



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL SUIT NO 64 OF 2013**

**JAMES OGUNDO.....PLAINTIFF**

**VERSUS**

**THE STANDARD GROUP LIMITED.....DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. In his Complaint dated and filed on 26<sup>th</sup> February 2013, the Plaintiff sought the following reliefs:-

- a) General Damages.**
- b) Damages on the footing of aggravated or exemplary damages.**
- c) Costs of this suit.**
- d) Interest on (a), (b) and (c) above.**
- e) Any further relief the court deems fit to grant.**

2. The Defendant's Memorandum of Appearance and Notice of Preliminary Objection dated 13<sup>th</sup> March 2013 were filed on 14<sup>th</sup> March 2013 while its Statement of Defence dated 21<sup>st</sup> March 2013 was filed on 27<sup>th</sup> March 2013.

3. On 12<sup>th</sup> June 2013, the Plaintiff filed a Notice of Motion application dated 11<sup>th</sup> June 2013 seeking the striking out of the Defendant's Statement of Defence and entry of judgment in his favour as he had sought in his Complaint. The Defendant filed its Grounds of Opposition thereto dated 26<sup>th</sup> June 2013 on even date. The Plaintiff thereafter filed a Notice of Withdrawal of the aforesaid Notice of Motion application dated 4<sup>th</sup> April 2014 on even date.

4. Notably, this court did not see a copy of the Ruling in respect of the Preliminary Objection in the court file.

5. Be that as it may, the matter proceeded for hearing before this court. The Plaintiff's Written Submissions and List of Bundle and Documents were dated and filed on 7<sup>th</sup> February 2019 while the Defendant's Written Submissions were dated 23<sup>rd</sup> April 2019 and filed on 24<sup>th</sup> April 2019. Its List and Bundle of Documents were dated 24<sup>th</sup> April 2019 and filed on 16<sup>th</sup> May 2019.

6. Parties asked this court to deliver its decision based on the Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

**THE PLAINTIFF'S CASE**

7. The Plaintiff was a Consultant/Advisor/Researcher in Finance, Governance and Capacity Building. At Central Bank of Kenya (CBK) where he had been an employee, he rose from being a management trainee to the rank of a Director. He was at one point the Executive Director (ED) of Kenya School of Monetary Studies (KSMS) and the Chief Executive Officer (CEO) of the Deposit Protection Fund Board (DPFB). He was also a member of several boards including the National Elections Board (NEB) where he was appointed as a Commissioner for Orange Democratic Movement (ODM).

8. His role as a Commissioner for Orange Democratic Movement entailed conducting civil education, conducting the nomination process, appointment and training officials who would preside over the primary nominations, conducting party nominations and submitting names of candidates to Orange Democratic Movement to be issued with nomination certificates and thereafter to be listed by Independent Electoral Boundaries Commission (IEBC) as candidates.

9. On 23<sup>rd</sup> January 2013, in its 7pm Kiswahili Bulletin, KTN aired an article referring to the Plaintiff by name claiming that some ODM officials had been arrested for being involved in a scam where they were minting millions of monies selling nomination certificates to aspirants.

10. The said Article claimed that the Plaintiff and his son, one Valentine Ogundo, an Information Technology expert were selling the Nomination Certificates to aspirants, that they had gone into hiding and that the Plaintiff who was in charge of Nyanza Region nominations, had been suspended by one Frankline Bett, the Chairperson of NEC, for issuing the said nomination certificates.

11. The Plaintiff visited the Standard Group offices and informed them that the Article was defamatory. However, despite having been given an assurance that the Article would not be aired again, it was aired again during the 9.00pm News Bulletin. The following day, on 24<sup>th</sup> January 2013, the Standard Newspaper published an Article titled “**ODM officials arrested over Certificate scam.**”

12. His health deteriorated as a result of the defamatory Article and he lost consultancies with World Bank (WB), International Monetary Fund (IMF) and Commission on Revenue Allocation (CRA).

13. Further, as a result of the publication, his reputation was injured, he was brought to ridicule, odium, humiliation and mental anguish and right thinking members of the society changed their perception of him.

