REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 379 OF 2007

DDO.....1ST PLAINTIFF

CAO..... 2ND PLAINTIFF

VERSUS

EAST AFRICA MAGAZINE LIMITED...1ST DEFENDANT

JOHN OYWA.....2ND DEFENDANT

NATION MEDIA GROUP LIMITED.....3RD DEFENDANT

JUDGEMENT

The plaintiffs herein are a husband and wife who moved the court vide a plaint filed in court on the 26th day of April 2007, in which they have sought general damages, punitive, aggravated and/or exemplary damages plus costs of the suit against the defendants.

The plaintiffs' cause of action is premised on an article published on the 26th February, 2007 in the Drum East Africa Magazine, a periodic magazine published in Kenya. They aver that, on the said date, the defendants falsely and maliciously printed and published and/or caused to be printed, and published; of the first and the 2nd plaintiffs and of the 1st plaintiff in the way of his station as a clergyman and in relation to his conduct as such and of the 2nd plaintiff in relation to her conduct as a wife of a clergyman, the words set out in paragraph 7 of the plaint in the article carrying the title.

"Weddings- who must be wooed?"

They contended that the said words referred and were understood to refer to them. They have set out the natural and ordinary meaning of the words in paragraph 9 of the plaint.

The plaintiffs state that their reputation, both personal and as a clergyman and a spouse of a clergyman and a devout member of the Christian faith respectively have been damaged and they have each suffered considerable emotional stress, public odium and embarrassment in the eyes of right thinking members of the East Africa Society. The particulars of malice on the part of the defendants are set out in paragraph 13 of the plaint. They have prayed for judgment against the defendants jointly and severally for the reliefs as set out in the introductory part of the judgment.

The defendants have denied the claim in their statement of defence filed on 28th May, 2007. They have admitted publishing the article but have denied that the same is defamatory as alleged or that it was published falsely and/or maliciously.

First, and without prejudice, they have averred that the words complained of, consists of statements of facts, that they are true in substance and/in fact and in so far as they consist of statements of opinion they are fair comment on a matter of public interest. The particulars of facts and fair comment are set out in paragraph 5 of the plaint.

The defendants have denied that the words bore and were understood to bear or were indeed capable of bearing in their ordinary and natural sense or by way of innuendo or at all, the meaning assigned to them in the plaint. They averred that the plaintiffs' claim is incompetent so far as it does not identify the particular words that are alleged to be defamatory of the plaintiffs.

The defendants further deny that the publication was capable of causing such damage as claimed by the plaintiffs. They have also denied that the words complained of were published falsely, maliciously or recklessly. They have urged the court to dismiss the plaintiffs' claim.

The plaintiffs filed a reply to defence on the 13th June, 2007 in which they have denied all and in singular the averments made in the defence. They reiterated the contents of their plaint.

At the hearing, the 1st plaintiff testified as PW1. It was his evidence that he married the 2nd plaintiff in church on the 27th August 2005. That on the 26th February, 2007, he saw an article in the Drum Magazine in which the 2nd plaintiff had been mentioned. The article talked about a specific wedding that was to take place, but which aborted and it mentioned the 2nd plaintiff as the bride but though the article did not mention his name as the bridegroom, by implication, he was the one.

He testified that the venue of the wedding was stated as Tom Mboya Labour College Hall, in Kisumu, but the date of the wedding was not stated. That the article further stated that the 2nd plaintiff's parents did not approve of the wedding and that on the morning of 27th August, 2005, he was served with a court order restraining a named person or any other pastor nominated by him from officiating at a marriage ceremony involving himself and the 2nd plaintiff scheduled to take place that day but in his evidence, the marriage took place the same day in another venue and was officiated by a different pastor.

He told the court it was not true that he married the 2nd plaintiff a week after, as alleged in the article; that on the day of the wedding her parents forcibly took her away; that he had not sought the consent of the 2nd plaintiff parents and that the 2nd plaintiff ran away from home to marry him.

He stated that the implication created in the article was that they had not undergone HIV test and that was one of the reasons why the wedding was stopped or that they had undergone the test but the results were probably positive.

