



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 100 OF 2013

JEREMIAH NG'AYU KIONI.....PLAINTIFF

-VERSUS-

THE STANDARD MEDIA GROUP LTD.....ST DEFENDANT

JUMA KWAYERA.....^{2ND} DEFENDANT

RADIO AFRICA GROUP.....^{3RD} DEFENDANT

MAINA KAGENI.....^{4TH} DEFENDANT

DANIEL NDAMBUKI.....^{5TH} DEFENDANT

ROYAL MEDIA SERVICES.....^{6TH} DEFENDANT

SWALEH MDOE.....^{7TH} DEFENDANT

MEDIA MAX NETWORK LIMITED.....^{8TH} DEFENDANT

FRED NJIRI.....^{9TH} DEFENDANT

ALPHONSE OLADIPO.....^{10TH} DEFENDANT

BUNI LIMITED.....^{11TH} DEFENDANT

NATION MEDIA GROUP.....^{12TH} DEFENDANT

MOSES NGURE.....^{13TH} DEFENDANT

JUDGMENT

The plaintiff herein moved this court by way of the plaint dated the 26th March, 2013 which was amended on the 5th April, 2013 in which, he has sued the defendants herein claiming general damages for defamation, an apology, and injunction restraining the defendants from further publishing or causing to be published the alleged defamatory articles about him.

In his amended plaint, the plaintiff who was the immediate former Member of Parliament for Ndaragwa Constituency at the material time, and a registered voter at Kanyagia Primary School in Ndaragwa Constituency in Central Province, was the running mate of Hon. Musalia Mudavadi in the Amani coalition party who was the presidential candidate in the 2013 general elections. He pleaded that the 1st defendant, on or about the 9th day of march, 2013 falsely and maliciously and without a justifiable cause printed and published on page 24 of the Saturday Standard Newspaper, an article concerning him and caused the same to be circulated via print and electronic media. The article, titled;

“Musalia Ponders his future after dismal showing” as set out in paragraph 18 of the plaint but the court will only set out herein

below the most relevant part.

Deputy Prime Minister Musalia Mudavadi and Eugene Wamalwa paid the price for failing to heed the will of voters in western Kenya. Western voters for the second time in ten years voted against “their own”. And as the two came to terms with dismal showing in the presidential poll in which Mudavadi was flag-bearer of the Amani Coalition that included United Democratic Front, Wamalwa’s New Ford-Kenya and Kanu, cracks are emerging about who between CORD and Jubilee to back. This is irrespective of whether there will be a run-off or not. While Mudavadi is said to be collating data from his stronghold in Western, Wamalwa is open to talks with Jubilee from which he fled in the countdown to the polls.

---His agony is amplified by failure to get a single vote at Ndururumo Primary School, the polling center in Ndaragwa Constituency where his running mate Jeremiah Kioni cast his ballot. The “anomaly” reinforces perceptions in Western that voting for Mudavadi was tantamount to voting for his rival Uhuru Kenyatta.

Mudavadi is coming under pressure from his Raila-friendly supporters who would rather put their eggs in CORD basket instead of Jubilee. The reservations run even deeper now after Kioni’s vote did not reflect in the tally at his polling station.

He averred that the same publication was printed in the first defendant’s cartoon pullout popularly known as “*madd madd*” world in the form of a caricature depiction of the plaintiff dressed in party colours and apparently casting his vote for the TNA presidential candidate.

He further pleaded that the 1st defendant being the publisher of Nairobi newspaper; in its publication dated 8th – 14th March, 2013, falsely and maliciously and without any justification published the article titled;

“**Did Musalia fail to see Kioni’s vote**” as follows:

“Mudavadi’s running mate Jeremiah Kioni either intentionally forgot to vote for his presidential candidate, or his vote was spoilt. Kioni voted at Ndururumo polling station where Musalia Mudavadi got zero votes. That means Kioni, his wife, his brothers and sister, and his extended family, none of them voted for Mudavadi. Even though betrayal in politics is not new, Kioni betrayal stinks- if his is not a case of spoilt vote. How could he have looked at Kenyans in the face, during his unveiling as Amani Coalition running mate and with a Straight face give a speech on how Mudavadi is best suited to run this country.... politics indeed, is a dirty game”.