14. He therefore urged this court to allow his claim as sought.

#### **THE DEFENDANT’S CASE**

15. At the time of publication of the Article, Kenya was preparing for general elections and Orange Democratic Movement, being a main contender in the elections, it was in a matter of public interest to keep abreast of what was going on in the dominant parties.

16. The Article was published after a Press Conference that was made by Franklin Bett, who was the source of the information that was in the said Article.

17. The Defendant was emphatic that the Plaintiff was not entitled to any damages but that if the court was to be persuaded to grant the damages, then it ought to be guided by the Defamation Act Cap 36 (Laws of Kenya).

#### **LEGAL ANALYSIS**

18. The Plaintiff’s and Defendant’s joint Statement of Agreed issues was dated 12<sup>th</sup> May 2015 and filed on 13<sup>th</sup> May 2015. The issues were as follows:-

- 1. Whether this Honourable Court had jurisdiction to hear and determine this suit.**
- 2. Whether there was publication by the Defendant of the words complained of by the Plaintiff.**
- 3. Whether the publication of the words complained of refer to the Plaintiff.**
- 4. If so, whether they were defamatory to the Plaintiff?**
- 5. Whether there were any defences available to the Defendant.**
- 6. Whether the Plaintiff was entitled to the reliefs sought.**
- 7. What other orders should be made as to costs and interests against the Defendant.**

19. Having considered the parties’ Written Submissions, it appeared to this court that the issues that had been placed before it for determination were as follows:-

- 1. Whether the court had jurisdiction to hear and determine this matter;**
- 2. Whether the Plaintiff had proved its case;**
- 3. If no (2) hereinabove was in the affirmative, what was the quantum payable.**

20. The court therefore deemed it prudent to address the same under the following distinct and separate heads.

## **I. JURISDICTION**

21. The Defendant submitted in detail that the court did not have jurisdiction to grant the prayers the Plaintiff had sought for the reason that the dispute herein was a civil dispute, a defamation claim under Article 33(3) of the Constitution of Kenya and the Defamation Act and not a suit seeking protection or enforcement of the Plaintiff's right under Article 28 of the Constitution of Kenya.

22. It further argued that the Defendant was guaranteed freedom to publish under Article 34(1) of the Constitution of Kenya and that the State was precluded by Article 34(2) of the Constitution of Kenya from granting general damages and damages on the footing of aggravated or exemplary damages as was sought in Prayer No (a) and (b) of the Plaint herein or otherwise exercise control over or interfere with it.

23. It added that Article 34(5) of the Constitution of Kenya provided for the creation of the Media Council which was a Tribunal with jurisdiction under Article 159 of the Constitution of Kenya to deal with matters relating to the media and it was the correct forum with jurisdiction to deal with the Plaintiff's complaint. It thus urged this court to dismiss his suit or referred to the court with original jurisdiction.

24. It placed reliance on the cases of **Lilian "S" vs Caltex Oil Kenya Ltd [1989] KLR I, Uhuru Muigai Kenyatta vs Nairobi Star Publications Ltd [2013] eKLR, Samuel Kamau Macharia & Another vs Kenya Commercial Bank Ltd & 2 Others [2012] eKLR amongst other cases where the common thread was that courts ought not to arrogate themselves jurisdiction exceeding what has been conferred to them by law.**

25. On his part, the Plaintiff argued that the issue of jurisdiction was *res judicata*, a Ruling having been delivered by Seron J on 6<sup>th</sup> November 2015 where he dismissed the Defendant's Preliminary Objection on the same issue.

26. The Plaintiff attached a copy of the Ruling that was delivered by Seron J on 6<sup>th</sup> November 2015 in respect of the Defendant's aforementioned Notice of Preliminary Objection. This court carefully perused the same together with the Written Submissions by both the Plaintiff and the Defendant and noted that the argument of whether or not the court has jurisdiction to hear and determine this matter was decisively determined by Seron J, a position that this court entirely agreed with as can be seen in its own decision in **Jasper Ndeke Shadrack vs Standard Group Ltd & Another [2019].**

27. Section 7 of the Civil Procedure Act provides as follows:-

**“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.**

28. This court therefore agreed with the Plaintiff that the arguments that had been raised by the Defendant that this court had no jurisdiction in this matter were *res judicata* and therefore fell by the wayside.

