



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 136 OF 2006

HEZEKIAH WANG'OMBE GICHOHI.....PLAINTIFF

VERSUS

PETER NDAA.....DEFENDANT

JUDGMENT

The Plaintiff herein has moved this Honourable Court by way of a plaint dated the 13th February, 2006 and filed in court on the 14th February 2006 seeking general and exemplary damages, costs of the suit and interest at court rates.

It is pleaded that the plaintiff and the defendant were at all material times relevant to this case, co-joint Receiver and Manager of Grand Regency Hotel situated in Nairobi. The plaintiff avers that on or about the 4th day of October 2004, the defendant falsely and maliciously wrote and published or caused to be written and published of and concerning the plaintiff of him and his occupation, to the Manager of Co-operative Bank of Kenya and to 12 other parties, the following words in a printed letter;

“Please take note that the said Mr. Gichohi has not only made a fraudulent misrepresentation of the existence of a court order which he did not attach to the letter under reference but has gone ahead and forged my signature on page (2) of the said letter to give credence to his criminal and fraudulent acts.”

It is further pleaded that in a subsequent memorandum dated 4th October 2005 addressed to the plaintiff and copied to the acting General Manager and all the Heads of Departments at the Grand Regency Hotel, the defendant blatantly caused to be written words that were defamatory of the plaintiff. The said memorandum read;

“Following your forgery of my signature on 2nd October 2004, the bank accepted middle position in which both receivers and a manager signed the cheques. The existence of the third signature not only ensured authenticity of cheques issued, but also ensured integrity and transparency of the respective transactions. The bank accounts have since operated well till early April 2005 when you cancelled Mr. Kagambi’s signature on cheques without consulting me. This is surprising since any person with noble intentions would wish to maintain integrity and transparency especially in light of the pending investigations re fraud.....”

The plaintiff averred that the said words in their material and ordinary meaning meant and were understood to mean that:

- (I) The plaintiff is a fraudulent character capable of forging signatures
- (II) The Plaintiff is a criminal who has been involved in a number of illegal acts.

Further or in the alternative, the said words meant and were understood to mean that;

- (I) The plaintiff is a liar and is untrustworthy.
- (II) The plaintiff has no respect for the law and the High Court in general.

That by reason of the above, the plaintiff has been greatly injured in his credit, character, reputation and in his occupation and profession and has been brought into hatred, ridicule, contempt and has thus suffered damage. He has prayed for judgment against the defendant.

The defendant filed his statement of defence on 24th March 2006. He denied ever publishing the words complained of in the plaint but without prejudice to that, he avers that, even if he ever published the alleged words, the same are not defamatory of the plaintiff and could not be understood to bear any meaning defamatory of the plaintiff as alleged.

Further and in the alternative the defendant averred that, even if he published the alleged words, the same were published on an occasion of qualified privileged communication, the particulars of which he has set out in paragraph 5 of the defence. He denies that the plaintiff had been seriously injured in his credit, character and that his reputation has been disparaged in his occupation and profession. He also denied that the plaintiff has suffered damage as alleged in the plaint. He asked the court to dismiss the suit with costs.

When the matter came up for hearing on the 10th April 2018, the plaintiff testified as the only witness in support of his case. He applied to have his witness statement adopted as his evidence in chief. It was his evidence that he is an accountant by profession and he has practiced as such for the past 36 years. He told the court that he was appointed a Receiver and Manager of Grand Regency Hotel (as it then was), together with the defendant herein. This appointment was effected via a consent to replace the court appointed Receiver and Manager one Mr. Gitari T. which consent was filed in High Court Case Number 111/2002 on the 7th day of June 2004.

That their powers and duties as per the consent aforesaid included *inter alia*, “to jointly take such steps in the management and administration of the Grand Regency Hotel and its affairs and business operations as may be deemed proper by the joint Receiver/Managers”.

