REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D.K. Kemei – J

CIVIL APPEAL NO. 123 OF 2016

ROYAL MEDIA SERVICES LIMITED.....APPELLANT

-VERSUS-

J.A MAKAU t/a

J.A. MAKAU & CO ADVOCATES.....RESPONDENT

(Being an appeal from the Judgement and decree of Hon. L. Mbugua (Chief Magistrate)

at Machakos Chief Magistrate's Court in Civil Case No. 470 of 2006 delivered on 18.5.2016)

BETWEEN

J.A MAKAU .

t/a J.A. MAKAU & CO ADVOCATES.....PLAINTIFF

-VERSUS-

ROYAL MEDIA SERVICES LIMITED.....DEFENDANT

JUDGEMENT

1. The respondent sued the appellant for recovery of aggravated general damages for defamation, interest and costs. The respondent at all material time was practicing in the name and style of M/S J.A. Makau & Co Advocates. His claim was that the appellant on several occasions namely 3.3.2006 from 6.50 am to 7.00 am and 8.50 pm to 9.00 pm, 4.3.2006 from 6.50 am to 7.00 am and 25.5.2006 from 6.50 am to 7.00 am and 8.50 pm to 9.00 pm through its agents and presenters made a false and malicious publication against the respondent emanating from an allegation by a claimant against the respondent who neither knew nor received any instruction or payment or acted for the said claimant. The allegations against the respondent was that he had represented one Dennis Keli in a case against Steel Structures Africa Limited and had been paid monies but however the same was not remitted to the claimant as some portion was alleged to have been retained by the Respondent to the detriment of the claimant Dennis Keli yet the respondent had never represented the claimant in any court of law in Kenya. The respondent contended that the publication was false and malicious and that his reputation as a prominent advocate in Machakos was injured and had been put into public ridicule as well as embarrassment and that he had suffered loss and damages.

2. In their defence, the appellant denied the claims and pleaded that the respondent consented to a discussion of his professional life by dint of Section 79 of the old constitution. It was averred by the appellant, in placing reliance on the case of **New York Times v Sullivan, 376 US 254** that they were at liberty to subject the plaintiff's conduct to scrutiny and that the public was entitled to know the information. It was pleaded in the alternative that the words uttered were true in substance; they consisted expression of opinion and were fair comment made in a matter if public interest. The appellant denied that the information in the broadcast was false or malicious and that the broadcast was conducted in the honest belief that they were true and were therefore broadcast on an occasion of qualified privilege. The appellant prayed that the suit be dismissed with costs.

3. The hearing of the suit in the trial court commenced in earnest before Hon F.N. Muchemi on 5.2.2009 with **James Aaron Makau** testifying as **Pw1.** It was his testimony that in 2006 he was practicing in Machakos in the name J.A. Makau & Co Advocates. He recounted how on the material dates, the appellant through a program known as "Wembe wa Citizen" conducted by brother and sister Wembe broadcasted a defamatory matter against him. Pw1 reiterated the exact words that were used and he testified that he understood the words to mean *inter alia* that he was a thief and had stolen his client's money. He testified that he received calls from clients and friends who

informed him what they had heard on radio; it was his testimony that the words were false and that he called the appellant and got no response hence swiftly filed the instant suit. Pw1 lamented how he closed his Kitengela office because clients could not give him work anymore and that at one point a client made a jest out of him as a result of the broadcast that was aired by the appellant. Pw1 testified told the court that the appellant ought to have verified the truth of the matter if they were to do investigative journalism and he urged the court to reject the respondent's defence. On cross-examination, he testified that he did not know of an Advocate called J.M. Makau of Mombasa; that the broadcast referred to J.A. Makau as he heard it. He also reminded the court in reexamination that the appellant in their defence had not talked of another Makau but insisted that it was the respondent.

4. The matter was part heard by Hon. Muchemi and the parties were agreeable that the hearing was to proceed from where it had reached. The testimony of Pw2, Pw3 and Pw4 was taken by Hon B.T. Jaden.

5. **Faith Katunga** testified as **Pw2**. She told the court that she heard the impugned broadcast that mentioned the name of the respondent and she understood it to mean that the respondent got money for the client and did not give to the client what was due to him; a priori that the respondent stole from the client. She told the court that she contacted Pw4 who confirmed hearing the same broadcast. On cross examination, she testified that she was not aware that there was a J.M. Makau & Co Advocates of Mombasa and she identified that letter from Dennis Keli that was addressed to the complaints commission against J.M. Makau & Co Advocates. She confirmed that the J.M. Makau was different from J.A. Makau, the respondent herein. On re-examination, she testified that the broadcast did not mention an advocate practicing in Mombasa.