29. It also took the view that the Defendant's argument that the court could not exercise control over, interfere with or penalise any person engaged in media save in so far as it relates to the exclusion under Article 33(2) of the Constitution of Kenya was also not correct. This court dealt with the issue in the case of **Jasper Ndeke Shadrack vs Standard Group Ltd & Another** (Supra) where it held that:-

**“The crux of the Defendants case was that the court had no jurisdiction to hear and determine a defamation matter on the grounds THAT:-**

**1. The State, which includes the three (3) arms of Government shall not:-**

**a. Exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; or**

**b. Penalize any person for any opinion or view or the content of any broadcast, publication or dissemination.**

**2. Article 34 of the Constitution of Kenya has imposed a limit on the court's jurisdiction to hear matters under Article 33 (3) of the Constitution of Kenya which are matters on tort but donates power to courts to hear criminal aspect of contravention of Article 33 (2) of the Constitution of Kenya.**

**3. The High Court is required to supervise tribunals such as the Media Complaints Commission under Article 165 (6) of the Constitution of Kenya and make any order or give any directions it considers appropriate to ensure fair administration of justice.**

**4. The Media Complaints Commission established pursuant the Article 34 (5) is the one mandated to hear and determine defamation cases against the media because defamation as a tort, has not been criminalized under Article 33 (2) of the Constitution of Kenya.**

**5. A party seeking intervention of the court under Article 165 (3) (b) of Constitution of Kenya to enforce remedies provided under Article 23 of the Constitution of Kenya must only do so as provided in Article 22 (3) of the Constitution of Kenya and comply with the Constitution (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.**

6. This court agreed with the Plaintiff that this was a flawed argument. Article 22 (1) of the Constitution of Kenya stipulates that:-

“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened”.

7. Infact Article 22 of the Constitution of Kenya provides the procedure in which to approach the court where a right has been denied, violated, infringed or is threatened. Not being defamed is not a fundamental freedom in the Bill of Rights of the Constitution of Kenya. In essence, an aggrieved party who has been defamed cannot approach a court through Articles 22 and 165 of the Constitution of Kenya for relief.

8. As was correctly pointed out by the Plaintiff, there was no limitation by the Constitution of Kenya of the High Court hearing and determining defamation cases against any party and in particular, the media. The only limitation of the jurisdiction of the High Court is to be found in Article 165 (5) of the Constitution of Kenya.

9. Article 165 (5) of the Constitution of Kenya provides as follows:-

1. The High Court shall not have jurisdiction in respect of matters—

a. reserved for the exclusive jurisdiction of the Supreme Court under this Constitution;

b. or falling within the jurisdiction falling within the jurisdiction of the courts contemplated in Article 162 (2).

10. Article 162 (2) of the Constitution of Kenya stipulates as follows:-

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

a. employment and labour relations; and

b. the environment and the use and occupation of, and title to, land”.

11. If the intention of the drafters was to exclude the jurisdiction of courts from hearing and determining defamation cases, nothing would have been easier than for them to have said so.

30. This court therefore agreed with the Plaintiff that he could not be compelled to bring his cause of action in a particular format as defamation being a tort, could be instituted by way of a Plaint. This court did not therefore agree with the Defendant that the Plaintiff could only have moved the court by way of a Petition.

## **II. PROOF OF THE PLAINTIFF’S CASE**

31. The Plaintiff submitted that the words that were published and/or conveyed by the Defendant were defamatory because the words, as this court understood, purported that:-

1. He was corrupt;

2. He lived a pretentious life because he had sired a child out of wedlock contrary to how those who knew him viewed him.

3. He had interfered with the democratic will of members of Orange Democratic Movement to elect their leaders of choice.

32. He averred that the Defendant did not adduce any evidence to justify that the words he complained of were true. It was his contention that while taking the defence of justification or privilege in the defamation case, the Defendant was required by law to establish the true facts and that he had no burden to prove its defence as was held in the case **Hon Uhuru Muigai Kenyatta vs Baraza Ltd** by Rawal J (as she then was) and which was cited with approval in the case of **Joseph Njogu Kamunge vs Charles Muriuki Gachari [2006] eKLR.**

33. He was emphatic that the anomalies on a defendant to prove the truth of the words in their ordinary and natural meaning as was observed in **Joseph Njogu Kamunge vs Charles Muriuki Gachari** (Supra).

