



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 493 OF 2012

ISAAC OPICHO MUKHWANA.....PLAINTIFF

-VERSUS-

DIAKONIA SWEDEN..... DEFENDANT

JUDGMENT

The Plaintiff herein filed the suit vide a plaint dated the 4th day of October, 2012 against the defendant claiming general, aggravated and exemplary damages, injunctive orders restraining the Defendant by itself, and/or servants from further printing, circulating, distributing or otherwise publishing any such libels of and concerning him. He has also sought the costs of the suit and interest on the damages sought.

It is pleaded that the Plaintiff was employed by the Defendant as its Finance and Administration Officer by a contract of Employment dated 11th April, 2011, which contract was expressly stipulated to conclude or expire on 30th November, 2012. The Defendant is a Non-Governmental Organization with a Regional office situated in Nairobi within the Republic of Kenya and registered under the NGO Coordination Act.

The Plaintiff's cause of action is premised on three publications (letters) which he maintains were written and circulated by the Defendant to three organizations all dated 3rd June, 2012. The said letters were written to International Aids Services (IAS), Care Nederlands and to the Representative to Somalia, EU Delegation in Kenya, Somalia Operations Unit in Nairobi. The contents of the said letter are set out hereunder;

Dear Sirs,

RE: DISMISSAL OF DV-ties STAFF

Diakonia is dismayed to inform you of the dismissal of Isaac Opicho Mukhwana, who was formerly the Finance and Administration Officer in the Developing Vocational Training for the Informal Economy in Somalia (DV-TIES) project contract number FED/2010/231-093.

Isaac was found to have defrauded the project of US \$ 19,261.16, between 9th – 12th July, 2012 in Garowe, Somalia and thereafter travelled to Nairobi. Although police investigations have started in Garowe Somalia, it is not currently possible to take legal action in Kenya due to jurisdictions complications.

Diakonia has taken the decision on dismissing him from the organization as legal avenues are sought to bring him to book.

Yours sincerely,

STEPHEN NDICHU KINYANJUI

Country Manager, Somalia.

The Plaintiff avers that the said allegations were untrue and/or false and by reason of the publication and circulation of the said words, he has been seriously injured in his character, credit and his reputation has been brought into public scandal, odium and contempt. He further contended that the Defendant published the said statements maliciously. He has set out the particulars of malice in paragraph 11(i) to (v) of the plaint.

The Defendant has denied the claim vide its statement of defence which was annexed to the supporting affidavit to the Notice of Motion dated 16th January, 2014. This defence was adopted by way of a consent recorded in court by the counsels, on the 30th October, 2018, which

also set aside the interlocutory judgment that had been entered against the Defendant on the 12th April, 2016.

In the said defence, the Defendant denies having made the publication but avers that without prejudice” to the foregoing, the alleged publication, if any were rightfully made in accordance with the required business and trade practice in which it is engaged and was well within its scope of duty to give that relevant information to the relevant actors in the business. The Defendant further contends that the suit was solely filed in order to stifle its rights of freedom of expression and conveyance of information.

The Defendant averred that “without prejudice” to the above or any other defence hereunder, the alleged publications are a reflection of information of true facts based on tangible documents available to it and which are within the knowledge of the Plaintiff. Further to the foregoing, the Defendant states that the alleged publications were neither false nor malicious and the same were justified and are a reflection of true facts well within the knowledge of the Plaintiff and that accordingly, it was under a duty to investigate and communicate the same to its readers, the public, who had a corresponding legitimate interest in receiving them and therefore not a defamatory publication.

The defendant has further averred that the words complained of were published on an occasion of qualified privilege as the same relates to official communication to key organs involved in the running of the business of the Defendant and the words related wholly to an accurate representation of facts that had to be communicated to the addressees.

It has denied that the Plaintiff is entitled to the damages sought.

