher of the school to steal money for construction of the Administration Block.

86. PW3 further stated that upon hearing the radio address by the defendant, he was down hearted and his estimation of the plaintiff got lowered as he had believed that the plaintiff was a person of integrity until he heard the interview given by the defendant. PW3 further testified that he received calls from a friend who jided him on their electing a thief as an MP in comparison to the previous MP. Although the defendant’s counsel in submissions claimed that this friend of the witness was not called as a witness, this court does not find that such failure to call him was fatal to the plaintiff’s case as PW3 was already a third party who had heard the radio broadcast interview by the defendant. Furthermore, this PW3 was never cross examined by the defence hence his testimony remains unchallenged.

87. In addition, PW4 Hesbon Omondi the plaintiff’s constituent testified that on 31st August 2020, he saw comments on a WhatsApp group for WAGAI/YALA DIVISION (GEM) of which he is a member for years when one Godrick of Telephone No. +254[xxx], a blogger whom he knew to be a close ally and supporter of the defendant herein posted a letter dated 21/8/2020 (read 23<sup>rd</sup> August 2020) written by the defendant circulating on social media, claiming that the plaintiff was a thief who had stolen public funds. It was his testimony that he knew the plaintiff as an honest person so he shared the letter with the plaintiff. As earlier stated, although the witness mentioned the letter to be dated 21<sup>st</sup> August, 2020, I find this discrepancy not to be material as all witnesses referred to the letter dated 23<sup>rd</sup> August 2020, which letter the defendant admitted to writing to the plaintiff and there is no contrary evidence that that is the letter the witness PW4 was referring to in his witness statement.

88. In his oral testimony, which was on oath, he stated that he saw a letter written by the defendant to the plaintiff, being circulated on social media on WAGAI/YALA WhatsApp group to the effect that the plaintiff was a thief who had stolen public funds of about one million yet the bill was just about 100,000 to 150,000 and that as he knew the plaintiff to be an honest person, the letter made the witness perceive the MP as a thief and a person who could not be trusted.

89. PW4 further testified that on the morning of 3rd September 2020 while listening to Ramogi FM, he heard the defendant repeat the same words of the letter in question and that made the witness believe the defendant owing to his bold assertions. On the same date, the witness saw a post on the defendant’s Facebook Page with more than 30,000 followers, with the defendant informing his followers about the letter and its contents and he attached a voice recorded video part of his interview with Ramogi FM.

90. The defendant in his defence and witness statement dated 20<sup>th</sup> November 2020 denied ever publishing any defamatory matter of and concerning the plaintiff or doing any radio interview with any media house or Ramogi FM. He further denied publishing or causing anyone to publish the alleged defamatory matter of and concerning the plaintiff. He claimed that he found the alleged defamatory letter being circulated with pleadings in this case together with the restraining orders in Siaya WhatsApp groups.

91. However, this court observes that in the defendant’s response letter dated 8/9/2020 addressed to the plaintiff’s advocate, at page 2 paragraph 2 thereof, the defendant instructs his lawyer to respond as follows: “***the matter was then picked up by Ramogi FM who interviewed our client for the obvious reason that the project was undertaken by him...***”

92. At paragraph 32 of his replying affidavit sworn on 28<sup>th</sup> September 2020, responding to the application by the plaintiff for interim restraining/ injunctive orders pending the hearing and determination of this case, the defendant deposed, admitting that he was interviewed by Ramogi FM Radio where he explained his side of the story concerning the alleged claims by the plaintiff that the plaintiff had constructed the Administration Block at Masinde Primary School using NGCDF funds. In the said affidavit, the defendant readily deposes that he organized for demonstrations against the plaintiff and at paragraph 42 he deposes that he organized a press conference against misappropriation and lack of accountability on the part of the applicant/plaintiff therein.

93. The defendant’s exhibit 8 is a screenshot of the letter he wrote to the plaintiff and he claims that it was posted by the plaintiff’s supporters. That may be so as the writings therein were castigating the defendant for maligning the plaintiff’s reputation with propaganda and falsehood. However, there is no evidence that that is the basis upon which this suit is founded. Further, there is nothing on D-Exhibit 8 to show the date when the said letter was posted on the Central Gem WhatsApp Group.