34. He added that the Defendant could not rely on the defence of fair comment as is stipulated in Section 15 of the Defamation Act because it had failed to justify any of the alleged facts or tender any defence of justification.

35. He further averred that to rely on the defence of qualified privilege in a matter of public interest, the Defendant had to prove that the report was fair and accurate as provided in Section 7 of the Defamation Act.

36. It was his argument that the Defendant failed to establish and/or prove any of the defences and that in any event, Geoffrey Mogusu (hereinafter referred to as “DW1”) had told this court that as a member of public he would not have been interested to know if he had a

wife/concubine or have an interest in knowing who his children were.

37. The Defendant did not submit on the defences that were available to it in the circumstances of this case as its argument was that this court had no jurisdiction to entertain this matter for the reason that the Media Council Act 2013 had established a Complaints Commission and the fact that its freedom to expression in tortious liability was not limited, arguments that this court wholly disagreed with as shown hereinabove.

38. According to Black's Law Dictionary, defamation is defined as **"the act of having the reputation of another by making a false statement to a third party."**

39. Section 7 of the Defamation Act provides that:-

**(1) Subject to the provisions of this section, the publication in a newspaper of any such report or other matter as is mentioned in the Schedule to this Act shall be privileged unless such publication is proved to be made with malice.**

**(2) In an action for libel in respect of the publication of any such report or matter as is mentioned in Part II of the Schedule to this Act, the provisions of this section shall not be a defence if it is proved that the defendant has been requested by the plaintiff to publish, in the newspaper in which the original publication was made, a reasonable letter or statement by way of explanation or contradiction, and has refused or neglected to do so, or has done so in a manner not adequate or not reasonable having regard to all the circumstances.**

40.

**(3) Nothing in this section shall be construed as protecting the publication of any matter the publication of which is prohibited by law, or of any matter which is not of public concern and the publication of which is not for the public benefit.**

**(4) Nothing in this section shall be construed as limiting or abridging any privilege subsisting (otherwise than by virtue of [section 4](#) of the Law of Libel Amendment Act, 1888, of the United Kingdom) (Act No. 51 and 52 Vict. c. 64.) immediately before the commencement of this Act or conferred by this Act.**

41. Section 14 of the Defamation Act states that:-

**"In any action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the reputation of the plaintiff having regard to the truth of the remaining charges."**

42. Section 15 of the Defamation Act stipulates that:-

**"In any action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved."**

43. In his cross-examination, the Plaintiff denied ever having a son called Valentine Ogunda or having issued nomination certificates to Orange Democratic Movement candidates or being on or having sold nomination certificates to Orange Democratic Movement candidates as was reported by KTN and printed in the Standard Newspaper.

44. He was emphatic that the use of the term **"Commissioner"** before his name was evident that the Article referred to him specifically.

45. John Fred Ogumbo (hereinafter referred to as "DW2") confirmed to this court that the Plaintiff had four (4) children, none of whom was Valentine Ogumbo.

46. In his evidence, DW1 denounced the email of 28<sup>th</sup> February 2013 that had purportedly been said to have been authored by him. He testified that what he reported in the Article was true in substance and fact and that there was no falsehood in the reporting.

47. He further denied that there was malice or bad faith in the said publication or that the said publication was calculated at injuring his reputation or ridiculing him but that the same was fair comment at the time of the Orange Democratic Movement nomination that was taking place ahead of the 2013 general elections.

48. He admitted that if he was referred to as "Baba Hassan" and he had no such son, it would raise questions on his moral conduct. He stated that they were told that the Plaintiff had a son called Valentine Ogundo and that although the statement by Franklin Bett was long, they only picked a few lines because of space in the newspaper.

49. He also confirmed that if it was reported that a person was in hiding, it would mean that that person had done something wrong.