6. **Pw3** was **Paul Muthoka Mbole**, who testified that he heard the impugned broadcast on the material day and that the respondent was adversely mentioned as the one who "ate" Dennis Keli's money.

7. **Pw4** was **Martin Mutiso Makau**, who testified that Pw2 informed him that she had heard a matter on the radio in regard to a client whom the firm of J.A. Makau & Co Advocates was said to have represented and illegally withheld sums of money due and payable to the client. He testified that he heard the broadcast that was about the respondent who was said to have wrongfully held money belonging to Dennis Keli in cases that he represented the said Dennis Keli. He told the court that he recorded the broadcast and produced the compact disks that were played and listened to by the court. On cross examination, he testified that he had the tape in respect of the broadcast on 25.5.2006 and which mentioned the respondent. He told the court that he did not know of an advocate going by the name J.M. Makau of Mombasa and that the letter dated 11.1.2006 referred to a complaint against J.M. Makau by Dennis Keli. The respondent closed his case and the appellant was given an opportunity to tender its defence evidence.

8. **Dw1** was **Patrick Kanyeki** who testified before Hon L. Mbugua. He told the court that in the broadcast, he referred to an advocate called J.M. Makau and not J.A. Makau. He stated that as per the transcript for the broadcast, the advocate referred to was J.M. Makau and that the advocate who filed the instant case was not the one who was broadcasted about. On cross examination, he testified that he never got a complaint from J.M. Makau and it was brought to his attention that the respondent was complaining.

9. **Dw2** was **Dennis Keli James** who testified that he lived in Mombasa and that his lawyer was J.M. Makau who handled his case where he was injured in a factory. He testified that there were cases that were filed in Mombasa and that he was not paid the amounts due to him and hence he reported the matter to the Complaints Commission. He told the court that he took documents to the media and that he did not know the respondent. On cross examination, he testified that he did not listen to the broadcast. The appellant closed its case.

10. In her judgement, the trial magistrate found that it was undisputed that there was a program "Wembe wa Citizen" that was produced by the appellant in Kiswahili language and that the content related to a complaint by Dennis Kelly against an advocate that was rerun and repeated. She found that the advocate mentioned in the broadcast was the respondent; that the pleadings of the appellant did not mention J.M. Makau advocate. She chose to disbelieve the CD that was crafted by Dw1 and found that there was no evidence to support the averment that the lawyer who was mentioned was J.M. Makau from Mombasa. It was her finding that on a balance of probabilities, a reasonable person would have understood that the reference was being made to J.A. Makau and not J.M. Makau. It was the court's conclusion that the respondent was defamed and depicted as a thief who misappropriated client's money. The court placed reliance on the case of **John Machira v Wangethi Mwangi & Nation Newspapers** , **HCCC 1709 of 1996** and awarded the respondent damages of Kshs 6.5m/-.

11. The appellant was dissatisfied with the decision and appealed to this court on the following eight grounds, namely;

a) The learned trial magistrate erred in law and fact in failing to consider the evidence and the submissions by the appellant and proceeding to hold that the appellant was liable to the respondent contrary to the evidence tendered.

b) The trial magistrate erred in law and fact in failing to consider the submissions by the appellant

c) The learned trial magistrate erred in law and fact in finding that the alleged defamatory statements referred to the respondent.

d) ***The learned trial magistrate erred in law and fact in finding that the appellant was malicious;***

e) ***The learned trial magistrate erred in law and fact in making an award for damages when the same was not specifically proved;***

f) ***The learned trial magistrate erred in law and fact in making an award of damages that was manifestly excessive;***

g) ***The learned magistrate erred in law and fact in finding that the respondent had discharged the burden of proving that the alleged defamatory statements were made by the 2nd appellant(sic);***

h) ***The learned magistrate erred in law and fact in assessing and awarding the Respondent damages of Kshs 6.5m/- together with***

***costs and interests in the circumstances*.**

12. The appellant prayed that the judgement of the trial court be set aside and substituted with an order dismissing the suit with costs.

