



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NUMBER 506 OF 2012

DANIEL MUTHE NGEERE.....PLAINTIFF

VERSUS

NATION MEDIA GROUP LIMITED.....1ST DEFENDANT

JOHN ALLAN NAMU.....2ND DEFENDANT

J U D G M E N T

The plaintiff who is a Kenyan male adult of sound mind, working and residing at Isiolo, filed the suit herein against the Defendants on the 19th October, 2012. The 1st Defendant is described as the owner and licensee of the Television Station known as NTV which broadcasts countrywide in Kenya as well as internationally through other electronic media outlets, while the first Defendant is described as the publisher of the Daily Newspaper known as the Daily Nation and was at all material times to this case, an agent of or acting with the authority and for the benefit of the 1st Defendant.

The Plaintiff alleges that, on the 8th and 15th days of July 2012, the Defendants caused to be aired in the 1st Defendant's said television a documentary entitled "*in the footsteps of Kabuga*" the reference being to a suspected genocide perpetrator believed to have unduly contributed to the 1994 killing of about 1,000,000 Rwandese people. That among the material aired and published in that documentary were photographs of the Plaintiff who it was claimed in the documentary was the said Felicien Kabuga.

The Plaintiff pleaded that on the 9th day of July, 2012 the 1st Defendant caused to be published in the Daily Nation Newspaper a story under the headline "*Kenya Army men guarded Killer Kabuga*" which story carried photograph of the Plaintiff which was alleged to be that of Felicien Kabuga taken by a Mr. Michael Sarubei at a location within Kenya and like the claim in the NTV documentary, who was killed as a result of that exposure.

The plaintiff averred that on 14th July, 2012 and 2nd August, 2012, the first Defendant published or caused to be published other articles which portrayed its publication of 8th and 9th July, 2012 as factual including the representation of the plaintiff as Felicien Kabuga. He contended that the representation by the Defendants of his photographs as those of Felicien Kabuga were made falsely and maliciously or in gross recklessness and was known by the Defendants to be false which particulars he has set out in paragraph 12 of the plaint. He further contended that by virtue of the said publication, his name and standing in the society has been put into disrepute, odium, hate, ridicule and contempt which has caused him to be shunned and avoided by those who by virtue of the publications have been led to believe that he is the Felicien Kabuga, the international Pariah and fugitive. The particulars of defamation are set out in paragraph 17 of the plaint. He avers that he has been made to suffer and will continue to suffer great embarrassment and psychological torture. He has prayed for General and punitive damages, plus the costs of the suit.

The Defendants have denied the Plaintiff's claim in their defence filed on 5th December, 2012. Though they have admitted having aired the documentary entitled "*in the footsteps of Kabuga*" they have averred that due diligence was carried out independently for the verification of the Plaintiff's photo and therefore any subsequent publication was based on independent verification.

In answer to paragraph 8 of the plaint, the Defendants contended that if the photographs of the plaintiff were claimed to be those of Felician Kabuga (which is denied) sources of information held independently verified a true likeness with the said photograph and as such did not maliciously refer to the plaintiff.

With regard to the Article published on 9th July, 2012, the Defendants admitted having caused the publication of the same but denies the rest of the contents of the plaint as alleged or at all. They denied having published the Articles on 13th July, 2012 and on 14th July, 2012 as alleged and avers that they published a piece on 8th and 9th July 2012 portraying its publications as factual representation and that the same was stated at a backdrop of independent verification of sources of the same and was not maliciously published. The particulars of malice

were denied.

In their further reply they contended that the words and the photographs complained of consists of expression of interest, they were fair comment and a fair information upon facts in the public domain on matters of public interest and were done in the honest belief that the matters were true and the photograph was that of Felicien Kabuga. That the article was published on a privileged occasion.

