



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. 14 OF 2018

PASCAL OBONYO AGWENA.....1ST APPLICANT

PETER WERE AJULU.....2ND APPLICANT

EDWARD OCHAYE.....3RD APPLICANT

ROSEMARY OGUTU.....4TH APPLICANT

VERSUS

SIMON JUMA ODIYO.....RESPONDENT

(Being an appeal from the Judgment and Decree of Bondo PMCC No. 102 of 2015 dated 11.4.2017 before Hon. M. Obiero – Principal Magistrate)

JUDGMENT

1. On 26.6.2019, this court delivered a judgment in this appeal striking out the appeal on the ground that the appeal was filed after 30 days from the date of delivery of the impugned judgment without obtaining leave of court.
2. The above Order was informed by the fact that the Parties never made reference to any Order enlarging such time for filing of the appeal.
3. Subsequent to the striking out of the appeal, the appellant's Counsel filed an application dated 1.7.2019 and sought for reinstatement of the appeal on account that they had pursuant to the leave granted in Misc. Appl. No. 3 of 2018 obtained an enlargement of time for filing of this appeal out of time.
4. On 29.7.2019, this court did deliver a ruling setting aside the Order of 26.6.2019 striking out the appeal and reinstated the appeal herein for determination on merit.
5. As Parties had already canvassed the appeal by way of written submissions, I set this date for delivery of the judgment.
6. The main issue in this reinstated appeal, for determination is whether the trial court erred in law and fact in making a finding, that the appellants were liable for defaming the Respondent's character and therefore in awarding the Respondents general damages of KShs.600,000/= for character assassination.
7. This being a first appeal, I must in accordance with **Section 78 of the Civil Procedure Act** reassess the evidence adduced before the trial court and re-evaluate it afresh and arrive at my own independent conclusion bearing in mind that I neither heard nor saw the witnesses as they testified (see *Sielle Vs. Associated Motor Boat Company Limited*).
8. Revisiting the evidence before the trial court, PW1 Simon Albert Juma Odiyo who was the Plaintiff and now the Respondent in this appeal testified and stated that he was a businessman operating a hotel at Wichlum Beach and also a farmer.
9. He identified the defendants as the people he had previously worked with in the same office at Wichlum Beach and that he used to be the Chairman of Wichlum Beach Management Unit while the 1st Defendant was his vice chairman, the 2nd Defendant was a Committee Member and so were the 3rd and 4th defendants.
10. The Plaintiff testified adopting his witness statement and stated that on 19.8.2016, the defendants wrote a defamatory letter to the Fisheries Officer, Bondo wherein they alleged that the Plaintiff was using poison in the lake to harm fish and that he was also harvesting and selling sand at the beach. The subject letter was produced as an exhibit.

11. The Plaintiff testified that acting on the said letter, the Fisheries Officer Sospeter Okungu went to the Beach on 25.8.2016 and convened a stakeholder's meeting where he verbally suspended the Plaintiff from being the Chairman of the Beach Management Unit.

12. The Plaintiff appealed against the suspension and he later received a letter dated 1.9.2016 addressing the issue of his suspension, relating it to the defendant's letter dated 19.8.2016. Following the appeal, the Plaintiff's suspension was lifted vide a letter dated 30.9.2016 which he produced as an exhibit.

13. The Plaintiff testified that as a result of the said letter, he suffered loss and damage, lost business and suffered Public Shame. He prayed for damages.

14. The Plaintiff called PW2 Peter Agutu Were who testified as his witness and stated that he knew both the Plaintiff and the defendants. He recalled that on 25th August 2016, Fisheries Officers from Bondo visited Wichlum Beach and convened a meeting of stakeholders and informed the latter that the Committee had written a letter adversely mentioning the Plaintiff who was its Chairman and that the Plaintiff had written disowning the letter and its contents and that the Fisheries Officer said that he later received a letter to the effect that the allegations against the Plaintiff were false.

15. The 1st defendant Peter Were Ajulu testified on behalf of all the 4 defendants as DW1 and stated that he was a member of the Wichlum Beach Management Unit (WBMU).