94. From the above, I am satisfied that the plaintiff has established on a balance of probabilities that the defendant published the contents of the letter written by the defendant on 23<sup>rd</sup> August 2020 through the Interview at Ramogi FM and to his social Media Facebook platform and as reposted by Godrick to the WAGAI/YALA Division WhatsApp Group, and that the said impugned words were read and heard by, not just the plaintiff but third parties as well.

95. Albeit the defendant claims that the plaintiff has not accounted for the monies released by NGCDF towards construction of the building

in question, the letter dated 18th July 2019 from the School's Head teacher was addressed to the NGCDF Chairman seeking for an emergency fund towards completion of the office and she attached the quantities of the remaining works and from the attached Tender Document issued by the County Works Officer, it is evident that what was required was materials finishing works. It was not demonstrated by the defendant that the plaintiff was a member of the NGCDF Management team or that he received any money towards construction of the building that the defendant claims to have constructed from the commencement to completion and eventual handing over to the school administration.

96. Furthermore, PW2 Seth Baraka Ochieng the project Coordinator for Gem NGCDF testified that when the Fund Manager Mary Mwaki informed him that it was being alleged on social media that the completion of construction of the Administration Block of the Masinde Primary School could have cost only about 100,000 to 150,000, he concluded that that could not be true because when the head teacher of the school requested the Gem NGCDF for funds to complete the construction of the Administration block of the school, in her said request, she attached Bills of quantities done by Public Works as received by the NGCDF Office. He testified that the allegations in the letter published by the defendant were false because a report by the Public Works had revealed that the completion of construction works of the administration block would cost over Kshs. 1,000,000. A copy of the report which was produced as an exhibit together with the request from the Masinde Primary School shows that the cost of the remaining works was estimated at over 1 million(1,300,180).

97. Although the defendant in his submissions claimed that the exhibits produced by PW1 could not be believed, the witness was the project coordinator for NCDF Gem Constituency and having received the request and accompanying documentation as an office, he confirmed that the office provided one million to the school for completion of the administration block. There was nothing to demonstrate that this witness was not believable. There were also no audited accounts produced to show that the Gem NGCDF lost one million Kenya shillings under the pretext that it was going to be used for completion of Masinde Primary School Administration Block.

98. The defendant had initially claimed that he commenced the construction works of the building and completed it. However all his witnesses testified that the works that they undertook in the construction of the Administration Block of Masinde Primary School were not complete. The evidence of DW2 the architect and DW3 were contradictory in all material particulars. Whereas DW2 testified that the head teacher of Masinde Primary was a man, DW3 and the defendant stated that the head teacher of the School was a woman. (DW2) testified that he supervised the construction work from its commencement until completion but DW3 testified that he did completion of the works and contradicted himself saying, that he did roof work and made it habitable and handed over a complete building which was supervised by the architect. He also stated that they had a representative who attended the handing over of the building to the defendant and the school. However, in cross examination, the same (DW3) stated that when he took over the construction, it had been started in that there were existing walls both external and internal and that the foundation was done together with part of the ring beam and **that he did the roof and plastering and other completion works.** DW3 also stated that when they were exiting, he was aware that some works were remaining and that they had also not painted the foundation, curtains not fitted and technically, furnishing had not been done and added that those were not in the contract and design. This witness also stated in cross examination that he did not attend the handing over and that neither did they send any official representative to attend the said handing over event. **DW3 was clear that "the administration block was not fully completed as there were some works to be done."**

99. On the basis of the above evidence, I find no truth or justification or fair comment in the public interest on the part of the defendant.

100. There is un rebutted evidence from PW3 and PW4 that the defendant repeated the allegations contained in his letter of 23/8/2020 to the plaintiff during his interview with Ramogi FM and on his Facebook page. The contents were also on Wagai/ Yala Division WhatsApp group where one Godrick posted the entire letter of 23<sup>rd</sup> August 2020 and PW4 read the words and reached out to the plaintiff, and the plaintiff was compelled to seek this court's intervention in restraining the defendant from further publishing the said words and organizing demonstrations against the plaintiff, pending the hearing and conclusion of this case.

101. From the evidence adduced before this court and on a balance of probabilities, it is my finding that the letter dated 23<sup>rd</sup> August 2020 was published the moment the defendant addressed Ramogi FM Radio and uttered the contents of the said letter as stated by PW3 and PW 4. Am further satisfied that the impugned words were published in the defendant's social media Facebook page and on WAGAI/YALA DIVISION WhatsApp platform by one Godrick who, undoubtedly, is the defendant's ally and supporter and the said letter was read by, among others, PW4. The defendant in cross examination stated that the letter could only have been published by the author or recipient. There is no evidence that the plaintiff is the one who published or caused to be published the contents of the impugned letter before he approached this court seeking for injunctive orders against the defendant.

102. Albeit the defendant contended that the said letter was not published as it was addressed to the plaintiff, the defendant having repeated the contents of the said letter during a Ramogi radio interview, which Radio broadcast was heard by third parties including PW3 and PW4, the defendant published the letter and contents thereof.

103. On whether the plaintiff should have produced the actual recordings of the radio broadcast from Ramogi FM, the defendant contended strongly that in the absence of actual radio audio broadcast of the alleged published words, there was no evidence of publication or interview or broadcast. On this point, the Court of Appeal in **Raphael Lukale v Elizabeth Mayabi & another [2018] EKLK** overturning the decision of this court on the question of whether an audio radio broadcast must be produced in evidence to prove publication, held:

***" We have said elsewhere in this judgment that the sole reason why the learned Judge dismissed the suit was the fact that there was no audio recording and/ or certificate of translation of the offending words, hence, in her opinion there was no proof of publication of those words.***

***The word "publication" is repeatedly used without definition in the Defamation Act. Its permanent form has also not been explained. This is important in construing the provisions of section 8 of the Act on wireless broadcasting which provides that;***

***"8 (1) For the purposes of the law of libel and slander, the publication of words by wireless broadcasting shall be treated as***

publication in a permanent form.” (Our emphasis).

Black’s Law Dictionary 9<sup>th</sup> edition defines publication as “the act of declaring or announcing to the public”.

In Pullman v Walter Hill & Co (1891) 1 QB 524, the English Court of Appeal explained what publication constitutes as follows:

“What is the meaning of ‘publication’” The making known the defamatory matter after it has been written to some person other than the person of whom it is written. If the statement is sent straight to the person of whom it is written, there is no publication of it; for you cannot publish a libel of a man to himself. If there was no publication, the question whether the occasion was privileged does not arise..... If the writer of a letter shows it to his own clerk in order that the clerk may copy it for him, is that a publication of the letter” Certainly it is, showing it to a third person; the writer cannot say to the person to whom the letter is addressed, ‘I have shown it to you and to no one else.’ I cannot, therefore, feel any doubt that, if the writer of a letter shows it to any person other than the person to whom it is written, he publishes it” (per Lord Esher, MR). (Our emphasis).

Publication of a defamatory material occurs when the material is negligently or intentionally communicated in any medium to someone other than the person defamed.

The learned Judge insisted that there was no proof of publication merely because the appellant did not produce the audio version of the broadcast in the Luhya language as well as the certificate of translation.

Upon close reading of section 8 aforesaid we find nothing to suggest that all wireless broadcasts are either from recorded tapes or are reduced into some form of a document and that in order for a plaintiff to prove publication of a wireless broadcast he must tape record it and produce the tape record in court as evidence. That proposition is not realistic as it would require people to always have in their possession devices for recording and dwell in constant and vigilant anticipation of being defamed.

The appellant’s case was grounded on the fact that he and his four witnesses heard with their ears the words spoken by the 1<sup>st</sup> respondent and transmitted through the 2<sup>nd</sup> respondent’s Mulembe FM radio station.

The learned Judge in insisting on an audio recording in the original language appeared to have had in mind the provisions of Section 106B of the Evidence Act which requires that for a party wishing to rely on a recording, it must be accompanied by a certificate by a person who operated the recording device. That is the admissibility of electronic records. In our opinion this provision does not make it mandatory for parties who wish to prove that some defamatory statement by way of broadcast has been made of them.

In this case the appellant did not seek to produce any audio evidence. As a matter of fact he relied on oral evidence of witnesses who heard the broadcast by the 1<sup>st</sup> respondent. This was direct evidence as defined in section 63(2)(b) of the Evidence Act. Publication in a permanent form conveys the meaning that the defamation is libel as opposed to slander which is in a non-permanent form. See: Gatley On Libel And Slander 11th Ed At Paragraph 3.9, like our section 8(1) confirms that;

“.....for purposes of the law of libel and slander the publication of words in the course of any programme included in a programme service shall be treated as publication in the permanent form.”

We have emphasized that in Section 8 aforesaid and in the above authority that the publication of words by wireless broadcasting “will be treated” as publication in a permanent form; the key words being “treated as.” So that, though slander is generally regarded as an oral defamatory statement, where it takes the form of broadcast it is considered to be permanent in form.”[Emphasis added]

104. From the totality of the foregoing, there is no doubt that the words published by the defendant of and concerning the plaintiff were defamatory material which portrayed the plaintiff as a dishonest person who had fraudulently taken and misappropriated public resources under the pretext that he was to construct an administration Block at Masinde Primary School through Gem NGCDF and did nothing with the said money yet he was taking credit for a building that had been constructed by the defendant from commencement to completion.

105. In Miguna Miguna vs The Standard Group and KTN and another (supra), this court had dismissed the plaintiff’s case on account that the plaintiff had not proved publication of the alleged defamatory words and that the said words were not defamatory. Allowing the appeal in favour of the plaintiff, the Court of Appeal stated:

“A claimant in a defamation suit ought to establish that there is a defamatory statement; that the defendant has himself published or caused another to publish that statement and that the statement refers to the Claimant - See “Defamation Law, Procedure and Practice” by the authors David Price, Koriech Duodu and Nicola Cain, 4th Edition at paragraph 1 - 02.

106. The words complained of by the plaintiff herein, taken as a whole implied that the plaintiff is a corrupt person who had colluded with the head teacher of Masinde Primary School and stolen funds from the NG-CDF and piggybacked on the already constructed administration block in justifying his theft of the funds thus covering up his theft. The conduct of the defendant in continuing to make the same unverified allegations and even organizing for demonstrations in Gem Constituency to flash out thieves of public funds, forcing the plaintiff to seek the intervention of the court to restrain the defendant pending the conclusion of this suit further implies malice on the part of the defendant.

107. Taking into consideration the position of the plaintiff, as a Member of Parliament for Gem, and from the testimony of PW3 and Pw4, there is no question in my view, that the plaintiff's standing was lowered in the mind of right thinking members of the society by the defamatory words.

108. The Court of Appeal in the **Miguna Miguna (supra) Case** stated further:

*“Author Patrick: Callaghan while discussing the subject of defamation in "Common Law Series: The Law of Tort" at paragraph 25.1 says:*

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

*It was held in Knupffer v London Express Newspaper Limited [1944] 1 All ER 495 that:*

*"The only relevant rule is that in order to be actionable, the defamatory words must be understood to be published of and concerning the plaintiff".*

*This Court while dealing with an appeal in a defamation case held in SMW v ZWM [2015] eKLR:*

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

*It has been held in various cases in Kenya and elsewhere that the test whether a statement is defamatory is an objective one and is not dependent on the intention of the publisher but is dependent on what a reasonable person reading the statement would perceive of it - See the English case of Mortgage & Investment Society Limited v Odhams Press Limited [1941] KB 440.*

*In the 4th Edition Vol. 28 of Halsbury's Laws of England, the following statement appears at page 23:*

*"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".*

*The "reasonable man" was explained in Winfield & Jolowicz on Tort 8th Edition at P. 255 as:*

*"The answer is the reasonable man. This rules out on the one hand persons who are so lax or so cynical that they would think none the worse of a man whatever was imputed to him, and on the other hand those who are so censorious as to regard even trivial accusations (if they were true) as lowering another's reputation or who are so hasty as to infer the worst meaning from any ambiguous statement. It is not these, but the ordinary citizen, whose judgment must be taken as the standard."*

109. In this case, it is my finding that PW3 and PW4 are reasonable men who, upon hearing the address by the defendant of and concerning the plaintiff on Ramogi FM, and upon reading the contents of the letter dated 23<sup>rd</sup> August 2020 as posted on the Facebook page of the defendant and on Wagai/Yala Division WhatsApp Group, found the allegations of misappropriation of public funds levelled against the plaintiff defamatory and they said so in their testimonies.

110. Reputation is an integral and important part of the dignity of the individual and once besmirched by an unfounded allegation, a reputation can be damaged forever, especially if there is no opportunity to vindicate one's reputation. See **Nation Media Group Ltd & 2 others v John Joseph Kamotho & 3 others [2010] eKLR**.

111. Those words as published by the defendant, I find, could not amount to fair comment or truth or justified as alleged by the defendant. I find no justification for the words expressed by the defendant towards the plaintiff that he was a thief and or that he had connived with the head teacher of the School and misappropriated public funds in the name of constructing an administration block at Masinde Primary School.