The Defendants stated that if the photograph published was that of the Plaintiff (which is denied) the same was due to similar features and likeness exhibited by both the Plaintiff and Felicien Kabuga. They denied that the plaintiff's name and standing in the society has been put into dispute, odium, hate, ridicule and contempt as a result of the aforesaid publication. They urged the court to dismiss the suit with costs.

At the hearing, the Plaintiff testified as PW1 and called four witnesses in support of his case. He adopted his witness statement dated 15th October, 2012. It was his evidence that on 9th July, 2012 he was called by his friends who informed him about the article appearing on page 4 of the Daily Nation. He sent his son to buy the newspapers and upon reading the article he confirmed he was the person referred to, therein, and his photograph was on it wearing a T-shirt which he was given when he was working for the water department. He was wearing a cap and the photo was taken in his timber yard office. He stated he did not know who took the photo and when the same was taken.

It was his evidence that on the night of 8th July, 2012, he was alerted by his children and friends about a clip aired on Nation Television which he watched and the same was repeated on 14th July, 2012. He stated that the publications have caused him great trauma and have exposed him to danger and possible death and this has led to his friends treating him with suspicion while others out rightly shun and avoid him.

Geoffrey Gitonga Muyuri gave evidence as PW3. He described himself as a resident of Isiolo town who is familiar with the Plaintiff. It was his evidence that he watched the documentary on Nation Television entitled "**In the footsteps of Kabuga**" and he saw photographs of a familiar face wearing a blue T-shirt and a cap, which he associated with the Plaintiff.

George Gitonga Ntuara who testified as PW2, stated that on 9th July, 2012 he bought a Nation newspaper and saw a photograph of the Plaintiff with the accompanying story alleging that the photograph was that of Felicien Kabuga the fugitive from Rwanda who is known to have contributed to the 1994 Rwanda genocide. He said he was left with no doubt that the photograph was that of his acquaintance Mr. Ngeera as he was wearing a blue T-shirt, a cap, and spectacles which were familiar to him as Ngeera often wore them. He was greatly shocked to learn that the person with whom he had associated with, was the dreaded Felicien Kabuga. He received calls from his friends who knew of his association with the Plaintiff drawing his attention to the newspaper publications and told him that the Plaintiff was a dangerous person to associate with. That as a result, he held the Plaintiff with great fear and he did not want to have anything to do with him.

The other witnesses who testified in support of the Plaintiff's case are Geoffrey Gitonga Henry Mwingirwa Nkure and Timothy Kiara. They confirmed having read the articles and how they changed their opinion about the Plaintiff after reading the Articles and watching the documentary aired by the first Defendant

The Defendants did not call any witnesses in support of their case.

Parties filed submissions in support of their respective cases.

The court has duly considered the pleadings, the evidence on record, submissions of the parties and the authorities filed herein. Parties did not file a common list of agreed issues but the Plaintiff filed one on the 28th January, 2013 wherein he set out 22 issues for determination but which the court will rephrase as follows;

1. Whether the broadcast and the articles were published by the Defendants
2. Whether the contents of the articles and the broadcast were defamatory of the Plaintiff.
3. Whether the publication of the articles and the representation of the plaintiffs photograph as that of Felicien Kabuga were made falsely and maliciously.
4. Whether the defences of public interest, justification and privilege are available to the Defendants.
5. Whether the Plaintiff is entitled to damages and if so, the quantum thereof.
6. Who should meet the costs of the suit.

The cause of action herein is that of defamation. The tort of defamation has been defined variously with not one agreed definition. In the English case of scott Vs. Sampson (1882(QBD 491 at page 503, dare, J. defined the word "Defamation" as

"A false statement about a man to his discredit"

The definition of what a defamatory statement is, was also given by the Court of Appeal in the case of Musikari Kombo Vs. Royal Media Services Limited 2018 (eKLR) in which the court referring to its own decision in SMW vs. ZWM (2015) eKLR stated as follows:

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

Other authority cited as definitive on defamation is *Gatley on libel and slander* who has this to say;

“The gist of torts of libel and slander is the publication of matter (usually words) conveying a defamatory imputation. A defamatory imputation is one to a man’s discredit, or which tends to lower him in the estimation of others, or to expose him to hatred, contempt or ridicule, or to injure his reputation in his office, trade or profession or to injure his financial credit.