The plaintiff further averred that the 3rd defendant being the publisher and proprietor of the Star Newspaper, on the 6th and 7th March, 2013 falsely and maliciously printed an article titled;

“**corridors of Power column**” about the plaintiff with the following words;

“Wonders will never cease. The UDF deputy presidential candidate Jeremiah Kioni cast his vote in Ndururumo Polling station in Ndaragwa. However, the results indicate that Kioni and by extension, the UDF presidential candidate Musalia Mudavadi did not get even one vote from the polling station! The 60 million dollar question doing the rounds is, does this mean Kioni did not even vote for himself and his presidential candidate? Unless of course the vote he cast was among those recorded as spoilt!”

We told you of UDF presidential running mate Jeremiah Kioni casting his vote at Ndururumo polling station in Ndaragwa and results showing the party’s presidential candidate not getting any vote there.

Well, something similar may have befallen the Alliance for Real Change’s Mohammed Abduba Dida. The former teacher cast his vote at Visha Oshwal Primary School in Nairobi’s Westlands in the company of his three wives. But when the results were announced, Dida had only two votes at that particular station.”

The plaintiff further contended that, on the morning of 6th March, 2013, the 3rd defendant through its affiliate radio Jambo station aired a show in which the callers questioned why the plaintiff refused to vote for Hon. Musalia and in which the hosts ridiculed the plaintiff. Further, the 3rd defendant on the 18th March, 2013 through its employees and servants, the 4th and 5th defendants through their radio station classic 105 ridiculed the plaintiff as follows;

“Musalia pia alichagua running mate----- eee Kioni.... na si alikiona..... mpaka hakuona kura kwa kioni.....”

On the part of the 6th and 7th defendants, it was alleged that while anchoring a news item on the 5th March, 2013, the 7th defendant being an agent of the 6th defendant, maliciously and falsely stated that the plaintiff had voted in Ndururumo where Hon. Musalia got zero votes.

About the 8th, 9th and 10th defendants, the plaintiff pleaded that on the 8th March, 2013 the 9th and 10th defendants being agents of the 8th defendant while hosting a talk show, maliciously and falsely alleged that the plaintiff failed, ignored and/or refused to cast vote for Hon. Musalia Mudavadi at Ndururumo where he had no votes.

The plaintiff asserted that the 11th defendant being the modular of XYZ, a political satire parody through its show, falsely and maliciously aired a parody of Hon. Musalia Mudavadi lamenting that the plaintiff failed and/or refused and/or deliberately ignored to cast a vote for him while the 12th defendant caused the 11th defendant’s offensive, false and malicious contents to be broadcast through its television station, to

the plaintiff's detriment.

About the 13th defendant the plaintiff alleged that being the registered owner of the Kenya Daily Post Published and caused to be posted on the internet, false, scandalous and misleading post titled;

“SHOCKING; MUSALIA MUDAVADI'S RUNNING MATE VOTES FOR UHURU KENYATTA” which stated as follows;

“Mudavadi's running mate, Jeremiah Kioni intentionally forgot to vote for his presidential candidate.

Ndururumo polling station where Musalia Mudavadi's running mate, Jeremiah Kioni cast his vote gives Mudavadi zero (0) as presidential votes while all votes cast go to Uhuru Kenyatta in the presidential slot.

This means that even Kioni did not vote for him....

Did he do this intentionally or all along he has been cheating Musalia Mudavadi?

The plaintiff set out the natural and ordinary meanings of the publications in paragraph 38 while their insinuation and innuendo were set out in parag 39 thereof.

He averred that by reasons of those publications and broadcasts, he has been injured in his reputation, social standing and character and has been brought to public scandal, ridicule, odium and contempt and that the defendants published or aired the said articles with a view to making profits from the sales of the newspapers and/or advertising space therein.

On their part, all the defendants save for the 9th and 13th defendants filed their defences denying the plaintiff's claim. The Plaintiff's case against the 9th defendant was withdrawn. The 13th defendant having failed to enter appearance, the plaintiff applied for and obtained interlocutory judgment against him.

In response, the plaintiff filed reply to 1st and 2nd, 3rd 4th, and 5th, 8th and 10th, 11th and 12th statements of defences in which he denied the contents of the defences and reiterated the contents of his amended plaint.