13. The appeal was canvassed vide written submissions. Learned counsel for the appellant submitted that the clip of the broadcast was played in court, however there was no electronic certificate as required by Section 106B of the Evidence Act. Reliance was placed on the case of **William Odhiambo Oduol v I.E.B.C & 2 Others (2013) eKLR.** It was counsel's argument that lack of the certificate presented the lack of clarity of the person defamed and rendered the evidence inadmissible as the appellant was prejudiced by the lack of production of the certificate. Counsel took issue with the finding of the trial court yet the evidence on record spoke to the fact that the advocate J.M. Makau was practicing in Mombasa and that he had a client named Dennis Keli who instructed him; further that there was a dispute as to the payments due to Dennis Keli and as such the broadcast referred not to the respondent but to J.M. Makau. Counsel argued that the respondent was not the party who had the right to sue as he was not the one referred to in the broadcast.

14. According to counsel, truth is a defence to defamation and in this regard counsel submitted that the broadcast was true in so far as it related to J.M. Makau and further that no malice could be attributed to the broadcast.

15. On quantum, counsel placed reliance on the case of **Johnson Evans Gicheru v Andrew Morton & Another (2005) 2KLR** that cited the case of **JONES V POLLARD [1997] EMLR 233. 243** where a checklist of compensable factors in libel actions were enumerated as: -

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***.

16. Counsel submitted that the respondent would have been entitled to damages of Kshs 1m/- had he proved his case.

17. In response, learned counsel for the responded submitted on the issue of liability for defamation and quantum. On the issue of liability, counsel submitted that it was proved that the libel was published by the appellant; that the four witnesses proved that the defamatory words referred to the respondent; that the statements were false and defamatory of the respondent and that the publication was malicious. Learned counsel submitted that defence of truth/ justification, fair comment and qualified privilege was not available to the appellant. Reliance was placed on the case of **Phineas Nyagah v Gitobu Imanyara (2013) eKLR.**

18. According to counsel, the trial court was right to award the damages it did as the publication depicted the respondent as a thief and as such his image was lowered in the estimation of right thinking persons in society. Reliance was placed on the case of **Daniel Musinga t/a Musinga & Co. Advocates v Nation Newspapers Ltd (2005) eKLR.**

19. It is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see ***Peters v Sunday Post (1958) EA 424***). In a case of conflicting evidence, the appellate court has to make due allowance for the fact that it has neither seen nor heard the witnesses and that it must weigh the conflicting evidence and draw its own inference and conclusions (see ***Selle & Another v Associated Motor Boat (K) Ltd & Others [1965] EA 123***). This court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness. This court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he or she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence.

20. After considering the evidence presented before the trial court as well as the submissions I find that the issues for determination are whether the appellant was erroneously found liable for defamation and whether this court may interfere with the award of damages by the trial court.

21. The appellant has assailed the trial magistrate for having found that the respondent had been defamed by the appellant.

22. In ***Gatley on Libel and Slander*** **(9th edition) at p 7 para 1.5)** the learned authors state:

***"What is defamatory? There is no wholly satisfactory definition of a defamatory imputation. Three formulae have been particularly influential: (1) would the imputation tend to "lower the plaintiff in the estimation of right-thinking members of society generally?" (2) Would the imputation tend to cause others to shun or avoid the plaintiff? (3) Would the words tend to expose the plaintiff to "hatred, contempt and ridicule?" The question "what is defamatory?" relates to the nature of the statement made by the defendant; words may be defamatory even if they are believed by no one and even if they are true, though in the latter case they are not of course actionable*.**

23. A defamatory statement is one which imputes conduct or qualities tending to disparage or degrade any person, or to expose a person to contempt, ridicule or public hatred or to prejudice him or her in the way of his or her office, profession or trade. It is a statement which tends

to lower a person's reputation in the eyes of or the estimation of right thinking members of society generally or which tends to make them shun and avoid that person. The typical form of defamation is an attack upon the moral character of the plaintiff attributing to him or her any form of disgraceful conduct such as crime, dishonesty, untruthfulness, trickery, ingratitude or cruelty. The person defamed does not have to prove that the words actually had any of these effects on any particular people or the public in general, only that the statement could tend to have that effect on an ordinary, reasonable listener or reader. In **Odongkara v. Astles [1970] EA 377** and **J Kudwoli & another v Eureka Educational and Training Consultants & 2 others [1993] eKLR** it was observed that imputation of commission of a criminal offence or involvement in criminal activities is actionable per se without any need of proving damage on the part of the plaintiff.