To be defamatory, an imputation need have no actual effect on person’s reputation, the law looks only to its tendency. A true imputation may still be defamatory, although its truth may be a defence to an action brought on it, conversely, untruth alone does not render an imputation defamatory”

The test whether a statement is defamatory is an objective one. It is not dependent on the intention of the publisher but what a reasonable person reading the statement would perceive. In Halsbury’s law of England, 4th Edition vol. 28 at page 23, the author opined;

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

The common law of defamation protects every person from harm to their reputation by false and derogatory remarks of their person. The same protection is anchored in the constitution under Article 33 (1) (a) as read with clause (3) thereof of the constitution.

The essence of a defamatory statement is its tendency to injure the reputation of another person. Its, however, upon the plaintiff to show or establish how he was exposed to public hatred, contempt or ridicule or that the words had caused him to be shunned or avoided by certain people. The plaintiff has also to prove the actual words complained of and it is not sufficient to show that the defendant made a defamatory statement.

The elements of defamation were laid out in the case of *J. Kudwoli vs. Eureka Education and teaching Consultants & 2 others (HCCC NO. 126 of 1990)* as;

- a) The matters to which the plaintiff complains about were published by the defendant
- b) The publication concerned or referred to the Plaintiff
- c) That it is defamatory in nature
- d) That it was published maliciously.
- e) That in slander, subject to certain exceptions, that the Plaintiff has thereby suffered special damages. The same elements have been espoused in the case of *Wycliffe A Swanya vs. Toyota East Africa Limited and Francis Masai (Nairobi No. 70 of 2008)*

The foregoing ingredients were reiterated in the case of *John Edward vs. Standard Limited* where the court stated as follows;

“A statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule or contempt or which causes him to be shunned or avoided or has a tendency to injure him in his office, profession or calling.

I now proceed to consider the issues as reframed by the court

Whether the defendant published the Articles complained of.

In his plaint, the Plaintiff has complained about four Articles which were published in the Daily Nation on various dates to wit; 9th July, 2012, 13th July, 2012, 15th July, 2012 and 2nd August, 2012. I have carefully considered the defence filed herein, the defendants admitted having published the Articles complained of but denies that the contents thereof were defamatory. They also denied there was malice on their part and avers that the same were published after independent verification of sources of the same.

The defendants also admitted having aired the documentary complained of on the 8th and 15th July, 2012. The question therefore that this court should determine is whether by publishing the articles and by airing the documentary, there was malice on the part of the Defendants and whether before the said publication, they carried out due diligence to verify the same as they claimed in the defence. The court will also consider whether the defences mounted by the Defendants as stated elsewhere in the judgment, are available to them in this case, considering the circumstances under which the publications were made and the evidence on record.

The court will also have to consider whether the publications both in the daily Nation and the documentary aired by the first Defendant are defamatory of the Plaintiff.

As to whether the publications are defamatory, the Plaintiff relied on the provisions of Article 19(1) and 28 of the Constitution. Article 19(1) guarantees that the Bill of Rights is an integral part of Kenya's Democratic State while Article 28 states that inherent dignity and right should be respected and protected. He contended that, the court as the custodian of the Bill of Rights is entitled to intervene where the facts disclose a need to do so.

The Plaintiff further submitted that at the time the documentary was aired, he was a trader in Isiolo town carrying on business of timber merchanting. He is married to one wife with whom they were issued with a marriage certificate and both have been blessed with four children. He averred that the publication which was both on print and electronic media was not just extensive but worldwide as the same was in u-tube, a media of international circulation. That the publication portrayed the plaintiff as a genocide criminal that is, as the person called Felicien Kabuga who was accused of genocide in Rwanda where more than 800,000 people were killed and who is being sought by the International Community.