At the hearing, Albert Kamau Nguku testified as PW1. He is an employee of IPSOS limited in the media monitoring department. He stated that the plaintiff asked him to produce video footages for Radio Jambo, NTV, K24 and Classic 105 FM for 6th March, 2013, 10th March, 2013, 8th march, 2013 and 18th March, 2013 respectively.

On cross examination, it was his evidence that he is not the one who signed the certificate and that the same certificate did not indicate the particulars of the device used to produce the CD's.

The plaintiff testified as PW2. He stated that he is an advocate of the High Court of Kenya and the Member of parliament representing Ndaragwa Constituency where he is a registered voter at Kanyagia Polling Station. He sought to produce his list of documents filed on the 4th February, 2019 but the production of some of them were objected to, by counsels for the defendants and upon hearing the said objections the court disallowed the production of some of the items listed in that list. The court will comment about them later in this judgment.

It was his evidence that in the year 2013, the then deputy president, Hon. Musalia Mudavadi declared his intention to run for the office of presidency and picked him as his running mate under the United Democratic Forum Party (UDF).

That in that capacity he was required to take part in many rallies in the country and it also involved doing interviews in print media. He also took part in presidential debates that were televised nationally, culminating in the official nomination process at KICC by IEBC.

He stated that their party finished 3rd after Jubilee and ODM parties led by Hon. Uhuru Kenyatta and Raila Odinga respectively. That in 2017, he successfully run for the parliamentary seat for Ndaragwa Constituency and in his capacity as a Member of Parliament, he chairs the constitutional implementation oversight committee whose role is to ensure that the Constitution is implemented.

That on the 4th day of March, 2013, he voted at Kanyagia Polling Station in the company of his daughter. The said polling station is in Ndaragwa Constituency where he is registered as a voter polling station number 043, Constituency 093, Ndaragwa Constituency, within Nyandarua County. He produced a copy of his ID card, voters card and a confirmation letter from IEBC as exhibits. The letter confirmed that he was a voter in that polling station since 1992. He stated that he was covered live by the media houses as he voted.

He refuted claims that he voted at Ndururuma polling station stating that he does not know it; further stating that the little he knows about it, is that, it is in Laikipia County quite some distance from Kanyagia. He confirmed that he voted for himself and Hon. Musalia contrary to what was reported by the media houses and in the Newspapers.

It was his further evidence that on the 5th March, 2013, the occurrence of 4th march, 2013 was correctly reported in the Star Newspapers. That thereafter, he was alerted of allegations that were run by print and electronic media which stated that he did not vote for Hon. Musalia Mudavadi and that no votes were garnered at the polling station where he voted. That, according to the media, he voted at Ndururumo polling station which to him, was a deliberate distortion to ensure that Kenyans could not counter-check on the truthfulness of that statement. In his view, this was to help carry a narrative that being a kikuyu he could not vote for any other candidate but a Kikuyu. He produced the

article carried out in the 1st defendant's Newspaper of 9th March, 2013 as an exhibit.

He testified that in addition to the publication, the 1st defendant carried a caricature "**madd madd**" world showing him as part of team Musalia portraying him as marking a ballot for a ticket of Hon. Kenyatta depicting the same narrative which they had published.

He further referred to the publications by the Nairobiian in its weekly newspaper of 8th – 14th March, 2013 that was carrying a defamatory article of himself, and the one by the Star Newspapers dated the 6th March, 2013. He also made reference to the other defendants and the nature of the publication that he attributed to them, as set out in the plaint and elsewhere in this judgment.

He stated that he received calls from Hon. Musalia, friends and family members both here and outside the country, all of whom were wondering how that could happen and asking him if it was true. He asserted that there were many messages on tweeter that were hurting him and which continue to do so because they are still there. That he was forced to buy space in the Nation Newspaper who carried a statement on 11th March, 2013 in which he clarified the position.

He contended that the publications caused him and his family members a lot of suffering such that to get an engagement in 2013 and 2017 was difficult for him. That, even walking in the midst of people was difficult because they took him as a dishonest person and that as a result, his business in real estate was affected and even to get a position of the chair person in the parliamentary committee that he chairs was very difficult. That it was also difficult for him to capture the Ndaragwa Parliamentary seat in 2017 and being a church elder in the PCEA, his reputation was damaged by the publication.