He averred that in the course of time, the defendant was replaced as a joint Receiver Manager vide a further consent dated 3rd September 2004 which was filed in court on 20th September 2004 but he (the plaintiff) was to remain a Receiver and a Manager. That as a result of the aforesaid change he wrote a letter dated the 2nd October, 2004 to the Co-operative Bank of Kenya to inform them of the changes effected by the said consent and he also attached a past schedule of accounts held by Grand Regency which schedule had been signed previously by both the defendant and himself.

That shortly thereafter, on the 4th October, 2004 the defendant issued a torrent of letters to the same Bank, to the plaintiff and the management staff of Grand Regency Hotel making allegations that the plaintiff had acted fraudulently in informing the Bank officials that he was no longer a joint Receiver and Manager. He stated that the defendant through these disparaging letters purported that he had not only made up the consent dated 20th September 2004 but had also gone ahead to forge his signature in his letter to the Bank which letters were copied to various Advocates who were dealing with the suit from which, their appointment as joint receiver and managers emanated.

He averred that the defendant made accusations against him in the said letters and memos. He stated that the defendant had no basis for maligning his good name in the manner that he did and maintained that his letter was in furtherance of his duties as appointed Receiver and Manager and did not warrant such callous mud-slinging from the defendant. The plaintiff stated that the letters dealt him a great emotional blow from the unfounded remarks and so was his reputation and everybody who got to know about the letters held him out as a criminal and a liar and had to keep explaining what transpired.

The defendant gave evidence as DW1 and as the only witness in support of his case. He adopted his witness statement as his evidence in chief. It was his evidence that the plaintiff and himself were appointed as joint Receiver and Managers of the former Grand Regency Hotel by a consent dated the 31st May 2004 filed in HCCC No. 111 of 2003. That they both wrote a letter dated 8th July 2004 addressed to the Manager, Co-operative Bank of Kenya Limited, informing the Bank about the changes to the signatures for the accounts of Grand Regency Hotel as held with the Bank.

He averred that he later came to find out that the plaintiff had written a letter to the Manager, Co-operative Bank dated the 2nd October, 2004 purporting that there was a consent order filed in the High Court on the 20th September, 2004. In the said letter the plaintiff had stated that pursuant to the alleged consent order, the defendant had ceased to be a joint Receiver and Manager with the plaintiff and that he had been replaced by one Matthew Mungai Njuguna and consequently, he ceased to be a signatory to all of the bank accounts of Grand Regency Hotel and that the bank could only honour all the cheques signed by him upto 1st October, 2004.

He stated that the consent dated 3rd September 2004 whose effect was to remove him as a receiver manager was never adopted as an order of the court and as such, there is no such order as alleged by the plaintiff that was entered on 20th September 2004. That upon finding about the contents of the letter dated 2nd October, 2004 he wrote a letter dated 4th October, 2004 to the Manager, Co-operative Bank informing him that there was no consent order dated 20th September 2004 issued by the High Court. That he also brought it to the attention of the Bank manager that the plaintiff had not only made a fraudulent misrepresentation of the existence of the said court order, but he had also forged his signature on page 2 of his letter dated the 2nd October 2004. He stated that the words published in the letter dated 4th October, 2004 to the Bank were published on an occasion of qualified privileged communication and the same are not defamatory and could not be understood to bear any meaning defamatory of the plaintiff. That it was his duty as a Receiver and Manager to inform the Bank that he was not aware of any change of signatories as had been alleged by the plaintiff and stating the reasons for his concern. The words in the said letter were written under a sense of duty without malice but in the honest belief that the statements made therein were true. That as per the consent dated 31st May 2004, the plaintiff and himself were to act jointly but on a number of occasions, the plaintiff acted solely, which was contrary to the terms of the consent. He urged the court to dismiss the plaintiff's case with costs to him.

At the end of the hearing, Counsels put in written submissions which they later highlighted orally in court.