He contended that the article was an attack on his character as a Christian and it implied that he was a hypocrite and not a good example to the young people yet he was a youth pastor, a lecture and a dean of students. He averred that the article was false and malicious, the comments were not fair and he was not consulted before the article was published.

The 2nd plaintiff in her evidence confirmed the 1st plaintiff's evidence that they got married on the 27th August, 2005 in Kisumu. It was her evidence that they sought her parents' consent which they refused to give her, stating that they did not think the 1st plaintiff was the best choice for her. She testified that the 1st plaintiff was served with a court order on the 27th August, 2005 to stop the marriage but they were married in a different venue the same day. According to her, the article was sensational, in bad taste and designed to attract public attention to the story and that it caused her mental anguish.

Herbert Kerre gave evidence as PW3. He is a friend to the plaintiffs having met the 1st plaintiff in the year 2000 and it was through him that he met the 2nd plaintiff. It was his evidence that he was the best man in the plaintiffs' wedding and he was involved in the planning of the same. He was aware that the parents of the 2nd plaintiff had difficulties accepting their daughter to be married to the 1st plaintiff for unknown reasons and that many people intervened to no avail.

He averred that on the 27th, August, 2005, the 1st plaintiff was served with a court order restraining pastor Martin Mbandu or any other pastor under him, from officiating the marriage between the plaintiffs which was scheduled to take place at Tom Mboya labour College in Kisumu, but the wedding took place the same day at a different venue and was officiated by a different pastor. He concluded by stating that the story was not entirely factual but it contained many falsehoods and exaggeration.

Parties filed and exchanged written submissions which this court has considered together with the pleadings and the evidence on record.

From the evidence on record and the submissions by the parties, the court indentifies the following issues for determination.

1. *Whether or not the defendants published the impugned publication.*

2. *Whether or not the publication refers to the plaintiffs.*

3. *Whether or not the publication is defamatory of the plaintiffs.*

4. *Whether or not the publication was malicious and false.*

5. *Whether or not the publication was a statement of fact or fair comment.*

6. *Whether or not the plaint discloses a reasonable cause of action against the defendants.*

7. *Whether the plaintiffs are entitled to the reliefs sought.*

8. *Who should bear the costs of the suit.*

No doubt, the cause of action herein is based on the tort of defamation. In Kenya the law of defamation is now well settled and its governed primarily by the Defamation Act, Cap 36 Laws of Kenya which has its foundation in the Constitution and in particular Article 33(3) which states;

"In exercise of the right of freedom of expression, every person shall respect the rights and reputation of others".

The tort of defamation is defined variously with not one agreed single definition that fits all. In the ***English case of Scott vs. Simpson(1982/QBD 491, Dave J*** defines it thus;

> *"A false statement about a man to his discredit".*

In the well known work of Winfield, the definition is given as follows;

> *"It is the publication of a statement which tends to lower a person in the estimation of the right thinking members of the society generally or which tends to make them shun or avoid that person".*

Another authority often cited as definitive on defamation is that of ***Thomas v CBC (1981) 4WWR 289*** as follows;

> *"The gist of the torts of libel and slander is the publication of matter usually words conveying a defamatory imputation to a man's discredit or which tends to lower him in the estimation of others or to expose him to hatred, contempt or ridicule or to injure his reputation in his office, trade or profession or to injure his financial credit. The* standard of opinion is that of the right thinking persons generally."

The court of appeal of Kenya in the case of ***SMW vs. ZWM(2015)*** touched on the scope of a defamatory statement and stated;

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

The law on 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 or 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.

In the case of ***Musikari Kombo vs. Royal Media Services Limited (Civil Appeal Number 156/2017)*** , the threshold for the test as to whether a statement is defamatory was given as follows;

> *"The test for whether a statement is defamatory is an objective one. It is not dependent on the intention of the publisher but on what a reasonable person reading the statement would perceive.*

In the **Halsbury's Laws of England 4th Edition vo. 28,** the author opined thus;

> *"In deciding whether or not a statement is defamatory, the court must first consider what meaning the words 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 could be likely to understand them in a defamatory sense".*

The question as to who is a reasonable man" or ordinary man" was answered by the court of appeal in the case of **Miguna Miguna vs. Standard Group Limited & 4 others (2017) eKLR** as follows:

> *"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 accusation (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."*

After that analysis, I now proceed to consider the issues for determination set out hereinabove.