The Plaintiff urged that the defamation has exposed him to danger because any member of the public who comes across him is likely to incite other members of the public to lynch him or arrest him with a possible lengthy trial for human rights violation crimes and if found to be guilty that would lead to life imprisonment. That the plaintiff's movement has been curtailed to minimize his exposure which has affected his business and despite the seriousness of the publication, the Defendant has never apologized.

It was further submitted that the case is peculiar in that it is not his stand in the society which is in issue but the exposure in the society and has urged the court to consider the permanency of the libel and its effect. According to him, the perpetrators were not just reckless but it was also a deliberate publication in that the Plaintiff does not resemble Felicien Kabuga and therefore, there was a motive behind the publication. He contended that the real Felicien Kabuga has a prize over his head of Kshs. 400 million and there was a possibility that the perpetrators were looking at that award. The publication was presented in a sensational manner to increase the sale of the newspaper.

On their part, the defendants urged the court to dismiss the claim. It was submitted that the electronic evidence that was tendered was not produced in accordance with Section 106(B) of the Evidence Act and thus of no evidential value as the electronic certificate did not indicate the registration details of the ownership of the computer and whether the device was working in its normal condition.

The Defendants contended that the publications were not defamatory in that they did not have any relation with the Plaintiff apart from the Article that appeared on 13th July, 2012 where the Plaintiff gave a clarification as to his identity.

The court has looked at the Articles complained of and has considered the contents of the documentary that was aired in court during the hearing of the case. The articles are about Felicien Kabuga, the Rwandan fugitive who the Kenyan Government has been accused of hiding, by the International Community. He is alleged to have financed the militia groups that committed the 1994 genocide in Rwanda, and he is one of the most wanted men with a Kshs. 400 million bounty on his head. On various occasions between 9th July, 2012 and 14th July, 2012, the first Defendant published some articles torching on the subject of Felicien Kabuga. In addition, it aired a documentary on 8th July, 2012, entitled "***In the footsteps of Kabuga***" which was repeated on the 15th July, 2012 due to what the first Defendant stated was due to public demand.

In the documentary, the photograph of the Plaintiff is seen in which he is wearing a blue T-shirt with a government of Kenya Log, a black cap and on the table, are 2 phones make Nokia (old model) and a set of keys. At the hearing, he identified all these items and clothes as his. Though the said documentary was about Kabuga, the plaintiffs photograph was aired repeatedly. The Plaintiff produced documents to prove that he is a Kenyan by birth who holds a Birth Certificate marked as Exhibit 8(a) and a Kenyan Identity Card marked as Exhibit 8(b). The plaintiff is also a family man married with four children as evidenced by exhibits 9 and 10. At the time the documentary was aired, he was a trader in Isiolo town carrying on the business of timber merchanting. This was supported by the evidence of PW2 through to PW4. The blue T-shirt and the cap that he is seen wearing in the photograph aired in the documentary were confirmed by PW2 and PW3 as his.

Though the defendants contended that the articles have not used the image of the Plaintiff and that the story has no relation with him, my considered view is that the articles have to be read in context. In relation to the documentary aired on the 15th July, 2012 the photograph of the plaintiff was aired in a manner to suggest that the image was that of Felicien Kabuga and that would be the view any reasonable man watching the documentary would hold and therefore, the defendants' contention that the plaintiff's name was not mentioned is neither here nor there. In my view, the presence of the plaintiff's photo in the documentary made all the difference to the story and it made it sensational to the viewers.