At the hearing, the Plaintiff testified as the sole witness in support of his case whereas the Defendant called one witness as well. The Plaintiff adopted his witness statement dated 12th September, 2012 as his evidence in chief in addition to his oral testimony.

It was his evidence that he was an employee of the Defendant but was based in Somalia. He was a Finance Administration Officer for one of the Programmes that was being undertaken by the Defendant in Somalia. He was reporting to the Programme Manager one Izaak Harun. He gave an elaborate account of the procedure for generation and approval of payments and stated that his duty only involved reviewing of the documents that supported the payments.

That accountant was the custodian of the cheques and the supporting documents and he is the one who could write the cheques.

He would also prepare the payment vouchers which would be prepared in the name of the partner and it would bear the name of the person reviewing, the one approving and the recipient (received by).

He stated that though he reviewed some of the documents for the period between 4th June, 2012 and the 1st week of July, 2012 he was not aware of the cheques the subject matter of this suit and he did not review payments relating to the five (5) cheques in question.

It was his further evidence that, as part of his duties, he would collect all the payment vouchers for the quarter, prepare an internal report and because the other consortium members had their offices in Nairobi, he would travel to Nairobi to review and consolidate the same after which he would send the reports to both the programme and the country Managers for approval, and it is for this reason that he travelled to Nairobi on the 21/06/2012. He denied that he escaped from Somalia as alleged by the Defendant.

He told the court that it was while he was in Nairobi that he received a phone call from one of his colleagues who told him about the information that had spread about misappropriation of funds by himself. He was also informed that the Defendant was planning to have him extradited from Nairobi to Garowe and that a dismissal letter had already been prepared and the Defendant was waiting to give it to him on 3rd July, 2012 during a meeting that they had scheduled. The meeting, however, did not take place as he was unable to attend as his vehicle broke down in Eldoret and could not make it to Nairobi but later on after the phone call from his colleague, he decided not to attend because the Defendant had planned to arrest him and further that, he felt embarrassed by the information that was circulating in the office which information had not even been proven.

He stated that he received a formal communication on termination of his employment on 3rd July, 2012 which was a summary dismissal indicating termination, the ground being that of alleged loss of funds amounting to US\$ 19,261.16. He averred that he was not aware of any investigations prior to the dismissal and that he was not given any particulars of any allegations against him. That he was not offered any chance to respond to the allegations, if at all. Consequently, he resigned from employment but he did not tender a resignation letter.

He contended that the publications were communicated to third parties and it was reported to the donors that he had been found to have defrauded the project of US\$ 19,262.16. He denied having cashed the alleged cheques which, he stated, had been written in the names of third parties.

On the part of the defendant, Mr. Stephen Ndichu Kinyanjui , who was the Programme Manager of the Defendant, in charge of Somalia Country Office testified as the only witness. He adopted his witness statement filed on 28/11/2018 as his evidence in chief.

In his statement, he stated that on the 2nd July, 2012, the Defendant received information that an aggregate of US\$ 19,261.15 meant for payment of 4 partner organizations had been unlawfully withdrawn by the Plaintiff for his own benefit. That on the same day, the Defendant initiated internal investigations on the same and a detailed incident report was prepared confirming that the Plaintiff had indeed unlawfully withdrawn the money by countersigning and cashing four third party cheques for his own personal benefit instead of sending the money to the partner organizations.

It was his further evidence that on 3rd July, 2012, the Defendant elected to summarily dismiss the Plaintiff for misappropriation of the organization’s funds and lodged a formal complaint against the Plaintiff at Garowe Police Station. That out of abundant caution and in order

not to prejudice DV-TIES project, vide a letter dated 3rd July, 2012, though erroneously dated 3rd June, 2012, as the Country Manager Somali, he elected to inform the relevant/concerned partner organizations namely EU delegation in Somalia, international Aids Services and CARE Netherlands, of the plaintiff's dismissal.