The question to be determined by this Honorable Court is; whether the defendants defamed the plaintiffs by publishing the article complained of. The plaintiffs' allege that the defendants falsely and maliciously published or caused to be published and/or printed, defamatory statements against them in the Drum East Africa Magazine of 26th February, 2007.

The defendants in their statement of defence denied these allegations to the extent of the impugned article being defamatory and averred, inter alia, that the impugned article as published is not defamatory as alleged or at all. They have contended that the published words in the said article consisted of facts and were fair comments on a matter of public interest.

From the evidence on record and the pleadings, it is not in dispute that the impugned article was published by the defendants.

As to whether it is defamatory or not, this is subject of the other issues to be covered later on in this judgment.

As to whether or not the publication refers to the plaintiffs, counsel for the plaintiffs have referred to the case of ***Musikari Kombo v. Royal Media Services Limited 2018 (eKLR)*** where the court held

"We agree with the learned Judge that the general rule as to who can sue in a claim for defamation is that it is the person against whom the defamatory words have been published. This much was appreciated by ***Lord Atkin in Knupfler vs. London Express Newspapers Limited (1944) 1ALL ER 495*** *thus;*

> *"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."*

In regard to this issue, the defendants submitted that the impugned article did not refer to the plaintiff and was incapable of referring to the plaintiffs' in its entirety. They averred that in as far as the reporting concerning the requirement of HIV/AIDs testing for couples who intended to marry as a prerequisite to the said marriage was concerned, the article was based on other people and not the plaintiffs in that the article reported about a wedding ceremony in Mombasa which was cancelled. As such, they submitted that if there was any reference at all, to the plaintiffs in the article, it only made reference to the 2nd plaintiff which was limited to the sections of the impugned article.

They stated that the 1st plaintiff was not expressly mentioned by name.

On the part of the plaintiffs, counsel submitted that the defamatory publication mentioned the 2nd plaintiff by name and that it described the 1st plaintiff sufficiently as;

> *".....the groom, who himself is a pastor in a neighboring church.*

They further submitted that in any event, the 2nd plaintiff was the 1st plaintiff's bride and that the wedding described in the publication was their wedding which was scheduled to take place at Tom Mboya College Hall in Kisumu and the 1st plaintiff was a pastor in a neighboring church.

I have considered the submissions of both parties in this regard. It is obvious that the 2nd plaintiff is mentioned by name and the article talks about a wedding that was scheduled to take place at Tom Mboya Labour College Hall, in Kisumu. The article has gone further to give details of the groom; as a pastor in a neighboring church, which they have named as the [particulars withheld] in Africa of which the bride and groom were members. In my view, the details given by the article were sufficient to indentify the 1st plaintiff as the person it was referring to. In any event, having mentioned the name of the 2nd plaintiff and the venue of the wedding, the article did not have to specifically name the 1st plaintiff as the groom, for him to be sufficiently indentified by the readers of the article and especially those who knew him. I therefore find that the article referred to the plaintiffs.

On whether or not the article was defamatory of the plaintiffs, the plaintiffs submitted that the words in their natural and ordinary meaning meant and were understood to mean they are hypocrites and dishonest persons who eloped to get married without the consent of their parents; that the 2nd plaintiff was 20 years and therefore impliedly too young to make a sound and reasonable decision regarding her marital responsibility with the 1st plaintiff; the wedding at [particulars withheld] College was dramatically stopped by the 2nd plaintiff's parents and the 2nd plaintiff taken away by her parents yet neither the 1st or the 2nd plaintiffs were at the venue; that the 1st plaintiff did not wed the 2nd plaintiff on the 27th August, 2005; that they had courted for only one year, which was false because they had done so for 5 years; that the 2nd plaintiff eloped with the 1st plaintiff and married her at a secret location outside Kisumu a week later; that Pentecostal Evangelistic Fellowship in Africa had declined to formalize their union which was juxtaposed against the caption that ***"many churches are insisting couples to know HIV status before they wed"*** which in their view, casts aspirations and disparaging innuendo that the plaintiffs were either HIV positive or did not know their HIV status and hence the resistance by the 2nd plaintiff's parents and lastly that the plaintiff being a pastor conducted himself contrary to the Christian teaching regarding marriage.