The Plaintiff produced ample evidence to prove that he was not Felicien Kabuga. This is borne out in the article published on 13th July, 2012 produced as exhibit 5(C). In that article the plaintiff is seen with Eric Kiraithe (the then police spokesman), the title of the Article being "***I am not Kabuga, claims Isiolo timber merchant***". The photograph on that article is the same as the one aired in the documentary by the 1st defendant on the 8th July, 2012. In that Article, Mr. Kiraithe also confirms that the Plaintiff is not Felicien Kabuga and this was also buttressed by the press release that Mr. Kiraithe released on behalf of the Commissioner of Police (then) on the 12th July, 2012.

Though the Defendants would like the court to believe that the Articles and the documentary were not defamatory of the plaintiff, this court finds otherwise. The documentary and the Articles linked the Plaintiff to the Rwanda genocide by portraying his photograph as that of Kabuga. This lowered him in the estimation of right thinking members of the society generally and it exposed him to hatred, contempt and/or ridicule and it caused him to be shunned or avoided by people. This is borne out in the evidence of PW2, PW3 and PW4. After the documentary was aired, the Articles followed in quick succession and they related to the same subject of Felicien Kabuga.

As to whether there was malice on the part of the Defendants, it is trite law that malice can be express or it can be inferred from the circumstances of the case.

As submitted by the Plaintiff, any reasonable person reading the Articles and watching the documentary got the impression that the Plaintiff

is a criminal and is wanted by the International Community for committing crimes against humanity. The plaintiff testified that he suffered great embarrassment, humiliation, anguish, and emotional as well as mental stress and was even forced to close his business for a period of time.

It is therefore the finding of this court that the documentary and the subsequent articles were false and they injured his character and reputation. The Plaintiff was a civil servant who has retired from the civil service which means that he is a man of good reputation and good moral character.

The Plaintiff relied on the code of conduct for practice of Journalism in Kenya which places a responsibility on journalists and the media enterprises to write accurate and unbiased stories on matters of public interest. They have an obligation towards their audience to report and publish stories that are factually correct and fair as envisaged under the code of conduct. The same code provides that a person subject to the code shall not publish a story that falls short of factual accuracy and fairness.

This requirement was espoused in the case of Daily Nation vs. Mukundi & Another (1975)EA 311 where the court of Appeal for Eastern Africa held thus;

“When the defendant publisher accepted an item for publication, it had the right and indeed the duty to see whether such item contains seditious or libelous matters, and if it fails in that duty, it always publishes at its own risk” and that suggested recklessness on the defendants part”

By way of defence, the defendants contended that sources of information closely linked with the said Felicien Kabuga had independently verified a true likeness with the photograph of the Plaintiff and that due diligence was carried out for the verification of the said photograph and therefore, the publication of the same was based on Independent verification and the same was not malicious. The Defendants further stated that the publication of the plaintiff’s photograph, if at all it was his, but which is denied, was due to similar features and likeness exhibited by both the plaintiff and Felicien Kabuga.

It is important to note that the Defendants did not offer any evidence in this matter save for the written submissions. They chose to argue their case by way of pleadings, submissions and cross examination.

The plaintiff relied on the particulars of malice as set out in paragraph 12 of his plaint which are inter alia that;

- a) Clandestinely obtaining or procuring the photographs of the Plaintiff.
- b) Deliberately and falsely representing the plaintiffs photograph as that of Felicien Kabuga
- c) Deliberately and falsely claiming the said photograph (to have been taken at a Nairobi Hospital by a Mr. Michael Sarunei”
- d) Deliberately and falsely claiming that the photograph of the plaintiff had been confirmed by highly reliable and knowledgeable persons to be that of Felicien Kabuga
- e) Deliberately causing to be published the photograph of the plaintiff and depiction the same as that of Felicien Kabuga knowing the representation to be false.

The court had a chance to watch the documentary in the course of the proceedings. Looking at it, the background in the photograph showed clearly that it was not taken in a hospital as alleged by the Defendants in one of the Articles. This was confirmed by the Plaintiff in his evidence when he stated that the photo must have been taken by unknown person in his office in Isiolo. If the defendants had taken their time to keenly peruse that photograph, they could have had a reason to belief that the photograph could not have been that of Felicien Kabuga, and taken in a hospital as they alleged.