24. Once a statement is capable of being interpreted as an assertion of fact, the question then will be whether it imputes any moral fault or defect of personal character. For professional aspects, it will be deemed so if it imputes lack of qualification, knowledge, skill, capacity, judgment or efficiency in the conduct of one's trade or business or professional activity. There are certain established rules to determine whether a statement is defamatory or not.

25. The first rule is that the whole of the statement complained of must be read and not only a part or parts of it. The second is that words are to be taken in the sense of their natural and ordinary meaning. The court must have regard to what the words would convey to the ordinary man. In **J Kudwoli & another v Eureka Educational and Training Consultants & 2 others [1993] eKLR** it was observed that the determination depends on answering the question; "would the words tend to lower the plaintiff in the estimation of right-thinking members of society?"

26. The defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinions or feelings of other persons. A typical form of defamation is an attack upon the moral character of the plaintiff attributing to him any form of disgraceful conduct, such as crime, dishonesty, untruthfulness, trickery, ingratitude or cruelty (see **Odongkara v. Astles [1970] EA 377**).

27. ***Gately on Slander and Libel*** **(supra)** 8th Edition at page 114 paragraph 115 states that; "where words complained of are defamatory in their natural and ordinary meaning, the plaintiff need prove nothing more than their publication. The onus will then lie on the defendant to prove from the circumstances in which the words were used, or from the manner of their publication, that the words would not be understood by reasonable men to convey the imputation suggested by the mere consideration of the words themselves."

28. It must be proved that the statement referred to the plaintiff. In **Onama v. Uganda Argus [1969] EA 92**, the Court of Appeal of Eastern Africa held in deciding the question of identity, the proper test is whether reasonable people who knew the plaintiff would be led to the conclusion that that the report referred to him. The question is not whether anyone *did* identify the plaintiff but whether persons who were acquainted with the plaintiff *could* identify him from the words used. In the instant case, the evidence of the respondent was to the effect that one of the respondent's client's jested him and Pw2 to Pw4's evidence was that they heard the words uttered in reference to the respondent and further that the same were uttered in a series of incidents. I am convinced that they were capable of being regarded as referring to the respondent; the evidence of the appellant was that there were complaints made as against a J.M. Makau in Mombasa. However, I find that the appellant was reckless as to the effect of the broadcast and as was clearly brought out in the evidence of the respondent, the words would lead reasonable people who knew respondent to the conclusion that they referred to him.

29. The words complained of were contained in the broadcast, read as implying that there was an advocate called Makau who swindled a client. The words complained of referred to Makau and to his position as an advocate.

30. The question that arises would not be whether anyone *did* identify the respondent as the person referred to but rather whether persons who were acquainted with the respondent *could* identify him from the words used, I hold the view that any reasonable person who knew the respondent would be led to the conclusion that the broadcast referred to him.

31. The respondent's gravamen was that the allegations made in the broadcast were defamatory of him in so far as they imputed that he was a thief, a swindler. Indeed I find that the words complained of in their natural and ordinary meaning are capable of bearing the meanings attributed to them.

32. Defamation does not take place until the words complained of are published. Publication occurs when information is negligently or intentionally communicated in any medium. To succeed, the respondent must prove that the appellant deliberately communicated the libelous material to a third party or that the appellant was at fault when he or she published the defamatory statement, i.e. that the appellant failed to do something he or she was required to do that resulted in the material being published to a third party. In the instant case, the appellant's evidence as well as the respondent's evidence speak to the fact that the broadcast was aired on various days. The respondent's witness played the clip that he had captured from the broadcast and which left no doubt that the person referred to was the respondent. Even though a certificate regarding the recording was not produced I find the same did not water down the respondent's evidence since the appellant did not deny broadcasting the matter and hence the need for a certificate would have been superfluous and unnecessary.

33. The appellant in their defence asserted the truthfulness of the statements broadcasted and in the oral testimony of Dw1, it was his case that the broadcast referred to another Makau who practiced in Mombasa. However, this was not pleaded in their defence. It is a settled principle of law of evidence that he who asserts must prove. The onus is on a party to prove a positive assertion and not a negative assertion. It therefore means that the burden of proof lies upon him or her who asserts the affirmative of an issue, and not upon him or her who denies, since from the nature of things he or she who denies a fact can hardly produce any proof (see *Section 107 of the Evidence Act).* The respondent did discharge that burden and the trial court correctly found the words complained of to be defamatory of the respondent. This court, as an appellate court would only consider the evidence that was properly admitted at trial and in this regard, the letters that spoke to a complaint against the Makau from Mombasa were not admitted in evidence. On the issue of the Electronic Evidence recorded, I find that the same was improperly admitted and that leaves the court with the oral evidence of the witnesses. This was what informed my finding that the respondent discharged his burden of proof. In any event the appellant in its evidence did not dispute the fact that it did broadcast the matter thus making it unnecessary for a certificate to be produced to back up the electronic evidence adduced by the respondent's witness.