On their part, the defendants submitted that in order to rely on the innuendo meaning, the plaintiffs would be required to plead such extrinsic facts as would give rise to that meaning as well as to the special class of persons to whom such facts would be known and meaning understood. They contended that the innuendo meaning is not pleaded in the plaint and in the reply to defence. They argued that the plaintiffs are not entitled to ascribe to the words any other meaning than the ordinary and natural meaning where an innuendo meaning has not been pleaded. They relied on the provisions of order 2 Rule 7(2) of the civil Procedure Rules which provides;

> *"where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning he shall give particulars of the facts and matters on which he relies in support of such sense".*

They further submitted that since no issue of innuendo arises, the court has to determine the natural and ordinary meaning of the words and that for the publication to be defamatory, they would have to be understood as such in their natural and ordinary meaning by a reasonable man as in so doing, the courts have recognized the need to consider the entire article in which the words complained of were published.

Reliance was made on the case of ***Charleston & another vs. News Group Newspapers Limited and Another (1995)2 ALL ER 313*** where the court held that;

> ***"A prominent headline or a headline and photograph could not found a claim in libel in insolation from the related text of an accompanying article which was not defamatory when considered as a whole, because it was contrary***
>
> > ***(1) To the law of libel for a plaintiff to sever, and rely on an insolated defamatory message in an article if other parts of the article negated the effect of the libel and (ii) to the principle that if no legal innuendo was alleged, the single natural***

and ordinary meaning to be ascribed to the words of an allegedly defamatory publication was the meaning which the words taken as a whole conveyed to the mind of the ordinary, reasonable, fair minded reader.

Accordingly, a plaintiff could not rely on a defamatory meaning conveyed only to the limited category of readers who only read headlines."

That the 2nd reason is that it is necessary to do so to avoid drawing misleading inferences and to avoid placing words outside their proper context. They relied on Charleston case (supra) where the House of Lords restated this principle;

"*The first formidable obstacle which Mr. Craig's argument encounters is a long and unbroken line of authority. The effect of which is accurately summarized* ***In Duncan and Neill on Defamation*** *(2nd edn, 1983)p13, paragraph 4.11 as follows;*

"*In order to determine the natural and ordinary meaning of the words of which the plaintiff complains, it is necessary to take into account the context in which the words were used and the mode of publication. Thus a plaintiff cannot select an isolated passage in an article and complain of that alone if other parts of the article throw a different light on that passage."*

The defendants herein relied on the case of ***Martha Karua vs. the Standard & Another (2006) eKLR and that of George Benedict Maina Kariuki vs. Nairobi Star Publication ltd & Another (2016) eKLR*** and have invited the court to analyse the entire article in detail in order to ascertain the words from the proper perspective.

The court has considered submissions by the respective counsel in this issue and has also perused the article as published. As rightly submitted by counsel for the defendants, the plaintiffs have not pleaded the innuendo meaning of the alleged defamatory words but have relied on the ordinary and natural meaning of the words in the article and therefore the court would have to analyze the entire article to ascertain the words from their proper perspective. Looking at the article, in my view, it can be divided into two segments; the first one being the part that relates to the 1st and 2nd plaintiffs (whether true or not) and the 2nd part which is on the comments by third parties or what the defendants have referred to as fair comment.