Going by the evidence adduced by the Plaintiff, the only irresistible conclusion that this Honourable court can make is that the circumstances under which the Defendants obtained the Plaintiff’s Photograph were suspicious. They were under duty to verify if indeed the same belonged to Felicien Kabuga before they could air the documentary and/or publish the articles.

The defendants also pleaded that the photograph had been confirmed to be that of Felicien Kabuga by highly reliable and knowledgeable persons. It is unfortunate that the defendants did not call any witnesses in this matter and all what is stated in their pleadings and submissions are only mere statements that cannot be verified by this court. It could have helped the defendants’ case if a witness had been called to testify as to how they obtained the plaintiff’s photograph and from whom. It is common knowledge that the issue of Felicien Kabuga has been and still remains a very sensitive issue and the Defendants ought to have taken that fact into account and exercise due diligence before publishing the Articles and the documentary. In fact and to say the least, they needed to be very cautious before publishing the Article. No evidence of such caution was adduced before the court.

Further evidence of malice can be inferred from the Re-publication of the documentary on the 15th July, 2012 even after the press release and the clarification made by the plaintiff on 13th July, 2012.

As justice Odunga rightly stated in the case of Phineas Nyaga vs. Gitobu Imanyara, malice can be inferred from failure to inquire into the facts. The defendants herein insisted that they carried out independent verifications of sources before publication. The evidence on record from the Plaintiff and the press release shows otherwise. In the circumstances, the only logical conclusion is that they failed to make proper enquires of the facts. In coming to this conclusion, the courts finding is fortified by the decision in the case of KITTO Vs. Chadwicks &

Advocates (1975) Ea 141 where it was held;

Where the allegations are false and the same are not disputed by correspondence or evidence and in the absence of any attempt to show believe in the truth of the allegations, the malice is established and there is no sustainable defence

This court in its finding also find support from the case of Daniel Musinga vs. Nation News paper Ltd in which the court stated;

“Malice can be inferred from reckless and deliberate or even negligence or ignorance of facts”

It was important in this case for the Defendants to adduce evidence and show the court that they were not reckless, negligent and that there was no ignorance of materials facts on their part. From the foregoing, it is my considered view that there was malice on the part of the defendants as can be inferred from the circumstances as analyzed hereinabove.

On the defences, there are a number of them allowable by law, some of which have been pleaded and relied on by the Defendants herein. The defence of justification implies the truth of the publication, a fair comment is a view that a reasonable person could have held whereas privilege is usually accorded to statements/publications made in parliament, judicial proceedings or fair reports of allegations in the public interest. A defamatory statement is presumed to be false, unless the Defendant can prove its truth. Defamation law puts the burden of proving the truth of allegedly defamatory statement to the defendant, rather than the plaintiff.

The defendants justified the Articles on the basis of independent report and investigations, the sources of which were not disclosed as no evidence was tendered on their part. The defence therefore fails.

The Defendants have further relied on the defence of fair comment on matters of public interest and therefore privileged, in that, the whereabouts of Felicien Kabuga is a matter of Public interest. They have contended that the publications were done under a sense of public duty and without malice and in the honest belief that the photograph published was that of Felicien Kabuga.

The defence of qualified privilege is mostly associated with public interest. The essence of this defence is that the person making a statement has a duty to do so and that the person who hears or reads the statement has a corresponding interest in doing so.

In support of their defence of qualified privilege, the defendants have relied on the case of KL Vs. standard Limited (2014) eKLR where the court held as follows;

“Qualified privilege, though it also protects the maker of an untrue defamatory statement, 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, not for the defendant to disprove it”

They also relied on the case of Simon Nyachae vs. Lazarus Ratemo & Another (2007) EKLR and that of Ndung’u Njoroge & Kwach advocates & Another vs. Standard Limited & 2 others (2012) eKLR.