16. The 1st Defendant admitted that they wrote the letter dated 19.8.2016 and further stated that the letter stated that the Plaintiff was not serving the interests of members and the Public. He conceded that the letter was addressed to the Director of Fisheries Siaya County and copied to other relevant offices. He conceded further that as a result of the said letter, the Plaintiff was suspended but was later reinstated after investigations were completed. He stated that prior to writing the letter, they had approached the Plaintiff with Complaints but that he took no action.

17. To canvass this appeal, Parties Advocates filed written submissions. The Appellant's Counsel filed submissions dated 19th February 2019 restating facts and evidence adduced before the trial court. The appellant's Counsel also framed the issues for determination acknowledging that the appellants having admitted writing the letter in issue concerning the Respondent, in the form of a complaint, was not defamatory and if so, whether the appellant's defence of qualified privilege was justified and a complete defence to the claim.

18. It was submitted that the appellants having pleaded and testified on the specific incidents which gave rise to the nature of the allegations which the Respondent considered to be false and defamatory, and that as the Respondent did not deny or challenge the said allegations, the trial court erred in finding that the impugned letter was defamatory.

19. According to the appellant's counsel, the investigations leading to the lifting of the suspension of the Respondent as Chairman of Wichlum Beach Management Unit did not exonerate him from the allegations levelled against him. He maintained that the allegations were found to be legitimate concerns raised by the appellants as shown by paragraph 2 of the said letter.

20. In their view, there was no malice in the allegations which bore the truth and which truth was never challenged by the Respondent.

21. In addition, the appellants' counsel submitted that even if the respondent had proved defamation, the defence of qualified privilege which constitutes a complete defence to a claim of defamation sufficed. He relied on **Black's Law Dictionary** definition of privilege, and the case of **Rwekanika V. Bina Mungu [1974] E.A. 388 and citing Garley on slander 6th Edition Page 218.**

22. According to the appellants' counsel, the Fisheries Officer was the competent authority to whom any such allegations of impropriety by the Respondent ought to have been made for investigations to be instituted.

23. Further, that in any event, the Fisheries Officer agreed that the law required such a report for investigations to be undertaken under the relevant Laws being the Fisheries Act. The Appellants' Counsel maintained that the trial Court therefore ought to have dismissed the Respondent's suit with costs.

24. In the alternative, Counsel argued that the award of damages was too high in the circumstances of the case as the complaint raised by the Appellants was for the benefit of the society hence justified and therefore it should have attracted nominal damages of KShs.50,000/= taking into account all circumstances of the case.

25. On the part of the Respondent, his Counsel filed written submissions dated 29.6.2019 contending that the Court ought to resolve the issues of:-

(a) Whether the Respondent proved malice.

(b) Whether the defence of qualified privilege is available to the appellants.

(c) Whether the award was excessively high.

26. On the first issue, the Respondent's Counsel submitted that the statement disclosed malice because it brought out the element of criminology on the part of the Respondent.

27. In that Section 42 of the Fisheries Management and Development Act prohibits use of poison or other noxious substance for killing,

stunning, disabling or catching fish or in any way rendering fish more easily caught.

28. Further, that the said Section provides a penalty upon conviction to a fine not exceeding five million or a term of imprisonment not exceeding 3 years or to both in respect of Industrial fishing and to a fine not exceeding 100,000 or to imprisonment for a term not exceeding three months or to both in respect artisanal fishing. Secondly, that encouraging theft of engines and nets meant that the Respondent was an accomplice to a felony under Section 275 of the Penal Code, and third, that by stating that the Respondent was improving illegalities and sand harvesting presupposed violation of **Section 42 of the Environment Management Act and the Penal Code:**

29. Further, that the appellants implied that the Respondent had embezzled funds given out for Beach Management Unit to which he was the Chair, which was abuse of office and trust as well as theft, yet, under Section 27 of the Fisheries (Beach Management Unit) Regulations, 2007, it is the Treasurer who is responsible for keeping records and accounts of the Beach Management Unit, not the Chairman; and that the overall responsibility lies with the Executive Committee under Regulations 24.