With regard to the first part, the defendants contend that the article is factual and have relied on the judicial proceedings in Civil Case Number 308/2005 in Kisumu (Rev. Daniel Godfrey Odhimbo & another vs. Dick Daniel Okallo & 2 others) wherein, an order was issued restraining the 3rd defendant from officiating at a marriage ceremony involving the 1st and 2nd defendants (who are the plaintiffs in this case) scheduled for 27th August, 2005 at Tom Mboya College in Kisumu or at any other place until, the hearing of the application inter partes.

In the plaint filed in the aforesaid suit, the plaintiffs in that suit are the parents of the 2nd plaintiff herein who moved to court to stop the intended marriage. The court has perused the chamber summons that was filed contemporaneously with the plaint and in the supporting affidavit; the 2nd plaintiff who is the mother of the 2nd plaintiff herein depones as follows in the relevant part;

a. I got wind of the relationship between the 1st and 2nd defendants (plaintiffs herein) in March, 2004.

b. I asked the 2nd defendant (the 2nd plaintiff herein) about it but she denied.

c. That rumors of their relationship persisted until my husband had to seek advice from the pastor of our church one Rev. Eric Swensen, of the Pentecostal Evangelistic Fellowship of Africa (PEFA) Christ Church, of Kisumu.

d. That the said Rev. Eric Swenson stated that permission to marry from the parents particularly the father, is essential and that both the parents and the pastor must be involved in the arrangement leading thereto.

e. That I know of my own knowledge that our daughter the 2nd defendant (2nd plaintiff herein) has not sought from us permission to marry the 1st defendant. (1st Plaintiff herein)

f. That I also know of my own knowledge that the 1st defendant (1st plaintiff herein) has not sought our permission to marry our daughter.

g. That I also know of my own knowledge that the 1st defendant has not been introduced to us nor have we been introduced to his parents.

h. That I further know of my own knowledge that it is a matter of practice in PEFA Church to which the first two defendants belong, that the introductions and exchange of marriage gifts between the parents of the groom and that of the bride precede the wedding ceremony and that this has not been done.

i. That I further know that we have not been involved in any way with regard to the preparation of the intended wedding.

j. That I know of my own knowledge that when the said Rev. Eric Swensen refused to have the 1st and 2nd defendants marry in his church; they sought assistance from Pastor Martin Mbandu of the Kisumu Pentecostal Church who agreed to marry them.

k. That the said pastor Martin Mbandu wrote to Rev. Eric Swensen requesting him to read the banns in his church but the request

was turned down.

That said, looking at the contents of the article and the judicial proceedings in civil case number 308/2005, it is noted that the reporting of the proceedings was correctly done to a great extent but the defendants for reasons only known to themselves, deviated from the proceedings and in so doing, reported some falsehoods as shown below;

a) Her parents arrived with a court order, and stormed the Tom Mboya Labour College Hall, in Kisumu, and stopped the wedding claiming they had not been consulted. They forcibly took away their adult daughter leaving the groom in shock.

b) Infuriated by her parents' tough stance, Caroline ran away from home and defiantly married her lover at a secret location outside Kisumu a week later.

c) The age of the 2nd plaintiff was also understated as having been 20 years instead of 26 and so was the courtship period between the plaintiffs which the defendants stated as one year instead of five years. The aspect of age and length of courtship is not so material to the case considering that she was above the age of majority and the courtship duration did not matter.

The evidence availed to the court is that the court order was served upon the 1st plaintiff in his house and not in the Tom Mboya Hall as alleged by the defendants which means the wedding ceremony had not even started. The plaintiffs had not yet arrived in the hall and this therefore means that the 2nd plaintiff was not forcibly taken away by her parents leaving the 1st plaintiff in shock as alleged in the article.

On the 2nd falsehood, the plaintiffs clearly stated that the wedding took place on the same day it was scheduled to take place and in a location in Kisumu town and not outside the town and not a week later as alleged by the defendants.

The defendants' defence is that the article is true. The evidence adduced by the plaintiffs point to the contrary. The defendants did not call any witnesses to prove that all the allegations in the article are true. They chose to rely on the proceedings but they needed to call evidence to proof the other aspects of the article which are outside the judicial proceedings.