That on 7th July, 2012, the Garowe Police issued a report after concluding their investigations and confirmed that the Plaintiff had unlawfully cashed the four cheques for his own personal benefit and since he was in Kenya, upon seeking assistance of the Kenya Police to apprehend him, they were advised that the Kenya Police were not able to arrest him as the offence was committed in Somalia and therefore the Kenya Police lacked the requisite jurisdiction to investigate and/or arrest him.

At the conclusion of the trial, parties filed written submissions which this court has duly considered together with the evidence on record, the pleadings and the cited authorities.

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

1. Whether the publication dated the 3rd day of June, 2012 are defamatory of the Plaintiff as alleged.
2. Whether the publications were published by the Defendant.
3. Whether the publications were false and malicious.
4. Whether the defences of justification and privilege are available to the Defendant.
5. Whether the Plaintiff suffered any loss or damage as a result of the publication and if so, whether he is entitled to the reliefs sought.
6. Who is to bear the costs of the suit?

There is no doubt that the Plaintiff's cause of action is based on 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”

It is trite law that in defamation, the Plaintiff must prove the following elements in order to succeed;

- a. The statement was defamatory
- b. It must have been published by the Defendant.
- c. The published words must refer to the Plaintiff.
- d. The statement must be false.
- e. The Publication was published with malice.

The foregoing position has been restated in numerous judicial precedents to wit *Gideon Mose Onchwati vs. Kenya Oil Co. Ltd and Another Civil Suit No. 140/2008* and that of *J. Kudwoli Vs. Eureka Educational and Training Consultant & 2 others Civil Number 120/1990* as well as the case of *Wycliffe A. Swaya & Another Civil Appeal No. 70/2008*.

The tort of defamation is defined variously with not one agreed single definition that fits all. In the English 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”

Whereas the well known work of Winfield gives the following definition;

“It is the publication of a statement which tends to lower a person in the estimation of right thinking members of the society generally or which tends to make them shy or avoid that person”.

On the other hand, *Halsbury's Law of England Vol. 28, 4th Edition at par. 10 page 7* defines it as;

“A defamatory statement is a statement which 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, that is, the estimation in which he is held by others. It does not protect a person's opinion of himself or his character. The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit and it affords redress against those who speak such defamatory falsehoods. 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 dependant 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 the words were published, a reasonable man to whom the publication was made would be likely to understand them in a defamatory sense”

In the case herein and as noted earlier, the cause of action is said to have arisen from three letters all dated the 3rd day of June, 2012 having the same contents but addressed to three different recipients. They were written by one Stephen Ndichu Kinyanjui, the Country Manager of the Defendant in their Somalia office. The full contents are set out elsewhere in this judgment.

The Plaintiff contends that the allegations contained in the letters are untrue and/or false and that by reason of the publications and the circulation of the same, his reputation has been seriously injured in his character and credit.

In their defence, the Defendant mainly relies on the defence of justification and qualified privilege and in particular that the publications relate to official communication to key organs involved in the running of the business of the Defendant and that the words related wholly to an accurate representation of facts that had to be communicated to the addressees.

From the onset, it has not been denied that the publications were done by the Defendant and that they refer to the Plaintiff. What this court has to determine is whether they are defamatory of the Plaintiff, whether they are false and malicious and whether the defences relied upon by the Defendant are available to them in view of the evidence on record. The court will also determine whether the Plaintiff suffered any loss or damage as a result of the publication.

In the course of the trial, an issue arose as to the correct date of the publications with the Defendant contending that they were erroneously dated 3rd June, 2012 but the correct date is supposed to be 3rd July, 2012. Though there was no amendment of the pleadings, in his witness statement as well as in his evidence under oath, the defence witness stated that the correct date is 3rd July, 2012 and therefore, for purposes of this judgment the court will go by the 3rd July, 2012 date as the correct date of the publication.