50. It was his further evidence that he never counter-checked if the Plaintiff had a son or if he was in hiding and that they did not specify who had been paid to issue the nomination certificates.

51. The Transcription of the Nine O'clock KTN News Bulletin on 23<sup>rd</sup> January 2013 though produced by the Plaintiff was withdrawn after the Defendant's Counsel raised an objection. However, the video clip of 23<sup>rd</sup> January 2013 was placed in court.

52. In the Standard of 24<sup>th</sup> January 2013, the following was published by DW1:-

**“Elections board members are alleged to have made millions selling the papers to the highest bidders**

**A member of the Orange Democratic Movement (ODM) polls board has been arrested after the party uncovered a massive scam involving the sale of nomination certificates to desperate aspirants.**

**ODM has unearthed that some members of the National Elections Board (NEB) and its secretariat have been minting millions of shillings selling the documents to aspirants.**

**Commissioner for Western region Aggrey Azelwa and a staff Maxmilla Wafula were arrested yesterday at Orange House for questioning while James Ogundo, who is in charge of Nyanza and his son Valentine Ogundo, an IT expert has gone into hiding and police are looking for them.**

**By last evening, the two were at Kilimani Police Station in Nairobi, where they were being questioned as the search for Ogundo and his son intensified. The officials were said to be selling certificates to the highest bidder in Nyanza region where holding an ODM ticket was equated to having already won an election.**

**Sources at Orange House said the officials had raked in millions of shillings targeting country representatives who were paying between Sh100,000 to Kshs 200,000 and some MP aspirants who were paying between Sh 1 million to Sh 2 million.**

**Some governor and senate aspirants were also said to be paying between the Sh 1million to Sh 2 million. The officials took advantage of the board's declaration that most parties in Nyanza region did not hold polls and thus were creating their own list from those who had paid them.**

#### **INVALIDATED**

**Consequently, ODM NEB Chairman Franklin Bett (*pictured top*) yesterday invalidated all nomination certificates issued to candidates in Nyanza and parts of Western. Bett revealed he had suspended one of his members, Commissioner Ogundo in charge of Nyanza region who had issued the certificates.**

**“In view of irregularities in issuance and distribution of nomination certificates for our candidates, particularly the county representatives from Nyanza region, I have disallowed James Ogundo from further handling of nomination certificates from that region on behalf of the National Elections Board. Bett said in a statement.”**

53. In the case of Kagwiria Mutwiri Kioga & Another vs The Standard Ltd & 3 Others [2015] eKLR, the Court of Appeal cited with approval V.W. Rogers, the Learned author of Winfield and Jelokwiz on Tort, of 6<sup>th</sup> Edition 2002 at pp 404-405 where it was stated as follows:-

**“12.2. Defamation is a publication of a statement which reflects on a person's reputation and tends to lower him in the estimation of right thinking members of a society generally or tends to make them shun or avoid him. For historical reasons defamation takes the form of two separate torts, libel and slander, the former being more favourable to the claimant because it is actionable *per se* and injury to reputation will be presumed...**

**In contrast, in cases of libel (and in some cases of slander) the claimant can recover general damages for injury to his reputation without adducing evidence that it has in fact been harmed, for the law assumes that some damage will occur in the ordinary course of things...”**

54. In the case of Musikari Kombo vs Royal Media Services Ltd [2018] eKLR, the Court of Appeal cited with approval the holding of Lord Atkin in Knupffer vs London Express Newspaper Ltd [1944] 1 ALL ER 495 that”-

**“The only relevant rule is that in order to be actionable the defamatory words must be understood to be published of and concerning the Plaintiff”.**

55. In addition, all that a plaintiff is required to demonstrate is the existence of a defamatory statement, that the defendant has published a defamatory statement and that the publication refers to the claimant.

56. The principles to be considered when hearing a defamation case were set out in the case of Wycliffe A Swanya vs Toyota East Africa Ltd & another (2009) eKLR where it was held that:-

**“i. the matter of which the plaintiff complains should be defamatory in character.**

**ii.the defamatory statement or utterances were 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. it was published maliciously.

iv. In slander, subject to certain exceptions, that the plaintiff has suffered special damages.”