34. The appellant in their defence pleaded the issue of qualified privilege. The appellant in their defence sought to rely on article 79 of the

old constitution and in order to avoid acting retrospectively, articles 33, 34 of the 2010 constitution guarantees freedom of speech and expression which include freedom of the press and other media. A person may succeed in a suit for defamation only if he or she proves on a balance of probabilities that the publication was made with "actual malice," as a compromise between the law of defamation and the Constitutional privilege. In this case, the case of **Phineas Nyagah v Gilbert Imanyara [2013] eKLR** is relevant where the court held:

> "***Malice here does not necessarily mean spite or ill will but recklessness itself may be evidence of malice. Evidence of malice maybe found in the publication itself if the language used is utterly beyond or disproportionate to the facts.***
>
> ***….malice may also be inferred from the relationship between the parties before or after the publication or in the conduct of the defendant in the course of the proceedings. Court should however be slow to draw the inference that a defendant was so far actuated by improper motives as to deprive him of the protection of privilege unless they are satisfied that he did not believe that what he said or wrote was true or that he was indifferent to its truth or falsely.***"

35. A privileged occasion is one where the person who makes a communication has an interest, or a duty, legal, social or moral, to make it to the person to whom it is made and the person to whom it is so made has a corresponding interest or duty to receive it. Malice in law, which is presumed in every false and defamatory statement, stands rebutted by a privileged occasion. In such cases, it is enough for the defendant to prove that he or she acted after a reasonable verification of the facts; it is not necessary for him to prove that what he or she has written is true. (see ***Adam v. Ward [1971] AC 309***).

36. Qualified privilege operates only to protect statements which are made without malice (i.e., spitefully, or with ill-will or recklessness as to whether it was true or false). The burden will shift to the respondent to show express malice on the part of the appellant (see ***Clark v. Molyneux (1877) 3 Q.B.D. 237***).

37. According to ***Gatley on Libel and Slander*** **(p 328 para 14.4)**, the main classes of statements which come under the defence of qualified privilege at common law are:-

> ***a) statements made in the discharge of a public or private duty;***
>
> ***b) statements made on a subject matter in which the defendant has a legitimate interest;***
>
> ***c) statements made by way of complaint about those with public authority or responsibility;***
>
> ***d) reports of parliamentary proceedings;***
>
> ***e) copies of or extracts from public registers;***
>
> ***f) Reports of judicial proceedings.***

38. In ***Reynolds v. Times Newspapers Ltd [2001] 2 AC 127, 205*** the court gave 10 illustrative factors to be considered when deciding whether defendants have established privilege; thus;

> ***a) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.***
>
> ***b) The nature of the information, and the extent to which the subject matter is a matter of public concern.***
>
> ***c) The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid.***
>
> ***d) The steps taken to verify the information.***
>
> ***e) The status of the information. The allegation may have already been the subject of an investigation which commands respect.***
>
> ***f) The urgency of the matter. News is often a perishable commodity.***
>
> ***g) Whether comment was sought from the plaintiff. An approach to the plaintiff will not always be necessary.***
>
> ***h) Whether the article contained the gist of the plaintiff's side of the story.***
>
> ***i) The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.***
>
> ***j) The circumstances of the publication, including the timing.***

39. It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation provided it is done in good faith. The person alleging in good faith must establish the fact that

before making any allegations he had made an inquiry and necessary reasons and facts given by him must indicate that he had acted with due care and attention and that he was satisfied about the truth of the allegation.