In the said letters, the writer informs the addresses of the dismissal of the Plaintiff who was found to have defrauded the project of US\$ 19,261.16 between 19th – 21st June, 2012 in Garowe Somalia and thereafter travelled to Nairobi. The letter further stated that the defendant's office in Somalia had taken the decision to dismiss him from the organization as legal avenues are sought to bring him to book.

According to the Plaintiff, the allegations were made when he had travelled to Nairobi for purposes of preparation, review, discussions and approval of quarterly financial reports for the months of March, April and May, 2012.

The detailed circumstances of the alleged theft were set out in the email sent on 2nd July, 2012 by Engineer Mohammed Dida to the Program Manager wherein he stated that payment for four partners totaling to US\$ 13,281 and an extra amount of US\$ 5,980, in the name of Galkayo VTC had been withdrawn by the Plaintiff but none of the partners had acknowledged receipt of the money. In the email dated 4th July, 2012, from Said Hersi to Stephen Ndichu and Haron, he stated that he reported the case to the police that morning and was waiting for their response. By another email dated the 4th July, 2012, Mr. Saidi Hersi, the Country Representative wrote to Garowe Police Station requesting them to carry out investigations of the said theft. In it they have named the Plaintiff as the person who was involved in the theft and they have stated the circumstances of the alleged theft and in particular that, the plaintiff prepared four cheques amounting to USD 19,261.15 and took the money in cash from Amaal Bank in Garowe while he was supposed to send it to the partners.

Following that request, the Central Police Station at Garowe wrote a letter to the Embassy of Somalia in Kenya in what appears to have been their findings. The said letter was produced as defendant's exhibit 6. In the letter, it is stated that the Chairman of Amaal Bank had confirmed that the Plaintiff was given cash by Amaal Bank which was written in four (4) cheques as follows;

1. Cheque number 1588 – USD 1,495.56
2. Cheque number 161489 – USD 5,980.24
3. Cheque number 161498 – USD 4,983.20
4. Cheque number 161491 – USD 4,933.45

Totaling to Kshs. 19,261.15

In their concluding remarks, they stated that the police confirmed that the theft was committed by the Plaintiff. On record are copies of some of those cheques set out hereinabove being cheques No. 161491, 161489 for USD 4,983.20 and 5,980.24 respectively. The other cheques that were produced as exhibits are cheque No. 161509, 161490 and 161488 for USD 4,933.45, 1,868.70 and 1,495.56 respectively. These last three cheques are not listed in the letter from Garowe Police Station and therefore the court will not belabor on them at all. With regard to the

other two cheque numbers 161491 and 161489 they were written in the names of third parties.

In a bid to connect the Plaintiff to the theft, the Defendants produced payment vouchers which were marked as exhibit 10. The said vouchers are in the name of Frank Owen Wafula and they are said to have been signed by the plaintiff. With regard to the two cheques the court has noted the following;

a. There is no evidence from Amaal Bank to confirm that it is the plaintiff who cashed the cheques. The sheets of papers that he is alleged to have signed do not evidence any money transaction and in any event, he denied having signed the same. No evidence was brought by the Defendant from a handwriting expert to confirm the signature on the sheets as that of the Plaintiff or a witness from that bank to confirm that indeed the sheets originated from that particular bank.

b. There was no evidence produced by the Defendant to confirm that Somali Banking System allows encashment of 3rd party cheques by another person other than the payee. Though the defence witness alluded to this proposition and even told the court that the Bank has a list of such officials who could encash cheques, the defendant's defence was pegged on that evidence and it was important for it to adduce sufficient evidence to prove it. In any event, their defence of justification had to be anchored on concrete evidence. It could have assisted their case if they had called an employee of Amaal Bank to confirm the position with regard to the encashment of the third party cheques and if indeed it was true that it could be done, that the Plaintiff was the one who encashed the cheques and that his name was among those of the people who could do so.