In regard to the defence of qualified privilege, the plaintiff relied on the code of conduct for the practice of journalism in Kenya and contended that a journalist should write a fair, accurate and an unbiased story on a matter on public interest. That they have an obligation towards their audience, to report and publish stories that are factually accurate and fair as envisaged in Section 8 of the Code of Ethics. See the case of Daily Nation vs. Mukundi & Another (Supra)

The courts have on many occasions dealt with this defence and in the case of Raynold vs. Times Newspapers, the House of Lords proposed a number of guidelines that a defendant should observe if wishing to rely on that defence which are;

1. The seriousness of the allegations ie. If the allegation is not true what will be the level of misinformation to the public and what will be the corresponding harm to the individual.
2. The nature of the information and the extent to which the subject matter is a matter of public concern.
3. The sources of information and whether it is reliable or motivated by malice and/or avarice.
4. Whether suitable steps have been taken to verify the information.
5. Whether the allegation in a story has already been the subject of an investigation which commands respect.
6. Whether it is important that the story be published quickly
7. Whether comment was sought from the complainant/or whether that was not necessary in the context of the story.
8. If the article or story includes the gist of the documents version of events.
9. Whether the article or story is written in such a way as to amount to statements of fact or whether it raises questions and is suggestive of the need for further investigations.

10. The timing of the publication.

I have carefully considered the evidence on record and in my view, the Defendants did not offer any evidence to bring their allegations within the purview of these guidelines. I do agree with the Defendants that the matter of Felicien Kabuga is one of public interest but they ought to have considered the seriousness of the allegation and the corresponding harm to the Plaintiff and the sources of information whether liable or not. They did not tell the court the steps that they took to verify the information and whether it was important that the story be published quickly before due diligence could be taken. I wish to note that the Rwanda genocide took place in 1994 and there was no urgency in the Defendants publishing the story without first ascertaining the truth.

On the defence of fair comment the same is made when the statement in question is one of opinion and not factual and that it was made on a matter of public interest. No evidence was put forth by the defendants to support this defence and nowhere is it suggested that the statements contained in the publications were expressions of opinions by the first defendants and not of fact. It is therefore the finding of the court that the defences relied upon by the defendants are not tenable and the same fails.

In conclusion, the court finds the Defendants liable to the plaintiff for defamation.

With regard to the production of Electronic evidence, the court notes that no objection was raised by counsel for the defendants when the compact disk was produced. Upon production, if formed part of evidence and the objection has come too late in the day. The same is hereby dismissed.

On damages, the court in the case of *Johnson Evans Gicheru vs. Andrew Morton & Another* had this to say;

In an action of libel the trial court in assessing damages is entitled to look at the whole conduct of the defendant from the time the libel was published down to the time the verdict was given. It may consider what his conduct has been before action, after action, and court during the trial. The case of Vein Vs. John Raira X & Sons property limited, 177 CLR 115, 150 is also useful to quote in which the learned judge Winderyer had this to say;

“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 wrong done. Compensation is here a solation rather than a monetary recompense for harm measurable in money”

The same position was held by the court in the case of *Brigadier Arthur Ndong Owuor vs. the Standard Limited Nairobi Hccc No. 511/2011* where the court stated;

“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, this court draws considerable support in the guidelines in the case of *Jones Vs. Pollard (1997) EMLR 233-243* where a checklist of compensatable factors in libel actions were enumerated as follows:

- a. 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.***
- b. 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.***
- c. Matters tending to mitigate damages, such as the publication of an apology.***
- d. Matters tending to reduce damages.***
- e. Vindication of the plaintiff’s reputation past and future.***

This court also reminds itself that an award of damages should not enrich a party but restore the said party to the position he was before the alleged injury see the case of *Johns vs. MGN Limited (1966) 1A11 ER 35* where the court held;

“In assessing the appropriate damages for injury to the reputation the most important factor is the gravity of the libel, the more closely it touches the Plaintiff’s personal integrity, professional reputation, honor, courage and loyalty the more serious it is likely to be.”