Nderitu Mureithi gave evidence as PW2. He is the current Governor of Laikipia and he stated that he has known the plaintiff for the last 13 years. He stated that he worked with the plaintiff and together, they helped to form united democratic forum party (UDF). On 6th March, 2013 he was made aware of the allegations about the plaintiff that were circulating in the social media claiming that the plaintiff did not vote for his presidential candidate. He listened to the broadcast aired on citizen TV which was anchored by Swaleh Mdoe. He subsequently read it in the Standard Newspaper and other Newspapers that had reported that the plaintiff had voted at a different polling station and for a different presidential candidate.

According to him, the publications were not true as there is no polling station called Ndururumo in Ndaragwa Constituency. He talked to the plaintiff who was so distressed by the publications. He stated that reputation in politics, matters, and trust is very important and that allegations of mistrust goes to the heart of a good political leader.

George Omari Nyamweya who testified as PW3, is an advocate of the High Court of Kenya. He stated that he knew the plaintiff well, having served with him in Parliament in 2010 and having formed the United Democratic Forum together, towards the 2013 General Elections. That the plaintiff was the running mate of Hon. Musalia Mudavadi in 2013. He stated that he was shocked when he learnt that the defendants were alleging that the plaintiff had not even voted for his own presidential candidate and that he voted in a different polling station. He asked the plaintiff who confirmed to him that it was not true and that he voted at Kanyagia polling station where he was a registered voter and that there were other people also voted for Hon. Musalia. That the publication portrayed the plaintiff as a person lacking in integrity and who cannot be taken seriously.

Linet Loise Wairimu (PW4) stated that she was in the company of the plaintiff when he voted at Kanyagia polling station on 4th March, 2013. That after the voting, the plaintiff held media briefing and they went back to Nairobi. That she was surprised when she was called by her friends on the 5th March, 2013, who told her that there were reports that herself, and the plaintiff who is her father, had voted at Ndururumo polling station and that in that polling station Hon. Musalia had garnered "0" votes. They also told him that the plaintiff had not voted for Hon. Musalia and himself. That she heard Maina Kageni and King'ang'I ridicule the plaintiff in their morning show. She referred to a caricature in the Standard Newspaper dated 9th March, 2013 and the article in the Nairobiian dated 8th - 14th March, 2013 on the subject of the plaintiff and Hon. Musalia. She stated that the contents of the publications were not accurate and the same affected not only his father, (the plaintiff herein) but the whole family.

The first defendant called one witness namely Leonard Juma Kweyera who was a former employee of Standard Newspapers. He adopted his witness statement as his evidence-in-chief. In his shallow statement, he stated that he was engaged in covering General Election on 4th March, 2013 and was relying on the information that was relayed by IEBC at its tallying Centre at the Bomas of Kenya. He denied having published any false information concerning the plaintiff neither did he have any malice.

The other defendants did not call any witnesses in support of their respective cases.

At the close of the hearing, parties filed submissions together with list of authorities which I have duly considered alongside the evidence on record.

From the pleadings, the court identifies the following issues for determination.

1. Whether the publications by the defendants are defamatory of the plaintiff as alleged
2. Whether the publications were published by the defendants
3. Whether the publications were false and malicious.
4. Whether the defences raised by the defendants are available to them.

5. Whether the plaintiff suffered loss and damage and if so, whether he is entitled to the reliefs sought.

6. Who should bear the costs of the suit.

There is no doubt that the plaintiff's cause of action is based on the tort of defamation. In Kenya, the law on defamation is now well settled and is 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 the exercise of the right to 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 7th Edition of Salmond on the law of Torts, defamation is defined as follows;

“The wrong of defamation consists in the publication of a false and defamatory statement concerning another person without lawful justification”.

In the famous case of *Scott vs. Sampson (1882) QBD 491* at page 503, Dare J. defined the word as follows;

“A false statement about a man to his discredit”.

On the other hand, Halsbury's laws of England Vol. 28, 4th Edition at para. 10 page 7 the following definition is given;

“A defamatory statement is one that tends to lower a person in the estimation of right thinking members of the society or cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or to convey an imputation on him disparaging or injurious to him in his office, profession, calling trade or business.”

The law of defamation protects a person's reputation in 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. See the case of *Musikari Kombo vs. Royal Media Services Limited Civil Appeal No. 156/2017*.

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 *Halsbury's laws of England, 4th Edition*, the author opines that

“In deciding whether or not a statement is defamatory, the court must consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether under the circumstances in which words were published, a reasonable man to whom the publication was made would be likely to understand them in a defamatory sense.”

On the first issue, the plaintiff has complained of both libel and slander against the different defendants. The court has perused the articles published by the 1st and 2nd defendant in the standard Newspapers and Nairobian as produced by the plaintiff.

These articles have been set out elsewhere in this judgment. A perusal of the said articles reveal that the plaintiff's name is mentioned in the articles dated 9th March 2013 and also in the one dated 8th – 14th March, 2013. The same applies to the article dated 5th March, 2013 by the Star Newspapers. His name is mentioned in relation, to the 2013 General Elections and in his capacity as Hon. Musalia Mudavadi's running mate with the UDF political party. In the article of 9th March, 2013, it is stated that Hon. Musalia did not get a single vote at Ndururumo Primary School, the polling station where the plaintiff voted. Infact it is stated that the Plaintiff's vote did not reflect in the tally at his polling station.

In the article of 8th-14th March, 2013 the 1st and 2nd defendants allege that at Ndururumo Polling station where the plaintiff voted, Hon. Musalia Mudavadi got zero votes. They went on to state that, this meant that the plaintiff, his wife, brothers, sisters and his extended family did not vote for Hon. Mudavadi and added;

“Even though betrayal is not new, Kioni's betray stinks if this is not a case of spoilt vote”.

In the article published by the Star, they also stated that Hon. Musalia got zero votes at Ndururumo polling station where the plaintiff voted.

The plaintiff in his evidence and submissions has averred that the publications are defamatory of him.

From the record, there is ample evidence that on the 4th day of March, 2013, the plaintiff voted at Kanyagia polling station in Ndaragwa Constituency and not in any other polling station. That evidence was collaborated by the evidence of her daughter who accompanied him on the material. He produced evidence showing that he is a registered voter at Kanyagia Poling Station. Infact, his evidence is also confirmed by the Star Newspaper's article dated 5th day of March, 2013 as to the polling station where he voted on the material day. In his evidence he stated that there is no polling station called Ndururumo in Ndaragwa Constituency. This was also confirmed by PW3, who is the Governor of Laikipia.

I am persuaded by the plaintiff's submissions that the 1st, 2nd and 3rd defendants portrayed him as a person who is dishonest and untrustworthy, a tribal bigot and a betrayal to his presidential candidate, to his political party and as a person who is not dependable.

I find that the publications were defamatory of the plaintiff in the eyes of the right thinking members of the society.

On whether the publications were published by the defendants, the first, 2nd and 3rd defendants have not denied having published the articles in the Standard, Nairobi and the Star Newspapers. Infact DW1 admitted having published the articles complained of, by the plaintiff.

On whether the articles were false and malicious, it is noted that only the 1st and 2nd defendants called a witness in this matter. The other defendants did not testify but chose to argue their respective cases by way of submissions. In the case of *Daniel Toroitch Arap Moi vs. Mwangi Stephen & Another (2011) eKLR*, the court made it clear that submissions cannot take the place of evidence. The court stated that submissions are generally parties' "marketing Language", each side endeavouring to convince the court that its case is the better one. On this issue, the plaintiff was able to convince the court that he voted at Kanyagia polling station and not at Ndururumo polling station as the latter is not even in Ndaragwa Constituency anyway. The articles talked about Hon. Musalia garnering "0" votes in Ndururumo and not Kanyagia. This, therefore, means that the station that they reported about is not the station where the plaintiff voted on the 4th day of March, 2013. It follows that the contents of the articles were outrightly false.

On the issue of malice, the court in the case of *Phineas Nyaga vs. Gitobu Imanyara (2013) eKLR* stated;

"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 can be founded in the publication itself if the language used is utterly beyond the facts. The failure to inquire into the facts is a fact from which inference of malice may properly be drawn. Any evidence which shows that the defendant knows the statement was false or did not care whether it is true or false will be evidence of malice".

In this regard, DW1 in his evidence sated that he knew the plaintiff as a public figure and not at a personal level and he could not reach him to verify the facts. He is the one who wrote the articles in issue in respect to the 1st defendant. He admitted that he did not verify the facts before writing the articles. Though in his evidence he stated that he was not writing about Ndaragwa or Ndururumo but about Musalia's performance, he mentioned the plaintiff in a negative light and he was under duty to verify whether what he was writing about him was true.

In cross examination, he admitted that as a writer, he is supposed to give a fair, accurate and unbiased information. The only thing he could say was that, because the article was trending, he assumed it was correct but he also admitted that what is trending in the main media is not necessarily true. In my view, DW1 was reckless in publishing the article and what comes out from his evidence is that he did not care whether the contents of the article were true or not.

The court also notes that the language that he used in the article was not kind. I therefore find that there was malice on the part of the 1st and 2nd defendants and also on the 3rd defendant who did not even bother to defend the case. The third defendant having carried out the correct version of the events on the 5th March, 2013, at all material times, knew the truth but in their subsequent articles chose to ignore the truth.

On the defences mounted by the 1st, 2nd and 3rd defendants in their statement of defences, they alleged that they were reporting matters relating to the outcome of General Elections of 4th March, 2013 which are matters of considerable public interest; are privileged, stating that they had a moral or legal duty to publish the article to the public who had a moral duty to receive the information and therefore, there was no malice on their part.

They also averred that they have a constitutional right to freedom of expression that constitutes the reception and impartation of information to the general public.

Concerning the defence of public interest, in the case of *nation Media Group Limited & Another, vs. Alfred N. Mutua (2017) eKLR* the court stated:

"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 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 prejudiced he might be, and however exaggerated or obstinate his view."

The above legal position was also held by the court of appeal in the case of *Grace Wangui Ngenye vs. Chris Kirubi & Another (2015) eKLR*.

In the case herein, it fell upon the defendants to show that the publications were an accurate representation of the facts on which they were premised, but this was not done.

On the defence of qualified privilege, in *Gatley on Libel and slander 8th Edition*, the writer has this to say; qualified privilege should apply in the following cases;

- a. Statements made in the discharge of public duty.
- b. Statements made on a subject matter in which the defendant has a legitimate interest.
- c. Statements made by the defendant to obtain redress for a grievance.
- d. Reports of parliamentary proceedings.
- e. Extracts from or abstracts of parliamentary reports, papers votes or proceedings published by the authority of parliament.

In the case herein, the 1st, 2nd and 3rd defendants did not adduce any evidence in support of their defences that they had pleaded in their statement of defences.

On whether the plaintiff suffered loss and damage, it was his evidence that he suffered injury to his reputation. Going by his evidence, he stated that it was an uphill task for him to capture the parliamentary seat for Ndaragwa Constituency after the publication and that he used a lot of money to convince people to vote for him. The publication occasioned a lot of suffering to members of his family and to himself such that it became difficult for him to secure an engagement in the years 2013 because people considered him a dishonest man. That he lost opportunities because of lack of trust and his business in real estate suffered a setback.

DW2 who is a politician testified that in politics, reputation matters and also trust is important and that allegations like the ones leveled against the plaintiff could destroy his career in politics.

In view of the above, I find that the plaintiff suffered loss and damage and he is entitled to damages.

In the end, I find that the plaintiff has proved his case against the 1st and 2nd defendants on a balance of probability.

Though the 3rd defendant has in its defence denied being the publisher and proprietor of star newspaper, it admitted the contents of the publication excerpted at paragraphs 23 and 24 of the amended plaint. The contents therein were published by the star newspaper and the 3rd defendant cannot be heard to say that they did not publish that piece, yet they have admitted being publishers of the star. These two limbs of defence cannot go together for the same defendant unless there was evidence to show that the publication was not done with their knowledge. There was none. I therefore hold them liable.

The cases against the 4th, 5th, 6th, 7th, 8th, 10, 11th, 12 and 13th defendants were not proved. The plaintiff's case against them is hereby dismissed with no orders as to costs. The evidence against them was based on the audio's and the same were not produced in evidence following the ruling of the court delivered on the 3rd April, 2019 after they raised objections on their production.

On the issue of the demand letter, I concur with the counsel for the plaintiff that it really does not matter if the notice to sue or demand letter is served on the defendants when the defendants have vigorously and continuously defended themselves in a case.

See the case of *Goodharg vs. Hynett (1883) 25ch D182*. Also as the court stated in the case of *Stanley Kaunga Nkarichia vs. Meru Teachers college & another (2016) eKLR*,

“it has never been the law that a defendant should always have notice of intention to bring suit against him before action is filed:

Turning to damages, it is trite that award of damages is at the discretion of the court but the same should be used judiciously. It is also trite that no amount of damages can compensate a plaintiff for lost reputation. See the case of *vein vs. John Rairax & Sons property Limited 177 CLR 1115*.

The same position was taken by the court in the case of *Brigadier Arthur Ndong Owuor vs. The Standard Limited Nairobi Hcc. No. 511 of 2011/* that;

“Once a reputation is lost in my view, monetary damages might not be adequate compensation. Monetary damages might be a consolation yes, but they will never be an adequate compensation for a lost reputation. In the eyes of the public once a person's reputation has been damaged, it will remain in memory possibly throughout his life.

In awarding damages, the court draws considerable support in the guidelines in the case of *Jones vs. Poland (1997) EMLR* where a check list of compensatable factors in Libel action were enumerated as follows;

1. The objective features of the libel itself such as its gravity, its prominence, 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.

From his evidence and that of his witnesses, there is no doubt that the plaintiff is a person of good repute and has held positions in public service that requires integrity and without which, he could not have been found fit to hold. He is a member of parliament for Ndaragwa and it is not his first term.

In his submissions, his counsel did not address the court on the issue of quantum of damages. On the part of the 1st and 2nd defendants, the court was urged to award Kshs. 500,000 in general damages. On the part of the 3rd defendant, a nominal figure of Kshs. 100,000 was suggested

Considering all the circumstances of the case and the plaintiff’s station in life and the circulation of medium in which the defamatory articles were published, I am of the considered view that Kshs. 5,000,000 is reasonable to compensate him. In this regard, I draw guidance from the case of *Miguna Miguna vs. The Standard Group & 4 others (Civil case Number 196 of 2013)* where the court had assessed damages at kshs. 5 million and the case of *Nation Media Group & 2 others vs. Joseph Kamotho & 3 others*.

The plaintiff also prayed for aggravated and exemplary damages. In the case of *Stephen Thuo Muchina vs. Wainaina Kiganya & 2 others (2012) eKLR* the court had this to say about both heads of damages;

“Exemplary damages are awarded where compensatory damages are not sufficient and when the plaintiff proves that the defendant when he made the publication knew that he was committing a tort or was reckless-----

On the other hand, aggravated damages, are meant to compensate the plaintiff for the additional injury going beyond that which would have flowed from the words complained of-----

On exemplary damages, the court notes that the 1st and 2nd defendants made further publications between 8th – 14th March, 2013. This was after the plaintiff had paid for and his statement was published in the Daily Nation on the 11th March, 2013 in which he clarified the correct position. In my view, that was impunity on their part and the same is a good ground on which the plaintiff should be awarded exemplary damages. A sum of Kshs. 1,000,000/= is hereby awarded to the plaintiff as exemplary damages but against the 1st and 2nd defendants.

As for the 3rd defendant, in their first article they reported the correct facts but in the subsequent one, the reporting was altered to reflect incorrect information. On that account, I also find them liable to the plaintiff for exemplary damages for a similar sum of kshs. 1,000,000/=.

Finally, the defendants are ordered to publish an apology with the prominence with which the defamatory articles were made. The same to be done within 30 days from the date of this judgment.

In the end, the court enters judgment for the plaintiff against the 1st and 2nd defendants for Kshs. 3,500,000/= and against the 3rd defendant for a similar amount of Kshs. 3,500,000/=

The plaintiff shall also get the costs of the suit from the 1st, 2nd and 3rd defendants.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 29th day of October, 2020.

.....

L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the Defendants.