57. Further, in the case of Newstead vs London Express Newspaper Ltd [1940] 1 KB 377 [1939] 4 ALL ER 310, it was held that:-

**“Where the plaintiff is referred to by name or otherwise clearly identified, the words are actionable even if they were intended to refer to some other persons.”**

58. In Halsbury’s Laws of England 54<sup>th</sup> Edition Vol 28 at page 23, it was stated that:-

**“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 publication was made was likely to understand them in a defamatory sense.”**

59. For a defamation claim to succeed, the facts must demonstrate:-

1. The words that are published or printed must be found to be defamatory

in their meaning. For the words to qualify as being defamatory, the

printed or published words must be (a) false and (b) malicious.

2. The printed and published words must have been communicated to

another person other than the person who has complained of being

defamed.

3. The printed and published words must have the effect of lowering the

image of the person for whom the defamatory words have been made to

right thinking members of the society.

4. The person of whom the defamatory words have been printed or

published need not be named in the article, it is sufficient if right

thinking members of the society can be able to identify him as the person

to whom the words have been ascribed to.

60. Having considered the evidence in support of the Plaintiff’s case vis-a-vis that in support of the Defendant’s case, it was clear that:-

1. The words published about the Plaintiff were false and malicious. The inclusion of a fictitious son by the name of Valentine Ogunido was malicious and intended to paint him in bad light in the minds of upright members of the Society. The inclusion of a fictitious son was factual.

2. The words were printed in the electronic and print media of the Defendant and were thus expected to have been seen by 3<sup>rd</sup> parties. Indeed, PW2’s testimony was that he called the Plaintiff when he watched the 7.00p.m. News Bulletin on KTN on 23<sup>rd</sup> January 2013 to enquire from him if he was in hiding.

3. The words that were broadcast and printed had the effect of lowering the Plaintiff’s image to right thinking members of the society. In a society where people enjoy rumour mongering, rumours are never erased in their minds. What is untrue is often than not repeated to be the truth with no recourse of the truth being given the same prominence.

4. The Plaintiff was referred to by name and there was no doubt in the minds of upright members of the society that he was said to be corrupt and a person who lacked integrity. To those who knew him, his wife and children, he was an untrustworthy person as he had a secret child out of wedlock. This must have indeed been devastating to him, his wife and

children because he had no child by the name of Valentine Ogumbo.

61. This court was not persuaded that the Defendant was entitled to the defence of unintentional defamation as provided for under Section 13 of the Defamation Act Cap 36 (Laws of Kenya). The same provides as follows:-

**1. A person (in this section referred to as the defendant) who has published words alleged to be defamatory of another person (in this section referred to as the plaintiff) may, if he claims that the words were published by him innocently in relation to the plaintiff, make an offer of amends under this section, and in any such case-**

**a. if the offer is accepted by the plaintiff and is duly performed, no proceedings for libel or slander shall be taken or continued by the plaintiff against the defendant in respect of the publication in question (but without prejudice to any cause of action against any other person jointly responsible for that publication);**

**b. if the offer is not accepted by the plaintiff, then, except as otherwise provided by this section, it shall be a defence, in any proceedings by him against the defendant in respect of such publication, to prove that the words complained of were published by the defendant innocently in relation to the plaintiff and that the offer was made as soon as practicable after the defendant received notice that they were or might be defamatory of the plaintiff, and has not been withdrawn.**

**2. An offer of amends under this section must be expressed to be made for the purposes of this section, and must be accompanied by an affidavit made by the defendant specifying the facts relied upon by him to show that the words in question were published by him innocently in relation to the plaintiff, and for the purposes of a defence under paragraph (b) of subsection (1) of this section no evidence other than evidence of facts specified in such affidavit shall be admissible on behalf of the defendant to prove that the words were so published.**

**3. An offer of amends under this section shall be understood to mean an offer-**

**a. in any case, to publish or join in the publication of a suitable correction of the words complained of, and a sufficient apology to the plaintiff in respect of those words;**

**b. where copies of a document or record containing such words have been distributed by or with the knowledge of the defendant, to take such steps as are reasonably practicable on his part for notifying persons to whom copies have been so distributed that the words are alleged to be defamatory of the plaintiff.**