30. It was submitted that if the statements/allegations were true, they should have been reported to the Police for investigations and Prosecution of the appellant for the various offences disclosed.

31. It was submitted that there was no Orders of loss of Fishing nets or engine or illegal harvesting of sand or bribery or inducement by the Respondent hence the Complaint was baseless and intended to besmirch the character of the Respondent. Reliance was placed on **Joseph Njoroge Kamunge v Charles Macharia Nyeri HCC 42 of 2014** and a submissions made that the literal meaning of the letter imputed criminality on the Respondent and that there was no proof of factual and valid statements. Further that **Section 23 of the Fisheries Act** relied on by the Appellants was repealed and replaced with the Fisheries Management and Development Act.

32. On whether the defence of qualified privilege is applicable, it was submitted that the appellants never verified the truthfulness of the allegations made against the Respondent. Reliance was placed on **Reynolds v Times Newspaper (1999) 4 All E.R. 609** which gives the guiding principles for determining the defence of privilege. Further reliance was placed on **Gatley on slander** and **Libel** relied on by the appellant's Counsel in their written submissions.

33. On whether the award of damages was excessively high the Respondent's Counsel submitted that the issue of award of damage, is discretionary hence this Court was called upon not to interfere with the same as there is no evidence to show that the award was excessive.

34. On the whole, it was argued on behalf of the Respondent that this appeal is devoid of merit hence it should be dismissed with costs.

DETERMINATION

35. I have considered the evidence before the trial court, the grounds of appeal, submissions for and against this appeal and the authorities cited by both the appellants' and the Respondent's Counsel.

36. In my humble view, the main issues for determination are:

- (1) Whether the letter dated 19.8.2016 was defamatory of the Respondent.*
- (2) Whether the defence of qualified privilege is available to the appellants.*
- (3) Whether the Respondent was entitled to damages and if so, how much.*
- (4) What orders should this court make?*
- (5) Who should bear costs of this appeal?*

37. On whether the letter of 19.8.2016 was defamatory of the Plaintiff/Respondent herein, the Defendants/Appellants conceded that indeed they wrote the said letter to the Bondo Sub-County Fisheries Officer and copied it to several other offices. Further, that after writing the said letter, the Respondent was suspended as Chairman of the Beach Management Unit, and was only reinstated with a warning to comply with the law, after he appealed against the suspension. The appellants further claim that after the Respondent's reinstatement, elections were held and he lost to the 2nd appellant.

38. The appellants claimed that the letter was not defamatory as it was in the nature of a complaint by the appellants, made in good faith about the Respondent, to persons in authority and statutory responsibility to suspend and oversee operations of the Beach Management Unit, who had a corresponding duty to investigate such allegations and take appropriate remedial action for the benefit of the membership and the electorate hence he was accountable and answerable to them as he held a public office.

39. The impugned letter which was dated 19.8.2016 signed by all the appellants and addressed to the Bondo sub-county Fisheries Office, P. O. Box 328, Bondo States, in broken English reads:

“ ...

Dear Sir,

RE: CHAIRMAN MISCONDUCT

We hereby explain to your good office us (sic) below

The Chairman:-

- 1. He is connecting (sic) with the person who is using poison and giving him money.*
- 2. He also encourages theft of nets and engines.*
- 3. He is improving illegalities (sic) sand harvesting and alcohol by bribing (sic) money from sellers.*
- 4. He doesn't listen to his committee members and assembly.*
- 5. He has no clear report on CDF Finance to committee member, which was KShs.700,000/= for building police post. (sic).*

NOTE: To approve (sic) that the allegation is true even his name has been reported several times in Bondo Police Station (sic)

We us (sic) committee members of Wichlum Beach Management Unit under signed we are humbly requesting your office to take serious action immediately.

C.C.:

- 1. County Director of Fisheries Siaya.*
- 2. County Beach Management Unit networking Chairman Siaya.*
- 3. Sub-County Beach Management Unit Networking Chairman Bondo Bondo.*
- 4. D.O. Nyangoma.*
- 5. South Sakwa and Central Sakwa Fisheries Officer.*
- 6. Chief South Sakwa.*

40. In defamation cases, the plaintiff has a burden of proving on a balance of probabilities, the ingredients of defamation.

41. **Gatley on libel and Slander** writes as follows:-

“Libel or slander is any impulsion which may tend to lower the plaintiff in the estimation of right-thinking members of the Society generally to cut him off from society or to expose him to hatred, contempt or ridicule.”

42. In **Halsbury's Laws of England 4th Edition Volume 28**, it is stated:

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

43. The law of defamation must however give effect to the right to freedom of expression as guaranteed in **Article 33 of the Constitution**, which also protects the right to dignity, and to be protected from harm to their reputation arising from false and defamatory or vilifying statements:

Section – 2 of the Defamation Act defines Defamation as:

“A publication without justification, lawful excuse calculated to injure reputation, contempt or ridicule.”

44. To prove defamation, the claimant must establish:

- a) That the defendant made a defamatory statement to a third person,*
- b) That the statement was false.*
- c) That the defendant was legally at fault in making the statement, and*

d) That the Plaintiff suffered harm.

45. To everyone, reputation is everything. **William Shakespear** characterizes a good name in the following poetic terms:

“Good name in man and woman, dear my Lord, is the immediate jewel of their souls. Who steals thrush, it is something, nothing Twas mine tis his, and has been slave to thousands; but he that fitches from me good name robs me of that which not enriches him and makes me poor indeed.”

46. From the pleadings and evidence on record, it is undisputed that the appellants concede writing the letter in question albeit they claim that they were justified. The letter was addressed to a third person, the Bondo sub-county Fisheries Officer and was copied to six other persons.

47. The only question for this court is whether the words used in the said letter, which concerned the Respondent Chairman of Wichlum Beach Management Unit were defamatory of him.

48. In **Hayward V. Thompson and Others [1981] 3 ALL ER, Lord Denning** states:

“One thing is of essence in law of libel. It is that the words should be defamatory and untrue and should be published of and concerning the plaintiff.

That is, the Plaintiff should be aimed at or intended by the defendant”

49. **Gatley on libel and slander 6th Edition** states, on the legal meaning of defamation:

“A man commits the tort of defamation when he publishes to a third person words (or matter containing an untrue imputation against the reputation of another.”

50. In **Onama V. Uganda Argus Ltd [1969] E.A. 92**, it was held;

“In deciding whether the words are defamatory, the test is what the words could reasonably be regarded as meaning, not only to the general public, but also to all those who have greater or special knowledge of the subject matter”

51. In **Grant V Torsan [2009] 3 S.C. R. 540 SCC 61** the Court stated:

“1. The defamatory statement must be read in context of the publication as a whole;

2. Public interest is not synonymous with what interests the Public;

3. An individual’s reasonable expectation of privacy must be respected in this determination.

4. It is enough that some segment of the community would have a genuine interest in recovering the information on the subject.

5. The subject matter must be shown to be one inviting Public attention, or about which the Public has some substantial concern because it affects the welfare of citizens or one to which considerable public notoriety or controversy has attached.

6. The Public has a genuine stake in knowing about many matters ranging from science and the arts to the environment, religion and morality.”

52. In the instant case, having read the impugned letter as a whole, I am in agreement with the Respondent that it imputed criminality and corruption on the part of the Respondent.

53. This is so because **Section 42 of the Fisheries Management and Development Act** Prohibits the use of poison or other noxious substance for purpose of killing, stunning, disabling or catching fish or making fish more easily caught.

54. As a result, being connected with a person who is using poison and giving him money (sic) means that the Respondent was protecting those who were violating the Law and those criminals were bribing him with money.

55. Secondly, encouraging theft of nets and engines meant or was understood to mean that the Respondent was an accomplice to the theft complained of.

56. Thirdly, improving (sic) illegalities is understood to mean that the Respondent was encouraging sand harvesting and alcohol by receiving money from the sellers therefore receiving bribes which is a criminal offence.

57. Lastly, the claim that the Respondent could not account for KShs.700,000/= which was meant for construction of a Police Post. There was no evidence that the Respondent received such monies and failed to account for it. In addition, there was no evidence tendered by the appellants to support any of the alleged criminal offences which they alleged in their said letter that the Respondent had been reported

severally to Bondo Police Station.

58. To impute that one has committed a criminal offence, you must prove such imputation with a police report to the Police Station or to any other relevant enforcement authority for appropriate criminal sanction; and evidence that the Respondent was charged in a competent court of law tried and convicted of the offence(s). No such evidence against the Respondent was tendered by the Appellants.

59. Accordingly, I find and hold that the letter dated 19.8.2016 was defamatory of the Plaintiff/Respondent.

60. On whether the letter was activated by malice, the appellants put forth a defence of qualified privilege contending that the letter was just a complaint against the Respondent in his capacity as a Public Officer, accountable to the people who elected him.

61. However, the letter was clearly referenced as misconduct on the part of the chairman [not alleged] and was penned off with a request that the Fisheries Office take serious action immediately. The letter did not request for investigations to establish the truthfulness of the allegations against the Respondent. In addition, the Sub-County Fisheries Officer, Bondo by his letter of 1.9.2016 referred to a meeting convened on 25.8.2016 of the Assembly which decided to suspend the Respondent to pave way for investigations. Thus, immediately the letter was received by the Fisheries Officer, and before investigating into the allegations levelled against the Respondent in the said letter, he immediately convened a Stakeholders' meeting to announce the suspension of the Respondent on account of the letter by the BMU. The Respondent was directed to hand over to his Vice-Chairman Peter Were Ajulu, who is one of the appellants herein.

62. After the Investigations were carried out and the Respondent's suspension lifted vide letter of 30.9.2016, there was absolutely nothing in the latter letter that showed that the Investigations revealed that the Appellant's allegations of Misconduct against the Respondent as per their letter of 19.8.2016 were correct or justified in any way.

63. The statement that lifting of the suspension did not provide him with immunity to any existing laws did not, in the view of this Court impute guilt of the Respondent as far as the misconduct and criminal conduct allegations were concerned.

64. In addition, the fact that in the election that followed thereafter the Respondent lost to the 2nd appellant does not, in any way, vindicate the appellants. **Gatley on Libel and Slander** states:

“Clearly that where a publication has been made and the said case, in order to be shielded the publisher has to demonstrate that the publication was made to those who were entitled to receive it and that the same was not made maliciously.”

65. In this case, albeit the Fisheries Officers were entitled to receive such communication, such communication in the form of a complaint, the appellants did not demonstrate the truth in the said communication as there was no evidence adduced to prove that the Respondent was colluding with those who poisoned fish, or that he encouraged the crimes of sand harvesting or that he received bribes from them, or that he received and could not account for KShs.700,000/= or colluded and protected those who stole nets and engines.

66. In my humble view, the letter dated 19.8.2016 was an indictment against the Respondent as the language used affirmed that he was the person the authors were saying he was, not a general complaint and request for investigations into some allegations against the Respondent.

67. There was no evidence that the firm assertions against the Respondent contained in the said letter were genuine, necessitating Investigations and even though, the results of the investigations into each of the allegation were not disclosed.

68. In my humble view, the publication of the impugned letter by the appellants was intended to expose the Respondent to hatred, ridicule and/or contempt. Any right thinking member of the society reading the impugned letter would quickly conclude that the Respondent was a thief and corrupt person who was not fit to hold such position of Chairman of the Wichlum Beach Management Unit, and would make them shun or avoid the Respondent. The statements in the impugned letter as a whole were calculated to lower him in the eyes of right thinking members of the society generally and conveyed the imputation on him, disparaging or injurious to him in his office, profession, calling trade and business. The letter was copied to several people, which was absolutely unnecessary

69. This Court is also alive to the fact that defamation suits can at times be used to inculcate and encourage a culture of hypersensitivity, unreasonable litigation and a rush for gold digging in imaginary Judicial Mine fields. It follows that a person in a defamation suit should be a person of reasonable fortitude. It was not shown by the appellants that the Respondent was not a person of reasonable fortitude.

70. Privileged occasion was defined by Khamoni – J, in **Chirau Ali Makwere V. Nation Media Group Ltd and Another (2009) e-KLR** as:

“An occasion is privileged where the person who makes the communication has interest or a duty, legal, social or moral to make it to the person to whom it was made and the person to whom it is so made had a corresponding interest to receive it.”

See also **Bildad Abiud Mbuthia V. University of Nairobi [1978] eKLR**.

71. In **Hon. Uhuru Muigai Kenyatta VS. Baraza Ltd [2011] eKLR** the Court held:

“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.

72. Thus, 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. In the **Muskari Kombo** case, the Court stated that the essence of this defence is an attempt to balance two competing but vital interests in the society, the individual's rights to have their character and reputation protected and safeguarded from false, unwarranted and malicious and scurrilous attacks on the one hand, and the Public's right to know as exercised and fed by the freedom of expression, which is an indispensable feature of a free and democratic society as well as a major tool for public accountability.

73. In **Raynondo Vs Times Newspaper (1999) 4 ALL E.R. 609**, the House of Lords set out a criteria for determining whether a publication is subject to qualified privilege as follows:

(a) The seriousness of the allegation.

(b) The nature of the information and the extent to which the subject matter is 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 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 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.

74. From the evidence on record, I find that the appellants did not demonstrate that prior to the writing of the impugned letter, they brought to the attention of the Respondent the matters complained of. They did not name the persons whom the Respondent was allegedly protecting or encouraging to commit the crimes of poisoning fish, stealing nets and engines, harvesting sand and bribing the Respondent or that he was Responsible to account for KShs.700,000/= unaccounted for to the CDF.

75. The factual statements by the appellants were in my view, not brought in the preview of the public interest as there was no verified truth and the appellants did not first seek for investigation into the matter. They sought for serious action immediately meaning they had the facts as presented.

76. The letter has an emphasis:

“NOTE: To approve (sic) that the allegation is true even his name has been reported several times in Bondo Police Station.”

77. It was not difficult to get an Occurrence Book extract from Bondo Police Station showing the reports made of and concerning the matters complained of against the Respondent, or any minutes of the Committee where they had raised such issues for deliberation and the chairman refused to address them.

78. The appellants only stuck to their guns that infact, they wrote another letter to the Director of Fisheries asking for elections because Fishermen had rejected the Respondent, and DW1 confirmed in his testimony that the letter of 30.9.2016 cleared the Respondent of allegations but he insisted that when they wrote the impugned letter, they were convinced that they were saying the truth and that they had confirmed facts which they wrote in their letter.

79. The appellants claimed that they arrested a fisherman who was using poison to fish but the chairman took no action. There is no reason why they did not hand him to the police as required **under Section 42 of the Act**.

80. The appellants also did not present to the Police the people the Chairman allegedly encouraged to steal nets and engines. They did not even give or disclose the names of the said people including those who bribed the Respondent so as to harvest sand.

81. In my humble view, in the circumstances herein, the defence of qualified privilege is not available to the appellants.

82. Accordingly, I find and hold that the Respondent proved on a balance of Probabilities that he was defamed by the Appellants and that the defamation was without justification. Secondly, that the defence of qualified privilege was not proved by the Appellants. The same is dismissed.

83. I find that the trial Magistrate did not err in Law or fact in finding the appellants liable for defaming the Respondent.