40. The appellant would be found to have made the statements with "express malice" if he acted with knowledge that the statement was false or with reckless disregard of whether it was false or not. Evidence of inadequate investigation would show intent to inflict harm through falsehood. Such evidence would suggest that, because of his bias, the defendant knowingly or recklessly avoided the truth by performing an inadequate investigation. Deliberate or reckless falsity is evidence of express malice. Malice is present if the acts were done in the knowledge that the statement is invalid and with knowledge that it would cause or be likely to cause injury. It also exists if the acts were done with reckless indifference or wilful blindness to that invalidity and that likely injury. **see Lopes C.J. in *Royal Aquarium and Summer and Winter Garden Society Ltd. v. Parkinson [1892] 1 Q.B. 431 at p.454***).

41. In **Daniel Muthee Ngeera v Nation Media Group Limited & another [2019] eKLR** the court observed that a defendant ought to consider whether his or her intended publication is defamatory before making it, otherwise such publication is made at the defendant's own peril

42. In the instant case, the appellant made the statements on a subject matter in which the documentation that it sought to rely upon were not admitted by the court. I see no evidence of any efforts on its part to verify the information that was relayed; nor efforts to make the public aware that the Makau of Mombasa was being referred to. From the evidence of Dw1, the appellant did not strike me as someone who was cautious, it is apparent that Dw1 was more interested in causing intrigue and cared less as to whether or not there would be persons negatively affected by their actions. I find that the broadcast was not published on an occasion of qualified privilege. In any case the appellant had the opportunity to retract the alleged defamatory words upon being served with a demand notice by the respondent but it did not do so. That was the perfect opportunity to cross check the facts regarding the true identity of the advocate who was alleged to have swindled a client and to offer an apology if any to the respondent in good time. I am satisfied that the appellant is liable in damages to the respondent and thus the finding on liability by the trial court was based on sound evidence. The respondent's case was proved on balance of probabilities against the appellant. I see no reason to disturb the said finding.

43. On the issue of quantum, an appellate court may not interfere with an award of damages except when it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the trial court proceeded on a wrong principle or that it misapprehended the evidence in some material respect, and so arrived at a figure, which was either inordinately high or low. An appellate court will not interfere with exercise of discretion unless there has been a failure to take into account a material consideration or taking into account an immaterial consideration or an error in principle was made (see **Kemfro Africa Limited t/a Meru Express Services, Gathogo Kanini v. A.M.M Lubia & Another (1982-88) 1 KAR 777**).

44. It is trite that a person's reputation has no actual value, and the sum of be awarded in damages is therefore at large and the court is free to form its own estimate of the harm taking into account all the circumstances (see ***Khasakhala v. Aurali and Others [1995-98]1 E.A. 112***).

45. General damages are to be determined and quantified, depending upon various factors and circumstances. Those factors are;

(i) ***the gravity of allegation,***

(ii) the size and influence of the circulation,

(iii) the effect of publication,

(iv) the extent and nature of claimant's reputation and

(v) the behaviour of defendant and plaintiff.

It is not enough to consider the social status of the defamed person alone in assessing award of damages. It is necessary to combine the status with the gravity of or the seriousness of the allegations made against the Plaintiff. Anyone who falsely accuses another of a heinous crime should be condemned heavily on damages. Once an ordinary person is defamed seriously and is shunned by the public then it does not matter whether he or she is of high or low status (see ***Kanabo Sarah v. Chief Editor Ngabo Newspaper and others (*1990–1994] 1 EA 149**).

46. In its assessment of general damages, the trial court made references to the above said principles and it came up with a sum. I see nothing to show the fact that there was a failure to take into account a material consideration or taking into account an immaterial consideration or an error in principle was made. In comparative terms, the award made in this suit is at a scale of cases in which defamatory material was published nationwide. For example, in **Musikari Kombo v Royal Media Services Limited [2018] eKLR,** the court of Appeal upheld an award of Kshs 6m/- that was awarded by the trial court and in **Ken Odondi & 2 others v James Okoth Omburah T/A Okoth Omburah & Company advocates [2013] eKLR** the Court of Appeal awarded Kshs 4,000,000 general damages and upheld exemplary damages of kshs 500,000 to an advocate of the High Court of Kenya. The circumstance obtaining in the cited authorities are similar to the respondent's case. The respondent was an advocate of the High Court of Kenya and whose reputation was his forte and which had been damaged as a result of the defamation. I find the award of Kshs 6.5 million as damages to be reasonable in the circumstances and I see no reason to interfere with the same.

47. The upshot of the foregoing is that the appellant's appeal lacks merit. The same is dismissed with costs to the respondent.

It is so ordered.

Dated and delivered at Machakos this 30th day of July, 2020.

D. K. Kemei

Judge