The court has considered the pleadings, the evidence on record, the submissions together with the authorities cited. In my view, the following are the issues for determination by this Honourable Court:

- (1) whether the publication by way of a letter dated 4th October 2004 and the memo dated 4th October 2005 by the defendant were false and malicious.
- (2) whether the publications aforesaid were defamatory of the plaintiff.

(3) whether or not the aforesaid letter and memo were published on an occasion of qualified privileged communication and in the honest belief that the statements therein were true.

(4) whether the plaintiff is entitled to damages if so the quantum thereof.

(5) who is liable to pay costs of the suit.

It is trite that in a claim for defamation, the plaintiff must establish that; the publication complained of was published; it was published by the defendant, the words must refer to the plaintiff, the words must be communicated to a third party and that the publication was defamatory, malicious and false. This was the holding by the Court of Appeal in the case of **Wycliffe A. Swanya Vs. Toyota East Africa Limited & Another (2009) eKLR** in which the court stated;

“For the purpose of deciding a case of defamation, the court is called upon to decide the essentials of the facts generally and to see whether these essentials have been established and proved”. It is common ground that in a suit founded on defamation the plaintiff must prove;

(I) The matter of which the Plaintiff complains is defamatory in character.

(II) That the defamatory statement or utterance was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.

(III) That it was published maliciously.

This was also articulated in the famous work by Gately on libel and Slander 11th Edition at page 211 thus:

“To succeed in an action of defamation the claimant must not only prove that the defendant published the words and that they are defamatory; he must also identify himself as the person defamed. No writing whatsoever is to be esteemed a libel unless it reflects upon some particular person. It is an essential element of the cause of action for defamation that the words complained of should be published of the plaintiff. There is no cause of action, for instance, if words are defamatory of the claimant’s relatives, unless they reflect on the claimant.”

As submitted by the parties, the case herein revolves around some communication by way of a letter dated 4th October 2004 and a memo dated 4th October 2005 that were done by the defendant and which was a reaction to an earlier letter dated 2nd October, 2004 by the plaintiff to the Manager, Co-operative Bank Limited. Both of those communications were produced as exhibits in this case. The subject in the letter dated 2nd October, 2004 (exhibit 3) was “changes to our Bank signatories”. The said letter referred to a consent order dated 3rd September 2004 and filed in the High Court on 20th September 2004. In the said letter, the plaintiff was drawing the attention of the Manager, Co-operative Bank of Kenya, Kimathi Street to the fact that Mr. Peter Ndaa, the defendant herein had ceased to be a joint receiver and manager and that he had been replaced by Mr. Mathew Mungai Njuguna. The letter further stated that as a result, the signature of the defendant cannot operate any of the Bank accounts but for the smooth running of the accounts the manager may honour all cheques signed by the defendant upto the 1st October, 2004. A list of all bank accounts was enclosed for ease of reference. The plaintiff concluded by stating that he shall advise the Bank as necessary of new bank signatories after holding the first meeting with his co-receiver and manager. The full contents of the said letter are set out herein below verbatim:

“We have received a consent order dated 3rd September, 2004 and filed in the High Court on 20th September, 2004. The said consent is herewith enclosed for your ease of reference.

We draw your attention to the fact that Mr. Peter Ndaa has ceased to be my Joint Receiver and Manager and he has been replaced by Mr. Matthew Mungai Njuguna. As a result the signature of Mr. Peter Ndaa cannot operate any of our bank accounts but for the smooth running of the accounts, you may honour all cheques signed by him upto 1st October, 2004.

A list of our bank accounts is herewith enclosed, again, for your ease of reference.

We shall advise you as necessary of new bank signatories after holding our first meeting with my Co-Receiver and Manager.”