On the defence of justification, the court in the case of ***Digby vs. Financial News Limited*** stated;

"*A plea of justification means that all the words were true and covers not only the bare statements of facts in the alleged libel but also any imputation which the words in their context may be taken to convey"*

Terminologically, "Justification" as used in the law of defamation means "truth". The defence calls for the defendant to demonstrate that the defamatory imputation is true------- He cannot get away by saying that he believed that the matter complained of was true. He has a burden to prove that the words are true ------ see the case of ***Joseph Njogu Kamunge***

As was held in the case of ***Hon. Uhuru Muigai Kenyatta vs. Baraza Limited (2011) eKLR***

"W*hile taking the defence of justification or qualified privilege in a defamation case, the defendant was required by law to establish the true facts and the plaintiff has no burden to prove the defence raised by the defendant-------" once not verified the justification or qualified privilege does not inure the defendant and in any event, the onus that the same is true, rests on the defendant to make it fair publication (emphasis ours)*

In addition, the defendants have also relied on the defence of fair comment on a matter of public interest. On the said defence, the defendants relied on the case of ***Slim vs. Daily Telegraph (1968) 1 ALL E.R 497*** where the court observed;

"*If (the writer) is an honest man expressing his genuine opinion on a subject of public interest, then no matter that his words conveyed derogatory imputations, no matter that his opinion was wrong or exaggerated or prejudiced and no matter that it was badly expressed so that other people read all sorts of innuendos into it, nevertheless, he has a good defence of fair comment. His honesty is the cardinal test. He must honestly express his real view. So long as he does this, he has nothing to fear, even though other people may read more into it---- I stress this, because the right of fair comment is one of the essential elements of freedom of speech. We must ever maintain this right intact. It must not be whittled down by legal requirements. When a citizen is troubled by things going wrong, he should be free to write to the newspaper [as is the case herein] and the newspaper should be free to publish his letter [or article]. It is often the only way to get things put right. The matter must of course be one of public interest. The writer must get his facts right; and he must honestly state his real opinions. But that being done, both he and the news paper should be clear of liability. They should not be deterred by fear of libel actions-----"*

The defendants also made reliance on ***Halsbury's Law of England 3rd Edition vol 24*** where the author states as follows;

"*The defence of fair comment is not restricted to comments in newspapers as distinguished from those made by members of the public. It is available to anyone since the freedom of the "journalist is in ordinary part of the freedom of the subject.*

In English Law, opinion is free within the wide limits of what is fair and every man is equally entitled to comment in good faith on any matter of public interest.

As submitted by the defendants, the Court of Appeal in the case of ***Nation Media Group Limited Vs. Alfred N. Mutua (2017) eKLR*** set the threshold to be satisfied for a defence of fair comment to be sustainable.

> *"an exposition of what Lord Philips, the president of the supreme court of England described as "the outer limits of the defence" of fair comment is set out in the supreme court of England decision in **Spiller & Another vs Joseph & others (2010) UKSC 53.** In that case, Lord Philips adopted with approval what the court of final appeal of Hong Kong characterized as the five "well established" non controversial matters" in relation to the defence of fair comment. First, the comment must be on a matter of public interest. Second, the comment must be recognizable as a comment distinct from an imputation of fact. Third, the comment must be based on facts which are true or protected by privilege. Fourth, the comment must explicitly or implicitly indicate, at least in general terms; what are the facts on which the comment is being made. The reader or the hearer should be in a position to judge for himself how far the comment was well founded. Fifth the comment must be one which could have been made by an honest person, however prejudicial he might be, and however exaggerated or obstinate his views".*