84. On whether the damages awarded were excessively high, the principles for determining damages are:

- (a) Damages at large are in the discretions of the assessing court but like all other discretions the court is enjoined to exercise the same judiciously, not capriciously and with a reason;**
- (b) Damages are not meant to enrich a party but to compensate for the injury suffered and restore the victim to the position they were in before they suffered the injury;**
- (c) The damages assessed should not be too low or too high;**
- (d) Where past awards are taken into consideration, by the court these should be treated as were guides and each case should be treated on its own facts;**
- (e) Where past awards are taken into account as guides, the age when assessed and the strength of the Kenyan shillings when the awards were made and when the current award is being made also has to be taken into consideration. These principles must be read together with Section 16A of the Defamation Act which provides.**

85. The Appellants made no offer of apology and expressed no regret and have to date not taken any steps to correct the damaging effect of the impugned letter from the minds of those to whom it was distributed.

86. In *Nation media Group Ltd and 2 Others V. Joseph Kamotho and 3 Others* it was held:

“In actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of restitution in integrum has necessary 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 changes.”

87. Thus. The trial court has wide discretion in assessing general damages. However, the guidelines set out in *Jones v Pollard* must be taken into account in arriving at a fair and reasonable award. These are:

- a) The objective feature 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 upto and including the trial itself.**
- c) Matters tending to mitigate damages, such as the publications of an apology.**
- d) Matters tending to reduce damages.**
- e) Vindication of the plaintiff’s reputation past and future.**

88. In this case, the appellants maintained that what they wrote was the truth concerning the Respondent.

89. They also wrote another letter demanding for fresh elections, repeating the same defamatory words against the Respondent. In their testimony led by the 2nd appellant they never produced a single piece of evidence proving what they maintained to be the truth. They now claimed that the Fisheries Officers made a mistake as they did not conduct proper investigations into the allegations levelled against the Respondent to find him culpable.,

90. The Respondent is a businessman operating a hotel and following the impugned letter, he was suspended and reinstated after one month. The so-called investigations never disclosed his culpability.

91. The Respondent did not have to prove that his business had collapsed following the letter but he proved that he was suspended before investigations were carried out, on the strength of the letter. The plaintiff did not have to call a witness to state how the content of the letter had been viewed as the defendants conceded writing the letter which was copied to many other people including the chief of the area.

92. The members of the public too were notified of the letter at an urgent public meeting at the Beach. These people no doubt viewed the Respondent differently. His reputation was injured in the eyes of right thinking members of the society generally.

93. The trial court took into account the above factors in awarding damages of KShs.600,000 which is being considered excessively high. However, **Section 16A of the Defamation Act** provides:

“In any action for libel, the court shall assess the amount 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 not less than three years, the amount assessed shall not be less than four hundred thousand shillings.”

94. In this case, **Section 42 of the Fisheries Management and Development Act (Not Fisheries Act** (repealed) as relied on by the Appellants’ Counsel) prohibits permitting to be used, use or attempt to use any explosive, poison or other noxious substance for purposes of killing, stunning, disabling or catching fish or in any way rendering fish more easily caught.

95. Under Sub-Section 7, a person who contravenes the provisions of the Section commits an offence and on conviction shall be liable to a fine not exceeding five million (KShs. 5 million) shillings or to a term of imprisonment not exceeding three years

96. The Respondent is also alleged to have committed other offences of encouraging the theft of engines and nets (being as accomplice), receiving bribes from people who harvested sand illegally and that he could not account for KShs.700,000/= for building a Police Post which money was given to a Beach Management Unit Committee.

97. Taking into account the provisions of **Section 16A of the Defamation Act** and the various allegation of criminal nature against the Respondent and the conduct of the appellants who were non-apologetic and maintained in their stance claiming the truth which they could not substantiate with evidence, I find that the award of KShs.600,000/= general damages was not excessive in the circumstances of this case against the 4 appellants, jointly and severally.

98. I uphold the award and order that the appellants shall pay the said sums of money to the Respondent jointly and severally.

99. The Respondent shall also have costs of the appeal herein.

100. On the whole, I find and hold that this appeal on liability and quantum has no merit. The same is hereby dismissed with costs to the Respondent.

Dated, Signed and Delivered at Siaya this 25th Day of November, 2019.

R.E. ABURILI

JUDGE