As for the payment vouchers produced as exhibit 10, the court notes that the same are in the name of Frank Owen Wafula. Though it was alleged that they were signed by the plaintiff and that the payee is a relative of the Plaintiff, there was no concrete evidence adduced to bring out the connection between the Plaintiff and the payee or even that the Plaintiff is the one who signed the vouchers.

According to the evidence on record, the payment vouchers provided for space for indication of details of the person receiving the signed cheques for dispatch to payees/owners. There is no evidence that the Plaintiff ever received or handled the cheques the subject hereof, after approval and signature by the relevant officer. In response to this, the Defendant relied on the position that the Programme Accountant for DV-TIES Program was on leave and hence his duties had been taken over by the Plaintiff and in those circumstances, he was able to access the cheques. In this regard, the court has perused the email by the Program Manager to Mohamed Dida produced as exhibit 8. In this email he states that he will be out of office effective from 4th June to 1st week of July, 2012 to attend a workshop in Brussels and during his absence, he, Mr. Dida who was the Finance Officer was to assume his responsibilities with an N/B to the effect that other issues directly related to finance would be facilitated by Finance Officer and the Accountant. Going by this email, I am not persuaded that there was no accountant at the material time. I believe the Plaintiff's version that an accountant for one programme could act as an accountant for another programme in the absence of a colleague.

Finally, there is no evidence from the partners who were the intended payees/recipients of the alleged cheques confirming that they never received and did not cash the cheques the subject matter of this suit. The Defendant's witness in his evidence confirmed that the cheques passed through all the stages and were approved by the relevant officers. In view of the foregoing, I find that the publications were false and defamatory.

As to whether the same were malicious, the Defendant contended that the Plaintiff's bundle of documents does not show any form of bad blood or malice between the Plaintiff and his supervisor contrary to what the Plaintiff claims in his submissions. The Defendant, however, submitted that there is one instance in which the Plaintiff complained about the conduct of his supervisor towards him but that was not sufficient proof to demonstrate alleged malice/bad blood which would lead to them cooking up a situation of this magnitude just to edge him out of the company.

It is trite that malice can be inferred and for it to be inferred, the language of the publication ought to have altered the facts and their meaning and there ought to be animosity.

In the persuasive case of *Phineas Nyagah Vs. Gitobu Imanyara (2013) eKLR*, Odunga J. held;

“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..... The failure to inquire in the facts is a fact from which inference of malice may properly be drawn”

On the other hand, malice can be assumed if what is stated in the publication is false and defamatory see the case of *Gideon Mose Vs. Onchwati (Supra)*

In the case of *Joseph Njogu Kamonge*, the court was also of the view that malice does not necessarily mean spite or ill will but there must be lack of justifiable cause to utter the words complained of. Evidence showing that the Defendant knew the words complained of were false or did not care to verify can be evidence of malice.

The court has looked at the letters in issue. They state that the plaintiff was found to have defrauded the project of USD 19,261.15 in Garowe Somalia and thereafter travelled to Nairobi. A reading of that letter suggests that the Defendant had already made a conclusive finding that the Plaintiff had defrauded the project. The letter did not even leave room for any investigations and the impression created by the writer was that investigations had been carried out and the Plaintiff had already been found guilty. This is notwithstanding the contents of paragraph 3 of the same which states that investigations had started in Garowe Somalia. The letter further stated that Diakonia had taken the decision to dismiss him from the organization as legal avenues were being sought to bring him to book.

A clear reading of the letters show that they were done before the investigations had been completed and before the Plaintiff had been given a chance to defend himself. This further means that the defendant had not enquired into full facts and did not bother to get his side of the story

before the publication was done. Despite several requests by the Plaintiff to be given a hearing, the Defendant insisted on meeting him in their office even after he had requested to have the meeting in a neutral place. In my considered view this shows there was malice on the part of the Defendant.

On whether the defences of justification and qualified privilege are available to the Defendant in view of the evidence on record, the Defendant has relied on the case of *MCPerson Vs. Daniels (1829) 109 ER 448* in supporting the contention that **“The law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not, to possess”**.