**4. Where an offer of amends under this section is accepted by the plaintiff—**

**a. any question as to the steps to be taken in fulfillment of the offer as so accepted shall, in default of agreement between the parties, be referred to and determined by the High Court, whose decision thereon shall be final;**

**b. the power of the court to make orders as to the costs in proceedings by the plaintiff against the defendant, or in proceedings in respect of the offer under paragraph (a) of this subsection, shall include power to order the payment by the defendant to the plaintiff of costs on an indemnity basis and any expenses reasonably incurred or to be incurred by the plaintiff in consequence of the publication in question, and if no such proceedings are taken, the High Court may, upon application made by the plaintiff, make any such order for the payment of such costs and expenses as could be made in such proceedings.**

**5. For the purposes of this section, words shall be treated as published by the defendant innocently in relation to the plaintiff if and only if the following conditions are satisfied—**

**a. that the defendant did not intend to publish them of and concerning the plaintiff, and did not know of circumstances by virtue of which they might be understood to refer to the plaintiff; or**

**b. that the words were not defamatory on the face of them, and the defendant did not know of circumstances by virtue of which they might be understood to be defamatory of the plaintiff, and in either case that the defendant exercised all reasonable care in relation to the publication; and any reference in this subsection to the defendant shall be construed as including a reference to any servant or agent of his who was concerned with the contents of the publication.**

**6. Paragraph (b) of subsection (1) of this section shall not apply in relation to the publication by any person of words of which he is not the author unless he proves that the words were written by the author without malice.**

62. It was clear from the circumstances of this case that the Defendant did not make any amendments under the Section 13 despite the Plaintiff having asked it to retract the publication. It did not prove justification or fair comment under Section 14 and Section 15 of the Defamation Act.

63. Having considered all the evidence herein, this court came to the firm conclusion that the Plaintiff proved his case on a balance of probability which is the standard required in civil matters.

### **III. QUANTUM**

64. In his Curriculum vitae of 14<sup>th</sup> July 2015, the Plaintiff's professional achievements were evident. In addition to what was stated herein, he was the Group Managing Director of Track Group of Companies, and a Director and Regional Representative of International Deposit Insurers Corporation in Geneva representing East, Central and Southern African Regions. He had by no means achieved very great heights in his career.

65. Due to the volatile nature of politics in Kenya especially during general elections, the publication and broadcast put him in a precarious position as he could have been harmed or even killed. It was not lost to this court of how emotive nominations in Kenya are. It is a matter of life and death to followers of political parties who will not hesitate to harm anyone who attempts to or compromises their choice of candidates. It is this very volatility that caused Kenya to burn end of 2007 and beginning of 2008 after the 2007 general elections.

66. The Defendant went ahead to air the clip containing the false information at 9.00p.m. News Bulletin on 23<sup>rd</sup> January 2013 and further published the false story in the digital and print media despite the Plaintiff having visited the Defendant's offices and explaining his side of the story which he said entitled him to aggravated damages. The Defendant acted recklessly and cannot escape liability.

67. He asked this court to award him Kshs 16,000,000/= compensatory general damages and Kshs 4,000,000/= being aggravated damages.

68. He relied on the following cases to buttress his argument:-

1. On 22<sup>nd</sup> day of March 2002 Aluoch L.J. awarded the Plaintiff in Kipyator Nicholas Kiprono [2000] eKLR the sum of Kshs.10 million for compensatory damages and Kshs 10 million for exemplary damages (total 20 million) in the said case the Plaintiff had been accused of corruption.

2. On the 7<sup>th</sup> day of September 2001 the Honourable J.K Mulumwa J awarded the Plaintiff in John Machira vs Wangethi Mwangi and Nation Newspaper Ltd [2001] eKLR the Kshs 8 million as compensatory damages and Kshs 2 million as a aggravated damages. In this case the libel was against the Plaintiff who was an advocate accused of behaving disgracefully in his professional capacity.