In reaction to the said letter the defendant in turn wrote a letter dated 4th October, 2004 to the same Bank Manager, Co-operative Bank of Kenya, Kimathi Street the reference, being

“Fraudulent instructions and forged signature with regard to the change of Bank signatories for the Grand Regency Hotel”

In the said letter he acknowledged receipt of a fax copy of the purported notice of change of Bank signatories of the Grand Regency Hotel wherein he is a court appointed joint-receiver and manager. He sought to bring to the attention of the Manager that there is no consent dated 20th September 2004 issued by the High Court in terms of fraudulent and misleading contents of the letter dated the 2nd October 2004 by the plaintiff. He asked the Bank Manager to take note that the plaintiff has not only made a fraudulent misrepresentation of the existence of a court order, but he had also gone ahead and forged his signature on page 2 of the said letter to give credence to his criminal and fraudulent acts. He further stated that this conduct was communicated to the court and his lawyer including the Kenya Anti Corruption Commission way before the filing of the fraudulent and forged consent letter. The letter further stated that he took the plaintiff’s conduct as one that

warrants immediate investigations, by the Banking Fraud Investigation Unit and he has taken steps to that effect. He asked the Bank to note that neither the plaintiff nor himself can instruct the bank on change of Bank signatories without an order of the High Court to that effect; and that as he believed the plaintiff is on a fraudulent mission, he cautioned the Bank from then hence against honouring any cheque or bank transaction that is not signed or endorsed by both of them jointly. The letter further read; the manager may, if he wished, disregard any instructions from either the plaintiff or the defendant that is not jointly signed until the manager obtain further directions from the High Court. The full content of the letter are set out herein below;

“Fraudulent instructions and forged signature with regard to change of Bank signatories for Grand Regency Hotel the contents of the same as hereunder.

“I have received a fax copy of a purported notice of Change of Bank signatories of the Grand Regency wherein I am a court appointed joint-receiver and manager.

I wish to bring to your attention that there is no consent order dated 20 September 2004 issued by the High Court in terms of the fraudulent and misleading contents of the letter addressed to yourself by Mr. H.W. Gichohi, dated 02 October 2004. Please take note that the said Mr. Gichohi has not only made a fraudulent misrepresentation of the existence of a court order which he did not attach to the letter under reference but has gone ahead and forged my signature on page (2) of the said letter to give credence to his criminal and fraudulent acts. This conduct was communicated to the court and his lawyer including the Kenya Anti Corruption Commission way before the filing of the fraudulent and forged consent letter. I attach herewith the lawyers’ correspondence to the court and all parties involved to this effect for your ease of reference.

I take Mr. Gichohi’s criminal conduct as one that warrants immediate investigations by the Banking Fraud Investigation unit and I have taken steps to this effect.

Please note that neither Mr. Gichohi nor myself as joint receivers can instruct yourselves on change of bank signatories without an order from the High Court duly sealed with the Seal of the High Court to that effect. As I believed Mr. Gichohi is on a fraudulent mission, I wish to caution you from today onwards against honouring any cheque or bank transaction that is not signed or endorsed by both myself and Mr. Gichohi jointly. You may, if you wish, disregard any instructions from either Mr. Gichohi or myself that is not jointly signed until you obtain further directions from the High Court”

One year after the letter dated 4th October, 2004, the defendant wrote a memo dated the 4th October 2005 titled;

“Bank signatory mandates”

The letter was written to the plaintiff and he made reference to a memo dated the 27th September 2005 in which he informs him that the memo is misleading as the bank has no *locus standi* in setting or determining what signing mandates should be. He informs him that the responsibility of deciding who should be a signatory is a management matter that must be resolved between the receivers

The relevant part of the memo reads as follows;

Following your forgery of my signature on 2nd October, 2004 the Bank accepted a middle position in which both receivers and a manager signed the cheques. The existence of a third signature not only ensured authenticity of cheques issued, but also ensured integrity and transparency of the respective transactions..... The bank accounts have since operated well till early April 2005 when you cancelled Mr. Kagambi’s signature on cheques without consulting me. This is surprising since any person with noble intention would wish to maintain integrity and transparency especially in the light of the pending investigation on defraud. I have, however, filed a complaint with the anti-corruption commission to investigate the manner in which these investigations has been handled.....”