112. In a bid to justify his defamation of the plaintiff, the defendant went on a spree of claiming that he is the one who constructed and completed the said building yet his own testimony and that of his witnesses were clear that they did not complete the construction and that there were construction works which had been done before he engaged the contractor. Even after his contractor had done some works, some completion works remained. Besides, there was no evidence adduced by the defendant to demonstrate that the plaintiff received any money or part of the money requested for by the school head teacher for completion of the said building. Indeed there is no evidence that over Kenya shillings one million was advanced to the plaintiff by Gem NGCDF towards construction of the building. From the extracts of WhatsApp messages from the plaintiff, he was merely reporting on the projects undertaken by Gem NGCDF and if the defendant found that offensive, he had a right to challenge the plaintiff not only with evidence that he had himself commenced construction of and completed the building, but that the plaintiff had in fact received the money in question and misapplied it.

113. I reiterate that there was no evidence adduced to show that the plaintiff received and or misappropriated the public funds from Gem NGCDF in connivance with the head teacher of the school. I therefore find the defendant's allegations and defence of fair comment or justification, far-fetched and unsupported.

114. The defendant having failed to prove that his allegations were anchored on any truth, justification and or fair comment in the public interest, I now turn to whether the said defamatory words as published by the defendant were done with malice. I have already expressed myself that the manner in which the defendant continued to reiterate his allegations even after a cease and desist letter from the plaintiff's advocate in my mind casts no doubt on the intention of the defendant which was to assassinate the character of the plaintiff by all means. The defendant went as far as claiming in his response to the injunction application as per the YouTube material annexed to his response to the application for injunction, that the plaintiff was a criminal who had assaulted a blogger and he even admitted in his sworn affidavit that he had organized demonstrations against the plaintiff thief. He urges all and sundry to google out the plaintiff's name and establish the kind of person he is. His counsel in submissions contended that there was no evidence that the plaintiff had any reputation. In **Phineas Nyagah (supra) Odunga J held that:-**

***“Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice. .... Malice may also be inferred from the relations between the parties.....The failure to inquire in the facts is a fact from which inference of malice may properly be drawn.”***

115. The wordings of the letter published by the defendant both on Radio Ramogi through an interview and on his Facebook and WhatsApp group for WAGAI/YALA Division taken as a whole in my view are punctuated with malice against the plaintiff and therefore the defense of truth, justification and fair comment raised are not available to the defendant.

116. Further, the defendant in his replying and supplementary affidavits filed into court during the interlocutory proceedings maintained that the court was restraining him from exposing the corruption being perpetuated by the plaintiff. It was therefore incumbent upon the defendant to prove the existence of those corrupt practices by the plaintiff, which proof he did not supply to this court. He left the court with mere allegations and how he had spread those allegations far and wide including inviting the EACC to investigate the plaintiff. He never supplied the court with the results of those investigations. The defendant further after publishing the defamatory material against the plaintiff, organized for demonstrations against the plaintiff in the name of protecting public funds and flushing out thieves who had misappropriated public funds. It took the plaintiff an injunction to restrain the defendant who fiercely defended his actions claiming that this court was jumping into a political arena by issuing an injunction, which action would put the court into disrepute as it would be seen to be protecting thieves of public resources.

117. The defendant may be a public spirited individual against corruption and that must be appreciated by all including this court but he has no right whatsoever to publish malicious propaganda and falsehoods against the plaintiff or any other person.

118. Article 33 of the Constitution guarantees every person freedom of expression. However, that freedom is not absolute as it does not extend to Propaganda for war, incitement to violence, hate speech or advocacy of hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm.

119. For the above reasons, I find that the plaintiff has made out a case against the defendant. I find the defendant to have published false , defamatory matter a laced with malice against the plaintiff who is his arch rival in politics in Gem Constituency and his intention is to drag in the mud the plaintiff's name and incite the constituents against the plaintiff.