The court has considered the submissions by the parties on the issue of quantum. In his submissions, counsel for the Plaintiff has urged the court to award Kshs. 500,000,000 as general damages and Kshs. 100,000,000/= under each head for punitive, aggravated and exemplary damages. He has relied on several authorities both within and beyond this court’s jurisdiction. Among the cases cited are *Cairns vs. Modi (2012/EWHC 756 (OB)* in which the Plaintiff, **Chris Cairns** a well known international Cricketer sued the Defendant Lalit Modi who was also well known in the world of Cricket for publishing a message on the Twitter Website with reference to Mr. Cairn’s period of playing in the ICL and the court on hearing the matter awarded \$75,000 as general damages and \$ 15,000 of special damages. The other cases outside jurisdiction were not very relevant to our case herein and in some of them the facts were not stated in the annexed extracts and therefore

difficult to compare them with the facts in our present case.

On local cases, the Plaintiff quoted the cases of *Martha Karua vs. the Standard Limited and another (2006)* in which the court awarded Kshs. 4 million as general damages and kshs. 500,000 as aggravated damages. The case of John *Joseph Kamotho & 3 others vs. Nation Media Group Limited & 2 others 2005) eKLR* was also cited where a sum of Kshs 6 million was awarded to the 1st Plaintiff as general damages and a further sum of Kshs. 1 million as aggravated damages.

On the part of the Defendant, the court was urged to award Kshs. 800,000/- as general damages relying on the case of *Sankale Ole Kantai Vs. Nyamodi Ochieng Nyamodi & Another (2012)* where a similar sum was awarded.

On exemplary and aggravated damages, the Defendants submitted that the same should not be awarded as the Plaintiff is not deserving of the same and that there were no aggravating factors.

The court has considered the submissions for the respective parties on the issue of quantum of damages. As noted earlier the authorities cited by the Plaintiff outside our jurisdiction are not relevant to this case.

All considered, I find the authorities of *Martha Karua vs. Standard Limited & Another* and that of *Joseph Kamotho* more applicable in this case. The only difference being that the Plaintiffs' status in those cases were not the same as that of the Plaintiff herein who was a retired civil servant at the material time. But though his status in life was not on the same pedestal with those of the other Plaintiffs, the court also considers the gravity and the sensitivity of the Kabuga issue and the fact that the Rwanda genocide that Kabuga is connected with, is an issue that the International Community has a lot of interest in. The court also takes into account that the publication was done on both the print and the electronic media which means the circulation was far and wide.

Taking into account those circumstances, the court awards Kshs. 5,000,000/- as general damages.

The Plaintiff has also prayed for punitive damages. These may be awarded in situations where the Defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the Plaintiff should receive by way of compensation. Their aim is not to compensate the Plaintiff but rather to punish the Defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner.

On this aspect, the Plaintiff submitted and rightly so, that the 1st Defendant did not offer any apology and/or retracted the publications. The gravity of the defamation and the 1st Defendant's conduct after the initial publication and particularly of repeating the documentary and continuing to publish the articles and opinion pieces even after the Plaintiff held a press conference and denied being the "*Kabuga*" are matters to consider. The police also issued a press statement clarifying the position but, that notwithstanding, the Defendants went ahead and repeated the documentary thus further publishing the defamatory material. The court finds that this is a case deserving an award of punitive damages which this court awards at kshs. 1,000,000. The Plaintiff is also awarded the costs of the suit. General and punitive damages to earn interest from the date of this judgment.

Dated, signed and delivered at NAIROBI this 27TH day of JUNE 2019.

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L. NJUGUNA

JUDGE

In the presence of:

.....for the Plaintiff

..... for the 1st Defendant

..... for the 2nd Defendant