This memo was copied to the Acting General Manager and Heads of Departments.

The defendant also wrote several other memos and copied them to other parties but which this court shall not concern itself with, because the plaintiff has not complained about them.

The other important communication is the letter dated 4th October 2004 by the plaintiff to the Manager, Co-operative Bank and copied to the parties to whom the letter of 4th October, 2004 by the defendant was copied to. The letter is titled;

“claimed fraudulent instructions and forged signature”

in which he acknowledged receipt of a letter written by the defendant making a number of complaints and allegations and he sought to clarify the position.

In the letter he states that he has no problem working with the defendant and explained that he arrived in Nairobi at about 10.00a.m. and found a consent letter and the rest of the correspondences from various lawyers. He telephoned the bank and briefed their operations officer about the changes and the circumstances under which he sent the letter dated 2nd October 2004 to which he had attached list of bank accounts.

In the plaint, the plaintiff avers that the letter dated 4th October 2004 and the memo dated 4th October 2005 are defamatory. The court has perused the two documents the contents of which have been reproduced herein above.

The question that the court will have to decide is whether the two letters can be said to be defamatory of him and whether they are false and malicious.

From the onset, it is not denied that the letters were published by the defendant and they refer to the plaintiff. Infact, the letter dated 4th October 2004 was copied to him while the one dated 4th October 2005 was addressed to him. The defendant herein wrote the two letters. The letter dated 4th October, 2004 refers to a fax copy of a purported notice of change of bank signatories of Grand Regency. Though he did not give the court the date of the letter he was referring to, the evidence on record is that he was referring to the letter dated 2nd October 2004 by the plaintiff in which, the plaintiff had informed the Bank that the defendant had ceased to be a joint Receiver Manager and that he had been replaced by one Mathew Muigai Njuguna.

As to whether the words were false and/or maliciously published, it is trite law that the burden of proving the truth of the publication lies with the defendant. The law presumes that the publication is false until the contrary is proved. In the letter dated 4th October 2004, the defendant has accused the plaintiff of making a fraudulent misrepresentation of the existence of a court order and forgery of his signature on page 2 of the said letter so as to give credence of his criminal and fraudulent acts. He further states that he takes the plaintiff's criminal conduct as one that warrants immediate investigation by the Banking Fraud Investigation Unit and he has taken steps to this effect.

In the defendant's letter of 4th October, 2005 he alludes to forgery by the plaintiff of his signature on the letter dated 2nd October, 2004 and refers to pending investigations by the Banking Fraud Unit. He also allude to the fact that the plaintiff did not have noble intentions and he failed to maintain integrity and transparency for having cancelled Mr. Kagambi's signature on cheques, without consulting him.

The defendant has relied on the defence of qualified privilege. He contended that he was under duty to write to the Bank Manager informing him that he was not aware of any change of signatures contrary to what the plaintiff had indicated in the letter dated the 2nd October, 2004. That the words were written under a sense of duty without malice towards the plaintiff and in honest belief that the statements made therein were true. The defendant also avers that he had an interest and/or a legal, moral or social duty to the person to whom it was made and that the person to whom it was made had a corresponding interest and duty to receive it.

To enable the court address the issue of qualified privilege it is important for the court to consider the essentials of that defence.

The essentials of the defence were set out by the court in the case of **Joseph Njogu Kamunge Vs. Charles Muriuki Gacharia (2016) eKLR** where the court held:

“The person making a statement has a duty to do so and that the person who bears or reads the statement has a corresponding interest in doing so”

In the case of **KL Vs. Standard Limited (2014) eKLR** Justice Odunga had this to say about the defence of qualified privilege;

“Qualified privilege though it also protects the maker of an untrue defamatory statement, it does so only if the maker of the statement acted honestly and without malice. If the plaintiff can prove “express malice” the privilege is displaced and he may recover damages; but it is for him to prove malice once the privilege has been made out and not for the defendant to disprove it”

The court in the case of **Musikari Kombo Vs. Royal Media Services HCCC No.89 of 2011** stated the law with regard to qualified privilege as follows;

“Qualified privilege can be rebutted by proof of express malice, and malice in this connection may mean either lack of belief in the truth of the statement or use of the privileged occasion for an improper purpose. Lack of belief in the truth of the statement is generally conclusive as to malice, except in cases where a person is under a duty to pass on defamatory reports by some other person.