120. On whether the plaintiff is entitled to an award of damages and if so, how much, A successful plaintiff in a defamation action is entitled to recover the general compensatory damages of such sum as will compensate him for the wrong he has suffered. The award must compensate him for damages to his reputation. **Section 16A of the Defamation Act Cap 36 Laws of Kenya** provides:

***“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.”***

121. In ***Nation Media Group & Another v Hon. Chirau Ali Makwere C.A. No. 224 of 2010 (UR)***, the Court of Appeal discussed in detail factors to consider in awarding damages for defamation. 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.***

122. The Court of Appeal also cited a passage from the case of Wangethi Mwangi & Another v J. P. Machira t/a Machira & Company Advocates [2012] eKLR setting out additional guidelines as follows:

*"In addition, the awards should also be geared where circumstances permit to act as a deterrence so as to safeguard and protect societal values of human dignity, decency, privacy, free press and other fundamental rights and freedoms, including rights of others and personal responsibility without which life might not be worth living. The category of considerations will no doubt change as our societal needs change from time to time. In this regard, we think that courts must strive to strike a proper balance between the competing needs in the special circumstances of each case".*

123. It is also trite law that the award of damages is a matter of judicial discretion by the court. The Court of Appeal in C A M v Royal Media Services Limited Civil Appeal No. 283 of 2005 [2013] eKLR stated:

*"No case is like the other. In the exercise of discretion to award damages for defamation, the court has wide latitude. The factors for consideration in the exercise of that discretion as enumerated in many decisions including the guidelines in Jones V Pollard (1997) EMLR 233-243 include 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; 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; matters tending to mitigate damages for example, publication of an apology; matters tending to reduce damages; vindication of the Plaintiff's reputation past and future.*

124. The Court of Appeal in Johnson Evan Gicheru v Andrew Morton & Another [2005] eKLR stated that in an action of libel, the trial court in assessing damages is entitled to look at the whole conduct of the defendant from the time libel was published down to the time the verdict is given. It may consider what his conduct has been before action, after action, and in court during the trial. In the said case, the learned Judges of Appeal cited with approval the checklist of compensable factors in Jones v Pollard [1997] eMLR 233, 234 as reproduced above and which I apply in this case.

125. Applying the above principles to this case, and based on the evidence placed before this court, I find that the defendant's conduct before, during and after the trial of this case is one which will aggravate the damages to be awarded. The defendant after publishing the offensive letter persisted in his assertions. The un rebutted evidence of PW3 was that he heard the allegations against the plaintiff on radio, specifically Radio Ramogi which the plaintiff asserted, is listened to widely and this fact was not contested by the defendant.

126. Further, the response by the defendant to the plaintiff's cease and desist demand letter was to double down on his allegations. The defendant maintained his stance of defaming the plaintiff by swearing affidavits and alleging that what he had said of and concerning the plaintiff was truth, justified and fair comment and he even organized demonstrations against the plaintiff in the constituency where the plaintiff is the sitting MP so that him and his Communist Party of Kenya where he is the Vice Chairperson can flush out the plaintiff thief of public funds.

127. The defendant was, in my humble view, by his conduct malicious in publishing defamatory matter concerning the plaintiff which exposed the plaintiff in his personal and professional standing as a national leader and character to public scandal, ridicule, contempt and embarrassment. The plaintiff member of Parliament is a leader not just in the community but in the Republic of Kenya as a lawmaker. He is also a Human Resource Practitioner, which testimony was not controverted. Thieves and corrupt people have no place in leadership as they are criminals whom Chapter Six of the Constitution would not allow to sit in public Offices whether through appointment or election.

128. One's image and reputation is an integral and important part of the dignity of the individual as espoused in Article 10 of the National Values and Principles of Governance as well as Article 28 of the Constitution which provides *that "every person has inherent dignity and the right to have that dignity respected and protected."*

129. The plaintiff's inherent dignity is guaranteed by the Constitution at Article 28. That right must therefore be protected and respected by all and the defendant is no exception. The defendant, from the evidence on record and even after this court had issued restraining orders against him in an interlocutory application for injunction, had an opportunity to correct or delete the obviously untrue and misleading information published of and concerning the plaintiff. He did not. He filed Notice of Appeal against the said interlocutory injunctive order but he never pursued that appeal.

130. This court finds and holds that indeed, the publication by the defendant was highly libelous of the plaintiff, was untrue in substance and did clearly, on the evidence of the plaintiff and his witnesses injure the plaintiff's reputation. It is for those reasons that I find that the plaintiff qualifies for an award of not only general damages but also aggravated damages.

131. The plaintiff has urged this court to find that the total quantum of damages of Ksh. 20,000,000/= would be sufficient as damages, relying on the case of Samuel Mukunya (supra) where Kshs 20,000 damages were awarded to the plaintiff who was an advocate of the High Court of Kenya and Miguna Miguna (supra) where Kshs 5,000,000 general damages and Kshs 1,000,000 aggravated damages were awarded on appeal. The plaintiff in the latter case was also an advocate of this court.

132. In Hon. Henry Obwocha v Headlink Publishing Ltd (2014) (HCK), Ougo, J. relying on Manson v Associated Newspaper Ltd, [1965] 2 All E.R. 954, held that the plaintiff is entitled to exemplary damages for recklessness whether the words published are tortious or not.

133. In Ken Odondi & 3 Others v James Okoth Omburah t/a Okoth Ombura & Co. Advocates, Kisumu Civil Appeal No. 84 of 2009 a sum of Kshs. 4,000,000/= was awarded as general damages for libel and Kshs.500, 000/= awarded for aggravated damages. In Mwangi Kiunjuri v Wangethi Mwangi & 2 others [2016] eKLR, the Court affirmed the award of general damages for defamation of Ksh. 4,000,000/= and aggravated damages of Ksh. 1,000,000/= plus costs of the suit. In Eric Gor Sungu v George Oraro Odinga [2014] eKLR a defamation award was Kshs. 3 million at the High Court which was later on enhanced on appeal to Ksh. 5 million.

134. In **Miguna Miguna v The Standard Newspapers Ltd and Another**, the Court of Appeal upheld the award of kshs 5,000,000 general damages and awarded the appellant a further sum of Kshs 1,000,000 aggravated damages stating:

*“In the case before the trial court, the respondents were required to withdraw the publication and offer an apology but they did not do so. We are of the respectful opinion that the appellant was entitled, in addition to general damages awarded, to an award for aggravated damages which we now award at Kshs. 1,000,000/- which we find to be fair in the circumstances.”*

135. Having considered the above comparable awards made for defamation as well as the status of the plaintiff as a Member of Parliament, and the extent of the publication of the defamatory matters being splashed on the defendant’s Social media platforms namely, Facebook where he has many followers and readers and WAGAI/YALA DIVISION WhatsApp group, and the defendant repeating the same defamatory matters vide an interview at Ramogi FM Radio Station and organizing demonstrations against the plaintiff to further his agenda of defaming the plaintiff, I find an award of general damages of Kshs. 5,000,000 and Kshs. 1,000,000 aggravated damages sufficient compensation.

136. Regarding the permanent injunction sought, having found that the defendant incessantly acted with malice in defaming the plaintiff, and insists on continuing to defame the plaintiff, such that during the hearing, he stated that he had during the previous week held demonstrations in Nairobi against the plaintiff for alleged corrupt activities of the plaintiff, and that as the injunctive orders were lapsing before the suit was heard and determined within 90 days of the issue of the said orders, he stated in his testimony that he was free to go on with the said demonstrations, yet he has failed to adduce any evidence to prove that the plaintiff was engaged in any corrupt or fraudulent activities, I find that a permanent injunction sought is deserved. Accordingly, I grant the prayer on a permanent injunction as sought in the plaint, restraining the defendant, his agents and or servants from publishing and or circulating any articles or letters or material defamatory of the plaintiff in reference to the NG-CDF project at Masinde Primary School

137. Regarding costs, it is trite that costs follow the event and as such the costs in this suit are awarded to the plaintiff against the defendant, together with interest on costs and on the damages awarded to accrue from the date of this judgment until payment in full.

**138. Final Orders:**

Judgment be and is hereby entered for the plaintiff against the defendant as follows:

- a. The defendant is found liable at 100% for defaming the plaintiff and with malice;
- b. General Damages awarded to the plaintiff against the defendant: Kshs 5,000,000;
- c. Aggravated Damages awarded to the plaintiff against the defendant : Kshs 1,000,000;
- d. A Permanent injunction is hereby issued restraining the defendant, his agents and or servants from publishing and or circulating any articles or letters or material defamatory to an of the plaintiff in reference to the NG-CDF project at Masinde Primary School
- e. Costs of this suit
- f. Interest on a, b and e from the date of this judgment until payment in full.

139. **I so order**

**Dated, Signed and Delivered at Siaya this 28<sup>th</sup> Day of July, 2021 via Microsoft Teams**

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

For the plaintiff Mr. Okanda Advocate h/b for Mr. Oruenjo Advocate online

Mr. Were acting alongside Mr. Oruenjo for the Plaintiff Present online

Ms. Nkonge Advocate for the Defendant, online

Plaintiff absent

Defendant present online

CA: Modestar and Mboya