A perusal of the 2nd part of the article shows that it contains general comments and views that the defendant sought from different people. The views are on how marriages have collapsed because of the tough new requirements by certain churches that, couples seeking to marry must produce written consent from their parents. The writer also gives examples of how some churches insist on couples undergoing HIV/AIDs tests to know their status before they wed in church. He sought opinions from several people in that regard, some of whom he has named in the article. It is not in dispute that the issues raised in the article are of public interest, a fact admitted by the plaintiffs themselves. However, as I have noted earlier, the opinions were sought from the members of public generally, on the two issues raised in the 2nd part of the article whereas on the first part of the article, the defendants wrote about the 2nd plaintiff whom it has mentioned by name and her groom which, by implication, referred to the 1st plaintiff. The first part of the article is very specific to them and the events as captured referred to their wedding. It was therefore important for the defendants to capture those events correctly as they were not general but specific events. To that extent, I find that they are liable as the defence of fair comment cannot exonerate them from the falsehoods that are stated in the first part of the article. For that alone, I hold them liable.

On whether the publication was malicious and false, it is now trite law that malice can be express or implied from the publication itself. As the court rightly found in the case of ***Phineas Nyagah vs. Gitobu Imanyara (2013) eKLR;***

> *"Malice here does not necessarily mean spite or ill will but recklessness itself may be evidence of malice. Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice but the law does not weigh in a hair balance and it does not follow merely because the words are excessive, there is therefore malice. Malice may also be inferred from the relations between the parties before or after publication or in the conduct of the defendant in the course of the proceedings. Malice can be found in the publication itself if the language used is utterly beyond the facts."*

The court has keenly perused the article and has noted that the same was done in a sensational manner and it is fairly exaggerated. The plaintiffs in their evidence told the court that the defendants did not bother to call them to get their comments and/or establish the true facts. The article was published more than one and half years after the events had happened and the defendants had all the time to verify the correctness of the facts before publishing the same. This did not happen. There was no urgency in publishing the article before seeking the correct facts. For this, I find an element of malice on the part of the defendants.

On whether or not the plaint discloses a reasonable cause of action for failure to indicate with a reasonable degree of certainty the actual words complained of in the impugned article that are defamatory, I note that the plaintiffs have set out the relevant part of the article in the plaint. Whereas, they may not have set out all the particulars in the plaint, the article was produced as an exhibit and ample evidence was adduced to support their claim. As such, the failure is not fatal in the circumstances of this case.

On whether the plaintiffs are entitled to the reliefs sought, having found the defendants liable, it follows that the plaintiffs are entitled to an award of damages.

On the question of damages and as rightly submitted by the defendants, there is no mathematical formula for assessment of damages in libel cases. Section 16A of Defamation Act 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 thus a term of not less than three years, the amount assessed shall not be less than four hundred thousand shillings."*

In the case of ***JMM vs. Headlink Publishers limited (2015) eKLR*** the court held that;

> *"Damages for defamation are entirely at the discretion of the court. However, the court must bear in mind that damages should not be so high as to become a threat to the freedom of the press and free speech. Huge awards may also encourage litigation in this line of civil claims."*

Similarly, in the case of ***Nation Newspapers Limited vs. Gilbert Gibendi (2002) eKLR,*** the court held:

> *"Regarding the damages awarded, there must be some foundation or basis upon which the trial court will award a particular sum. The plaintiff must lead evidence of such actual damage to his reputation and character as will enable the trial court to assess an appropriate award posing only the defamation Per se is not sufficient to merit a substantial award of damages. Such a plaintiff would probably get only nominal damages"*

The rationale for awarding damages was discussed by the court in the case of **Kenya Tea Development Agency Limited vs. Benson Ondimu Masese T/A B. O. Masese & Co. Advocates (2008) eKLR** wherein the court quoted with approval the case of ***UREN V John Fair & Sons PTY Limited*** as follows;

> *"It seems to me that properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was publicly defamed. For this reason, compensation by damages operates in two ways; as a vindication of the plaintiff to the public and as a consideration to him for a wrong done. Compensation is here a solution rather than harm measurable in money".*

In awarding damages, the court draws considerable support from the principles laid out in the case of **Jones vs. Pollard (1997) EMLR 233-243** where a checklist of compensatable factors in libel actions were enumerated as follows;

> *1. The objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it was published, and any repetition.*
>
> *2. The subject effect on the plaintiff's feelings not only from the prominence itself but from the defendants 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.*

Being guided by those principles, the court has noted the evidence of the plaintiffs on the effect the publication had on their reputation. The 1st plaintiff was/is a [particulars withheld] and also a Lecturer at [particulars withheld] while the 2nd plaintiff is a Communication Consultant at [particulars withheld]. The court has also taken into account the circulation of the medium in which the article was published.