The Defendant further contended that it simply reported what it knew to be true at the particular time to their donors in order to comply with the obligations of their contractual relationships with the donors. Reliance was made on the case of *Horrocks Vs. Lowe (1975) AC 135* at page 149 by *Lord Diplock, J* where he stated;

“Apart from the exceptional cases, what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally though tautogously termed, “honest belief”.

It is well settled that the onus lies on the Defendant to prove the truth of the words in their ordinary and natural meaning. See the case of *Mangtup Din Vs. African Newspaper of Nigeria Limited no. 44/1980.*

In the case of *Digby Vs. Financial News Limited Collins; M. R.* Said;

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

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

From the evidence on record, the court did not see any tangible evidence to support the defence of justification. By the time of the publications no investigations had been carried out either internally or by the police with a conclusive finding of culpability on the part of the Plaintiff. In the incident report marked as defence exhibit 1, it clearly indicate that discussions with the management were underway to institute an internal investigation that will look into gaps in the financial processes that allowed for that to happen which therefore meant that the internal investigations had either not been done or had not been completed by the time of publication. Secondly, the report by Central Police Station at Garowe is dated 7th day of July, 2012 yet the publications were done on 2nd July, 2012. The court also notes that the cheque numbers that they have mentioned in that report were never proven to have been cashed by the Plaintiff. In my view, the report could not form a basis for proper investigations and findings on whether the Plaintiff was involved in the theft or what the Defendant referred to as “defrauding”

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

“While taking the defence of justification or qualified privilege in a defamation case, the Defendant was required by law to establish the true facts and the Plaintiff has no burden to prove the defence raised by the defendant.....” Once not verified the justification of qualified privilege does not inure the defendant and in any event, the onus that the same is true, rests on the defendant to make it fair publication (emphasis ours).

The defence of qualified privilege is closely related to that of justification in that in both, the Defendant is required by law to establish the true facts of its publication in order to succeed. As the court stated in the case of *Musikari Kombo* the essence of this defence is an attempt to balance two competing but vital interests in the society; the individuals rights to have their character and reputation protected and safeguarded from false, unwarranted and malicious or scurrilous attacks on the one hand, and the public’s right to know as exercised and fed by freedom of expression, which is an indispensable feature of a free and democratic society as well as a major tool for public accountability. In the case of *Raymonds Vs. Times Newspaper (1999) 4 ALL ER 609* the house of Lords set out a criteria for determining whether a publication is subject to qualified privilege as hereunder

a. The seriousness of the allegation

b. The nature of the information and the extent to which the subject matter is a matter of public concern

c. The source of the information

d. The steps taken to verify the information

e. Whether the allegation in the story has already been the subject of an investigation which commands respect

f. Whether it is important that the story be published quickly.

g. Whether comment was sought from the claimant or whether that was not necessary in the context of the story.

h. Whether the article or the 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.

i. The timing of the publication

From the evidence on record, the court finds that the defendant did not bring his allegations within the purview of public interest. No attempt was made to verify the truth of the allegations and no comment was sought from the plaintiff prior to publishing of the allegations. Attempts were made to reach him after the publication which was rather late in the day and therefore both defences cannot come to the aid of the Defendant.

Having found that the publication was defamatory it follows that the Plaintiff is entitled to damages. The publication was done to several organizations and a paid up advertisement was carried out in the Nation Newspapers. The Defendant in its emails has admitted that the publication circulated widely not only in Somalia but also in Kenya. This damaged the Plaintiff's reputation and he even lost a job opportunity that he was about to be offered by an organization namely Carara.

As was held in the case of **Nation Media Group Limited and 2 others Vs. Joseph Kamotho & 3 Others;**

“In actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of restitution in integrum has necessarily or even more highly subjective element, such actions involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, but, in case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charges.” (Emphases ours)

In awarding damages, the court has an absolute and wide discretion in assessing damages to award. The court in the case of **Jones Vs. Polland** set out some guidelines in what would guide the court in arriving at a fair and reasonable award which are enumerated as hereunder.;

- a) 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.
- b) The 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.

In this case, the Plaintiff was a Senior Officer working with an international organization. He had received a job offer with another organization which he was to take up upon expiry of his contract with the Defendant at an annual basic salary of USD 45,000. As a result of the publication, the Plaintiff's personal reputation and as a professional were seriously injured and he suffered distress, agony, humiliation and embarrassment. As rightly submitted by the Plaintiff and referring to the case of **Nagui syed Omar Vs. Paramount Bank Limited & Another cause no. 346/2014**

“In employment law, defamation takes place when the employer publicizes or causes to be publicized, statements which stigmatized the employee. The manner of dismissal and the negative publicity attached to the claimant had the potential to damage his employability. Potential employers in the industry in which the claimant was a longtime servant, would find his attractiveness diminished. His stock in the market dipped. Employment relation defamation is based on the old jist of defamation but given a new spin, the employees injured or damaged employability and not merely the personal stigmatization must be compensated.” (Emphases ours)

In dealing with a similar issue of defamation in the employment law the court in the **Gideon Mose Onchwati** stated;

“Being professional and a good ethical behavior are values that every employee is expected to possess to attract a prospective employer. However, when it is publicly declared that you are unethical and unprofessional, prospective or current employers will shun and avoid you.”

On the quantum, the Defendant did not address the court on what was reasonable in the event it was found liable for defamation. The court has perused the authorities relied on by the Plaintiff. He has urged the court to award damages as follows.

- General damages Kshs. 8 million
- Aggravated damages Kshs. 5 million
- Exemplary damages Kshs. 15 million
- Damages in lieu of apology kshs. 2 million and has relied on the case of **Gideon mose onchwati vs. Kenya Oil Company Limited and another Civil Suit No. 140 of 2008** where the court awarded 15.5 million in damages to an employee who had been defamed by his former employer. General damages of Kshs. 3 million, exemplary damages of Kshs. 12 million and damages in lieu of an

apology at Kshs. 500,000/-

He also relied on the case of Wangethi Mwangi & Another vs. J. P. Machira T/A Machira & Co. Advocates Civil Appeal No. 148 of 2003 in which the court of appeal upheld an award of Kshs. 8 million as compensatory damages, 2 million as aggravated damages and Kshs. 200,000 as damages in lieu of apology.

Hon Ibrahim Kipsang Kiptanui Vs. Francis Mwaniki & 4 others Hccc. No. 42 of 1987 (unreported) where Kshs. 3,500,000 was awarded as general damages and Kshs. 15,000,000 as aggravated damages.

Joshua Kulei Vs. Kalamka Limited where an award of Kshs. 10 million was made for general damages.

The court has taken into account the submissions and the authorities on quantum by the Plaintiff. I am of the considered view that the authorities cited are not a reflection of the loss suffered by the Plaintiff herein going by the principle guidelines set out in the case of Jones Vs. Pollard. Regard is also had to the Plaintiff's position in the society which is much lower compared to the Plaintiffs in the cases cited.

Doing the best I can, I do award the Plaintiff damages as follows;

1. General damages Kshs. 3 million
2. Aggravated damages Kshs. 500,000
3. Exemplary damages kshs. 500,000

Prayer (3) of the plaint has been overtaken by events due to the time it has taken to have the matter heard and concluded.

The Plaintiff shall also get the costs of the suit. The damages awarded herein shall earn interest from the date of this judgment until payment in full.

Dated, Signed and Delivered at Nairobi this 26th day of September, 2019

.....

L. NJUGUNA

JUDGE

In the presence of:-

.....for the **Plaintiff**

..... **for the Defendant**