3. On the 20<sup>th</sup> day of December 2000 the Honourable Visram J. awarded the Plaintiff in Kipyator Nicholas Biwott vs Clays Limited and 5 others [2000] eKLR the sum of Kshs 30 million as an award for libel which insinuated that he was engaged in a Criminal offence.

69. On its part, the Defendant argued that in the event this court was to find it liable, then it should award the Plaintiff Kshs 200,000/= as general damages but disallow the claim for aggravated damages.

70. In this regard, it relied on the provisions of Section 16A of the Defamation Act that provides as follows:-

Section 16A of the Defamation Act, Cap 36 Laws of Kenya provides that:-

**“In any action for libel, the court shall assess the amount of damages payable in such amount as it may deem just:-**

**Provided that where the libel is in respect of an offence punishable by death the amount assessed shall not be less than one million shillings, and where the libel is in respect of an offence punishable by imprisonment for a term of not less than three years the amount assessed shall not be less than four hundred thousand shillings.”**

In this case, the Plaintiff has not been accused of any of the offences as above and Court should therefore be guided by the minimum given for a grave offence attracting 3 years jail term getting quantum of Kshs 400,000/=

Justice Mbogholi stated in Susan Wangui Chomba V Peter Kisa Otabang [2015] eKLR that

**“Courts must guard against unduly high awards in defamation cases as such awards would no doubt negatively impact upon the freedom of speech and press.”**

71. It submitted that the Plaintiff had not been accused of any of the aforesaid offences and that the court should be guided by the minimum given for a grave offence attracting a three(3) year jail terms getting quantum of Kshs 400,000/=(sic)

72. This court agreed with the Defendant that courts must guard against unduly high awards in defamation cases as such cases would no doubt negatively impact upon the freedom of speech and press as was held by Mbogholi Msagha J.

73. In the Treatise of Macgregor on Damages 19<sup>th</sup> Edition at page 176, it has been stated that:-

**“This court therefore found and held that the Plaintiff was entitled to general damages to compensate him for the loss of reputation following the publication of the defamatory article against him. However, damages ought to be reasonable and sustainable in a country's economy. They are not to be granted to punish a defendant who has defamed a plaintiff but rather they are to offer consolation to the plaintiff who has been defamed. Indeed, it must be understood that no amount of money can compensate a person for loss of reputation following a false statement.”**

74. Consequently, bearing in mind all the cases that were relied upon by the parties herein, and taking into consideration the inflationary trends, it was the considered opinion of this court that Kshs 3,500,000/= would be reasonable to compensate the Plaintiff herein.

75. In arriving at the said conclusion, this court had due regard to the case of **Phineas Nyagah vs Gitobu Imanyara [2013] eKLR**, Odunga J held that he would have awarded the plaintiff therein Kshs 3,000,000/- general damages had he succeeded because he did not call any witness to testify that he had been injured by the spoken words.

76. Although the Plaintiff did not adduce any documentary evidence to support his claim that he lost consultancies worth Kshs 22,000,000/=-, this court took cognisance of the fact that a breach of Chapter Six of the Constitution of Kenya, 2010 has great ramifications on one's career in the public and private realm in Kenya if the recent upsurge of corruption and abuse of office cases under The Anti-Corruption and Economic Crimes Act, 2003 are anything to go by.

77. In view of the seriousness of the allegations, due to repercussions in politics the impact they were likely to have on the Plaintiff's career and the fact that the Defendant did not heed to his protestations regarding the false nature of the allegation, this court was satisfied that the Plaintiff was entitled to aggravated damages in the sum of Kshs 500,000/=-.

**DISPOSITION.**

78. For the foregoing reasons, this court found that the Plaintiff's suit dated and filed on 26<sup>th</sup> February 2013 was merited and hereby directs that Judgment be and is hereby entered in his favour against the Defendant for Kshs 4,000,000/= made up as follows:-

General damages      Ksh 3,500,000/=

Aggravated damages Kshs 500,000/=

**Kshs 4,000,000/=**

Plus interest thereon at courts rates from date of judgment until payment in full and costs.

79. It is so ordered.

**DATED and DELIVERED at NAIROBI this 23<sup>rd</sup> day of September 2019**

**J. KAMAU**

**JUDGE**