The plaintiffs have claimed general, aggravated and exemplary damages. On their part, they have urged the court to award Kshs. 10 million and 2 million to each plaintiff as general, aggravated and/or exemplary damages respectively.

They have relied on array of authorities including that of ***Miguna Miguna vs. Standard Group Limited & 4 others (2017) eKLR*** where an award of Kshs. 5 million was made for general damages and Kshs. 1 million for aggravated damages; that of ***Alnashir Visram vs. Standard Limited (2016) eKLR*** where Kshs. 18 million was awarded as general damages and Kshs. 8 million as aggravated damages and that of ***Nelson Havi vs. Headlink Publishers Limited (2018) eKLR*** where Kshs. 5 million was awarded as general damages and Kshs. 1 million as aggravated damages.

On the part of the defendants, they have urged the court to award Kshs. 500,000/- as general damages and Kshs. 100,000/= as exemplary damages to each of the plaintiffs.

They have relied on the case of ***Fred Oliver Omondi N'cruba Ojiambo vs. Standard Limited & 2 others (2004) eKLR*** where the court awarded Kshs. 1 million as general damages and that of ***Martha Karua vs. the Standard Limited & Another (2007)e KLR*** wherein the court awarded Kshs. 1,500,000/=.

In their proposition, the defendants relied on the case of ***CAM V. Royal Media Services*** where the court held;

> *"We agree with the observation of this court in **Nation Newspapers Limited vs. Daniel Musinga T/A Musinga & Co. Advocates** that while all people are equal before the law, injury suffered in the case of defamation is not the same for all persons and "the status of a particular person affects the extent of the injury suffered" . Having regard to the status of the appellant in that case relative to the status of the appellant in **Johnson Evans Gicheru & Andrew Morton**, the court concluded "the subjective effect of defamation on a Chief Justice cannot be reasonably equated to an advocate of whatever standing in the profession."*

This court wholly concurs with the above decision and finds that in the cases referred to by the plaintiffs, the status of those plaintiffs is different from those of the plaintiffs herein as at the material time of the publication.

The court has also noted that it is not the whole article that was defamatory but a portion of the same. In that regard, I find that general damages of kshs. 500,000/= is reasonable to compensate each of the plaintiffs for the damage to their reputation.

On aggravated damages, it is clear that the same are awarded where the court finds that there were aggravating factors. In the case of ***Francis Xavier Ole Kaparo vs. Standard Limited & 3 others (2010) e KLR*** the court held:

> *"The aggravated damages (distinguished from exemplary damages) are meant to compensate the plaintiff for the additional injury going beyond that which would have followed from the defamatory words or statements above, caused by the presence of the aggravating factors. The plaintiff, who behaves badly, as for example by provoking the defendant or defaming him in retaliation, will be viewed less favorably, a defendant who behaved well eg by properly apologizing, will be treated with favour. Damages will be aggravated by defendant's improper motive ie. where it is actuated by malice. Repetition of the libel; failure to contradict it; insistence of a flimsy defence of justification; and a non apologetic cross-examination are matters that will aggravate damages."*

The court has already found that there was malice on the part of the defendants in publishing the article as they did not bother to contact the plaintiffs to get their comments and establish the true set of facts. Further, they insisted on the defence of justification which they were not able to prove as they did not call any witnesses. In view of the aforegoing, I find that the plaintiffs are entitled to an award of aggravated damages. A sum of Kshs. 100,000/= is awarded to each of them.

The plaintiffs are also awarded the costs of the suit. General and aggravated damages shall attract interest from the date of this judgment until payment in full.

It is so ordered.

Dated, signed and delivered at NAIROBI this 5th day of March, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

……. for the Plaintiffs

……. for the Defendants