Mere carelessness, however, or even honest belief produced by irrational prejudices, does not amount to malice. But an honest belief will not protect the defendant if he uses the privileged occasion for some other purposes other than that for which the privilege is accorded by the law; if his dominant motive is spite or if he acts for some private advantage he will be liable. Existence of malice can be evinced by language; if the language used is utterly beyond or disproportionate to the facts. However, it does not follow that merely because the words are excessive malice won't be inferred, it can also appear from the relations between the parties before or after publication or from the conduct of the defendant in the course of the proceedings themselves, as, for example insisting on the defence of justification while nevertheless making no attempt to prove it. However, mere pleading of justification is not itself evidence of malice even though the plea ultimately fails. It may be deduced from the mode of publication where the dissemination of the statement is wide than necessary. When a defamatory communication is made by several persons on an occasion of qualified privilege only those against whom express malice is actually proved are liable”

The plaintiff's letter dated 2nd October, 2004 refers to a consent dated 3rd September, 2004. The defendant has accused the plaintiff of making a fraudulent misrepresentation of the existence of a court order. In the plaintiff's letter dated 4th October, 2004 he states that he arrived in Nairobi at about 10a.m. and found the consent letter and the rest of the correspondences from various lawyers. He telephoned the

bank and briefed their operations officer about the changes. He informed him that he would forward the letter on changes in the bank signatories and as they were closing he allowed him to send it before 11.30a.m. Due to the time constraints he asked his secretary to photocopy the list of bank accounts which was typed as part of the letter to the bank. The list and his letter had no relationship at all and his list did not even need his signature or any other signature at all.

Both the plaintiff and the defendant do not deny the existence of the consent dated the 3rd day of September 2004. The consent was filed in court on 20th September 2004 and it's duly stamped. One of the terms of that consent is that the defendant ceases to be the Receiver/Manager of the Grand Regency Hotel with effect from the end of the day Tuesday 31st August, 2004. The consent was filed in a case involving the Grand Regency Hotel, Kenya Anti-Corruption Commission and other parties. The court has perused the said consent. The defendant contends that there was no consent order issued by the High Court dated 20th September 2004 and therefore, by the plaintiff referring to a consent order dated 3rd September 2004 he made a fraudulent misrepresentation.

The plaintiff in his letter dated 4th October, 2004 stated that a copy of the consent was availed to him by his Advocate. The same was duly signed and filed in court. In my view, anybody looking at that consent, would have every reason to believe that it was a valid consent and indeed it is, only that it was not adopted as a court order. A "lay man" would not know the difference between the consent as filed and an extracted court order. There is no evidence to suggest that the plaintiff is a lawyer or he is endowed with some legal knowledge so as to know the difference between a consent and a court order. The consent was availed to him by his lawyers and he acted on it. For the defendant to have used the language that he did in his letter dated 4th October, 2004, it is my considered view that there was malice on his part. As the court rightly stated in the case of **Phineas Nyagah Vs. Gitabu Imanyara (2013) eKLR**

“Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice.....malice may also be inferred from the relations between the parties.....”

Existence of malice can also be inferred from the relations between the parties before or after publication. See the case of **Musikari Kombo (supra)**. The tone used in correspondences reveals that there was bad blood between the plaintiff and the defendant. The plaintiff's letter dated 2nd October, 2004 did not merit the tone and the aspersions cast on him in the defendant's letter dated the 4th October 2004 and 4th October, 2005. A reading of the letter dated 4th October, 2004 reveals malice on part of the defendant which essentially rebuts the defence of qualified privilege. This court refuses to be persuaded by the defendant's assertion that the letters were published on an occasion of a qualified communication. The allegations made in the two letters are serious and are criminal in nature and upto the conclusion of the trial, there was no evidence tendered to the court to prove the allegations. Though the court was told that the allegations were being investigated by the police at the instance of the defendant, the results of those investigations were not divulged to this court and therefore the same remain allegations to date. This court therefore finds that the contents of the two letters were defamatory and the defendant published them maliciously.

The letter dated 4th October, 2004 was addressed to the Bank Manager and copied to 12 people including the Governor, Central Bank of Kenya and the Director, Kenya Anti-Corruption Commission while that of 4th October 2005 was copied to the Acting General Manager and Heads of Departments. This means that the letters were published to 3rd parties and this according to the evidence by the defendant caused injury to his reputation and his estimation among his professional peers was lowered.

The defendant has argued that the plaintiff did not prove that the letter to the bank lowered him in the estimation of right thinking members of the society.

In this regard, the plaintiff gave his credentials as an accountant by profession and has practiced as such for 36 years as at that time. He is a fellow of Association of Certified Chartered Accountants, FCPAK (Fellow of Certified Public Accountant of Kenya) and FKIM (Fellow Member of Kenya Institute of Management). This was not challenged by the defendant. The plaintiff did not need to call witnesses for letters that were viewed and read as published.

The people to whom the letters were copied to, were lawyers and heads of departments. It was his evidence that people who read the letters held him as a criminal and a liar and had to keep explaining what transpired. See the case of **Miguna Miguna Vs. The Standard Group Limited & 4 others (Civil Appeal No. 164 of 2016)**

On the issue of damages, Winderyer J in the case of **Veir Vs. John Raira & sons Property Ltd. 177 C.L.R 115**, stated;

“It seems to me, properly speaking a man defamed does not get compensation for his reputation that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways as vindication of the plaintiff to the public and as a consolation to him for a wrong done. Compensation is here a consolation rather than a monetary recompense for harm measurable in money”

The same position was held by the court in the case of **Arthur Ndong Owuor Vs. The Standard Limited, Nairobi HCCC No. 511/2011**

“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 awarding damages, the court draws considerable support from the case of **James Vs. Pollard (1997) EMLR 233-243** which sets out a checklist of compensatable factors as follows;

1. The objective features of the libel itself, such as gravity, its province, the circulation of the medium in which it was 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 upto 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.

The court notes that the parties did not submit on the quantum of damages that would be reasonable to compensate the plaintiff. Being guided by the checklist aforesaid, and especially the prominence and the circulation, the same could not be said to have been widely circulated as opposed to a publication carried in a local or international newspaper. Taking that into account and considering the circumstances of this case and the status of the plaintiff, I am of the considered view that a sum of Kshs.600,000 would be reasonable as general damages.

The plaintiff is also entitled to aggravated damages. The defendant in addition to the letter dated 4th October, 2004 wrote a memo dated 4th October, 2005 a year later. He insisted on the defence of qualified privilege which as I have stated did not succeed.

In assessing the damages the court was guided by court of Appeal case **No. 69/2005 Nyamogo & Nyamogo Advocates Vs. Barclays Bank of Kenya** where a sum of Kshs.1,000,000 was awarded and that of **J.P. Machira T/a Machira & Co. Advocates Vs. Kamau Kanyanga & The Standard Newspaper Civil Appeal No. 612/1996** where a sum of Kshs.1,250,000 was awarded. Both the plaintiffs in these cases are Advocates of the High Court of Kenya with long standing experience.

The court awards a sum of Kshs.200,000 as exemplary damages noting that the publication was not widely circulated.

The general and the aggravated damages amounting to Kshs.800,000/- shall earn interest from the date of the judgment until payment is made in full.

The plaintiff is also awarded the costs of the suit.

Dated, signed and delivered at NAIROBI this 21st day of February, 2019.

L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent