REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CORAM: R. MWONGO, J.

MILIMANI LAW COURTS

CIVIL SUIT NO. 182 OF 2013

EVANS ARTHUR MUKOLWE.....PLAINTIFF

VERSUS

THE COMMISSION OF ADMINISTRATIVE JUSTICE.....DEFENDANT

JUDGMENT

Background

1. The plaintiff's case is that on or about 17th December, 2012, the defendant held a press conference in Nairobi concerning, inter alia the plaintiff. The press conference was reported on 18th December in a Daily Nation newspaper article captioned ***"Waititu, Sonko Unfit for Office"*** on page 3.

2. The newspaper article was in the following words, recited in paragraph 4 of the plaint:

> ***"…Embakasi MP Ferdinand Waititu and his Makadara counterpart Gidion Mbuvi are among 36 Kenyans the office of the Ombudsman wants barred from taking part in the next General Elections or holding any public office.***
>
> ***The Commissioner of Administrative Justice led by lawyer Otieende Amollo also listed another 12 senior Government and State Corporation officials who have been convicted for abuse of office. They include …….. former Kenya Wildlife Services Director Evans Mukolwe….***
>
> ***'Having received a long list of more than 160 names, we sought confirmation from the Judiciary whether appeals may have been preferred by any of the convicted officers on their respective cases. The Commission was not able to cross-check from each individual whether their convictions have been overturned on appeal. But, generally, they are now ineligible to run for office for having been found to have misused or abused public office' Mr Amollo added"***

3. The plaintiff alleges that the published allegations were defamatory, and intended to and did in fact portray the plaintiff as, inter alia, corrupt, untrustworthy and lacking in integrity and ethics. On that basis, the Plaintiff moved the court through a plaint dated 15th May 2013 alleging defamation against the defendant. The plaintiff seeks the following reliefs and prays for:

a) General and exemplary/aggravated damages for defamation

b) An injunction order restraining the Defendant by itself, its servants and/or agents or otherwise from further uttering or publishing or causing to be published defamatory words against the plaintiff

c) An order directing the Defendant to retract and publish or cause to be published the retraction of the defamatory parts of the article complained of herein in the Daily Nation issue of 18th December, 2012

d) Cost of this suit

e) Interest on the amount payable at (a) and (d) above at the Court's rates from the date of judgment until payment in full.

f) Any other or further relief that the Honourable court may deem proper to award in the circumstances herein.

4. At the hearing, the plaintiff (PW1), and one Josiah Masachi Achoki (PW2) gave evidence for the plaintiff. PW1 produced a bundle of documents showing that the defendant had written to the IEBC recommending that the plaintiff was ***"ineligible to run for office for having been found to have misused or abused public office".***

5. The plaintiff produced the said newspaper article in which was published the offensive words that he alleges were defamatory. He also availed the judgment in the consolidated **High Court Criminal Appeal Nos 385 and 386 of 2009 Josiah Masaki Achoki v Republic Consolidated with Evans Arthur Mukolwe v Republic.** In that case which was determined on 16th November, 2010, Khaminwa, J. set aside and quashed the conviction and sentences by the lower court for the abuse of office offences laid upon each of the applicants.

6. PW2, a friend of the plaintiff, testified that he had known the plaintiff for over fifteen years. He stated that he was reading the newspapers when he saw the plaintiff's name, and that he had been barred from contesting the election. He stated that he had been jointly charged with the plaintiff and both had appealed the conviction and sentence. Their appeals had succeeded and their sentences were quashed and set aside. On reading the newspaper, he thought the plaintiff was corrupt and lacked integrity.

7. For the defence, evidence was tendered by DW1 Edward Odhiambo Okello, a Director of the Defendant Commission and advisor to the Commission's chairperson.

8. DW1 testified that prior to the 2013 election, the Commission together with other Commissions and relevant state entities came up with a joint vetting process and criteria for persons seeking political office. He stated that applicants were placed in three categories: Public Officers convicted of abuse of power; Public Officers who are unresponsive, and who have engaged I misbehavior and other malfeasance in the public domain; and Public Officers found culpable of Malfeasance in public administration, ineptitude, inefficiency et al. The defendant sought information on applicants for political office from relevant organs.

9. The plaintiff fell into the category of those Public officers who had been convicted. This was evidenced from a list obtained from the Director of Public Prosecutions in a letter dated 12th October, 2012. It attached a list showing that the plaintiff, amongst others, had been convicted for abuse of office in ACC NO 5/06 CR 170/29/06, Nairobi. Further, from the Ethics and Anti-Corruption Commission, the defendant received a letter dated 12th October, 2012, showing that the plaintiff in Case No 5/06 had had his conviction quashed and sentence set aside on 16/11/2012 in the **High Court Consolidated Criminal Appeals Nos 385, 386/09 Josiah Masaki Achoki and Evans Arthur Mukolwe v Republic**. On 27th November, 2012, the defendant wrote to the Chief Registrar of the Judiciary for clarification on the status of various cases, including that involving the plaintiff, and forwarded the list of convicted officers requesting confirmation whether appeals had been preferred.

10. On 14th December, 2012, the defendant wrote to the IEBC forwarding the lists of public officers falling in the three categories, and stated as follows regarding those officers:

> ***"…in the respectful view of the Commission they fail the integrity test and ought to be disqualified from running for office for the General elections of 4th March 2013, on account of failing the moral and ethical requirements of the Constitution (A. 99(1)"***

11. No sooner had the information been forwarded to the IEBC than it found its way into the public forum, including the newspapers, leading to the plaintiff's claims of defamation and this suit.

Plaintiff's Submissions

12. The Plaintiff's statement of issues filed on 23rd July, 2014 raises the following issues:

a) Whether the utterances made at the press conference held on 17th December, 2012 were attributable to the defendant.

b) Whether or not the subject utterances were false, malicious, contemptuous, and defamatory to the plaintiff

c) Whether the words referred to the plaintiff.

d) Whether the defendant verified the truthfulness or otherwise of any such allegations prior to the publication

e) whether plaintiff is entitled to reliefs sought.

13. Arising from the hearing, the plaintiff's condensed submissions are as follows.

14. On issue a), above, the plaintiff submits that as much as the Defendant asserts that the publication complained of was made on an occasion of justification and qualified privilege, the defendant did not give regard to the plaintiff's reputation and in that regard, infringed the plaintiff's right to dignity therefore going against the constitution.

15. On issue b), he submits that the statement as reproduced in paragraph 4 in the plaint alleges the plaintiff as at that date had been convicted for abuse of office and that no appeal had been preferred and/or decided in the plaintiff's favor. Thus that, as at the date of the publication, the plaintiff was untrustworthy and corrupt was incompetent to hold public office and should not take part in general elections.

16. The Plaintiff adds that the allegations are not only false but also defamatory and intended to disparage the Plaintiff and frustrate his profession, social status and character and that the plaintiff's reputation was injured by the published words.

17. On issue c) above, the plaintiff submits that the published words include **'…** ***former Kenya Wildlife Services Director Evans Mukolwe*** **…'** and that the said statement directly referred to the Plaintiff alongside others not in this case.

18. On issue d), above, he submits that in a letter dated 12th October, 2012 drawn by the Acting Secretary/Chief Executive of the Ethics and Anti-Corruption Commission and addressed to the chairman of the defendant which gave a report. In the report, specifically, against the name of the plaintiff, it was indicated that his conviction had been quashed and sentence set aside. Therefore the publication was actuated by malice and was grossly reckless despite the clear communication from the EACC.

19. On issue e), the plaintiff submits that the defamatory words have caused him to suffer, and he continues to suffer, immense embarrassment, humiliation and mental anguish due to the numerous inexplicable questions and telephone calls that he has received and continues to receive from his friends, colleagues, peers, as well as his business associates.

20. On quantum, the plaintiff submits that given his professional, social, and political standing in society; and given the high positions that he has held including being the Chief Executive Officer of one of the higher end parastatals namely, Kenya Wildlife Service and earlier as a Director of Kenya National Meteorological services, the following award would suffice:

i. General damages Kshs 7,000,000/=

ii. Exemplary damages Kshs 2,000,000/=

Total Kshs 9,000,000/= plus costs and interest

Defendant's Submissions

21. Through submissions dated 4th July, 2019, the defendant submitted that: It is an undisputed fact that the Plaintiff was convicted in the Anti- Corruption Court on 28/8/2009 in **Nairobi Criminal ACC No. 27 of 2006 Republic v Evans Arthur Mukolwe;** that the conviction was for the offence of abuse of office, and that the plaintiff cannot overcome the defences of absolute privilege and justification pleaded by the defendant because it is true and factual that he was convicted.

22. The defendant further submitted that the sequence of events clearly established that as a Commission and state organ, it was only performing its constitutional and statutory duty. That it was not actuated by malice, ill will or extraneous considerations; that the brief involved several public servants; and that this was not an isolated case targeting the plaintiff personally.

23. In addition, the defendant submitted that the information complained of: was obtained from relevant state agencies and was not fabricated or obtained from dubious undisclosed sources; was relayed to a body which had a duty to receive it by a body which had a duty to provide it; and that the defendant only forwarded a letter to the Independent Electoral and Boundaries Commission attaching the list; that there was no embellishment; that there were no exaggerations, vivid illustrations or colour; and that as son as the defendant discovered that the Plaintiff's conviction had been quashed, it immediately informed the IEBC of the fact.

24. The defendant also argued that its actions must be restricted to the letter it wrote to the Commission; that the defendant cannot be responsible for publication and coverage of the words used by newspapers; and that any issues concerning newspaper coverage should be between the plaintiff and the said newspapers.

25. Finally, the defendant submitted that the plaintiff's suit is incompetent, misconceived and bad in law to the extent that the plaint does not provide the particulars of defamation as mandatorily required under the Defamation Act and rule 7 of the CPR, 2010. The defendants therefore take the position and defence of justification and qualified privilege.

Analysis and determination.

26. At the hearing the parties agreed to a list of fifteen issues for determination. The plaintiff summarized them into five issues and submitted on them. I analyse the matter on each of the five issues which I have restated as follows:

a) Whether the words published in the newspaper article 18th December, 2012 referred to the plaintiff and were attributable to the defendant

b) Whether the defendant is responsible for the utterances made in the newspaper publication of 18th December, 2012

c) Whether the utterances by the defendant were false, malicious contemptuous and defamatory of the plaintiff

d) Whether the defendant verified the truthfulness or otherwise of any such allegations prior to the publication and whether there was absolute privilege and justification.

e) Whether the plaintiff is entitled to the reliefs sought

Whether the words published in the newspaper article of 18th December, 2012 referred to the plaintiff and whether they were attributable to the defendant

27. There is no dispute on the first part of this issue, as it is clear from the face of the words on the said article that the words therein referred to the plaintiff. The words in the article in fact mentions the plaintiff's name: *"Kenya Wildlife Service Director Evans Mukolwe"*.

28. As for the second part of the issue, and for clarity, I take the word "attributable" in the phrase "attributable to the defendant" in the plaint, to mean: *"ascribe"* to; or *"assign"* to; or *"impute"* to; or *"pin on"* the defendant; as described in **Roget's International Thesuarus 4th Edition**. This is confirmed by the definition in the **Concise Oxford Dictionary** which defines the word ***"attribute"*** as follows:

> ***"quality ascribed to person or thing; characteristic quality; regard as belonging or appropriate to; assign"***

On the basis of that understanding, I deal with the issue herein**.**

29. This aspect of the issue is fairly easy to dispose of because there cannot be much to dispute on it. The actual statements made by the defendant can be easily verified as can those in the newspaper article in the Daily Nation of November 18, 2012 at page 3.

30. The actual words stated in the newspaper article complained of are as follows (I have numbered the statements for subsequent clarity in discussion):

> ***1."Embakasi MP Ferdinand Waititu and his Makadara counterpart Gedion mbuvi are among 36 Kenyans the office of the ombudsman wants barred from taking part in next year's General Election or holding any public office……..……."***
>
> ***2. "The Commission on Administrative Justice led by lawyer Otiende Amollo also listed another 12 senior government and state corporation officials who have been convicted for abuse of office……"***
>
> ***3. "They include former Permanent Secretary Sylvester Mwaliko……Others are former Kenya Wildlife Service Director Evans Mukolwe ……."***
>
> ***4. " 'Having received the long list of more than 160 names we sought confirmation from the Judiciary whether appeals may have been preferred by any of the convicted officers on their respective cases' he said at a news conference yesterday"***

31. Statements numbers 1-3 above are statements crafted and written by the Nation Newspaper reporter, indicated therein as one Dave Opiyo. They are reported speech, and so they are in fact the words of the reporter. The three statements are based on the reporter's reading and or interpretation of communications made or released by the defendant. As presented in the publication, these first three statements are therefore clearly attributable to the Daily Nation reporter himself.

32. Statement number 4 above, or that part of it that is quoted, is a paraphrase of the defendant's letter of 14th December, 2012, to the IEBC at page 4 thereof, which reads as follows:

> ***"While the Commission sought to confirm that none of those named may have had their convictions overturned on appeal, the Commission was not able to reach each of the individuals to cross check the information"***

Thus statement number 4 is also not in fact a direct quotation of the defendant's letter. It is therefore, inevitably, attributable in the form in which it is reported in the newspaper, to the reporter. It appears that the said statement was a quote made at an actual press conference by the defendant's chairman on the day before the publication of the article.

33. In his evidence in chief, the plaintiff confirmed that he listened to the press conference. His testimony was that:

> ***"Having heard the press conference, I felt that this was just malice. That what was being perpetrated by the defendant, because I was being rung by my family and friends, was that I am incompetent, untrustworthy, lacked integrity ….all these were untrue"***

34. All the above four statements – numbers 1 to 4 – are the subject of the defamation complaint as set out in paragraph 4 of the plaint. Clearly, all four statements have a foundation in or connection to the letter the defendant wrote to IEBC the extent that the information in them can be isolated and found in some form in the said letter. The first three statements, are however, strictly speaking, not attributable to the defendant in the form in which they are published. They are instead attributable to the newspaper reporter. I so find. I note that neither the reporter nor the newspaper have been sued herein.

35. The fourth statement which is a quotation attributed to the defendant's then Chairman, and which is a paraphrased version of the defendant's letter of 14th December, 2012, to the IEBC, is clearly attributable to the defendant. I so find. I also find that the said statement must be read in conjunction with the general sense of the discussion at the press conference which was about barring certain public officials – over 160 in number – from participating in the General elections, on account of integrity issues.

Whether the defendant is responsible for the utterances made in the newspaper publication of 18th December, 2012

36. The defendant does not deny that it issued to the IEBC a list of ***"Public Officers Convicted of Abuse of Power"***; that the list contained

the name of the plaintiff; and cited the case number in the Chief Magistrate's Court in which he was convicted; and the fact that the plaintiff was the Director of Kenya Wildlife Service. The defendant also does not dispute that it made the following statement:

> ***"…in the respectful view of the Commission they fail the integrity test and ought to be disqualified from running for office for the General elections of 4th March 2013, on account of failing the moral and ethical requirements of the Constitution (A. 99(1)"***

37. All this information, the defendant submits, was factual information based on a real case in which the plaintiff was convicted and therefore gives rise to the defences of absolute privilege and justification.

38. The defendant however disputes that it was responsible for the publication of the words in the newspaper. In paragraph 5 of its defence, the defendant stated that it: *"will contend and maintain that it cannot be legally responsible for the publication of the words complained of by the Daily Nation Newspaper or any other Newspaper"*.

39. On the point of legal responsibility, the Defendant relied on the case of the **Daily Nation v Mukundi and Another (1975) EA 311.** There the Court of Appeal of Eastern Africa held that:

> ***"The second defendant had claimed indemnity and contribution from the first defendant, on the ground that it had published the notice at the request of the first defendant. The trial judge dismissed the claim. I think* that the trial judge was right. The second defendant, in my view, was an *independent contractor; it could, at its own complete discretion, either have accepted or refused to accept the notice for publication. When it accepts any item for publication, it has the right and indeed the duty to see whether such item contains seditious or libellous matters, and it always publishes at its own risk unless of course express arrangements to the contrary are made between it and the customer."***

40. In the **Daily Nation v Mukundi** case, there was a direct attempt to claim indemnity and contribution from the newspaper. Here, there is no attempt to enjoin the newspaper as a party or indemnor. I agree with the defendant in this case that it cannot be held responsible for the publication by the newspaper. The newspaper is solely liable for articles it publishes. It publishes them at its own risk. It has a concomitant and unexclusive duty and responsibility to verify and weigh any articles and sentiments it publishes to avoid such action as defamation.

41. Accordingly, I am unable to find the defendant wholly responsible for the utterances made by the Daily Nation newspaper, except for the following quoted statement in the newspaper: ***'Having received the long list of more than 160 names we sought confirmation from the Judiciary whether appeals may have been preferred by any of the convicted officers on their respective cases' he said at a news conference yesterday"***

42. As earlier pointed out, the above statement is a paraphrase of the defendant's letter at page 4 to the IEBC that: ***"While the Commission sought to confirm that none of those named may have had their convictions overturned on appeal, the Commission was not able to reach each of the individuals to cross check the information"***

Whether the utterances by the defendant were false, malicious contemptuous and defamatory of the plaintiff

43. The starting point is to define and identify the ingredients of defamation in the context of the case. In the case of **Selina Patani & Another v Dhiranji V. Patani [2019] eKLR,** the court referred to the case of **John Ward v Standard Ltd**, **HCCC 1062 of 2005** in which the ingredients of defamation were summarized as follows:

(i) The statement must be defamatory.

(ii) The statement must refer to the plaintiff.

(iii) The statement must be published by the defendant.

(iv) The statement must be false.

44. Was the statement defamatory? The plaint recites an extract from the Daily Nation newspaper dated 18th December 2012. That statement mentions the plaintiff among others, to have been on the list of persons who had been convicted for abuse of office. In the article, the defendant is stated to have received a list of more than 160 names of convicted persons identified through court cases, and that they – the defendants – had sought confirmation from the Judiciary as to whether appeals may have been preferred by any of the convicted officers in their respective cases.

45. In **Gatley on Libel and Slander 6th Edition** at pg 6 the learned author characterises a defamatory statement as follows:

> ***"A defamatory statement must be false and it must also be defamatory to the plaintiff, that it is to say, the statement must contain, whether expressly or by implication, a statement of fact or expression of opinion which would lower the plaintiff in the estimation of a reasonable reader who had knowledge of such other facts not contained in the statement, as the reader must reasonably be expected to possess."***

Whereas in **Halsburys Law of England 4th Edition Volume 28** the learned author 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 an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business."

46. Clearly, for a statement to be defamatory, it must first be false. Having perused the letter from the defendant, it is not in dispute that the plaintiff was in fact found guilty and convicted for abuse of office. This is clear from the record and documents relied on by both the plaintiff and the defendant's list of documents, namely, the copy of judgment in **C.M Anti-Corruption Case No. 5 of 2006, Republic vs Evans Arthur Mukolwe** delivered on 27th August 2009. I do not make any judgment on whether it was false at this point as the evidence itself must lead to that finding

47. In **Phinehas Nyagah v Gitobu Imanyara Civil Suit No. 697 of 2009 [2013] eKLR,** Odunga J observed as follows on malice in statements said to be defamatory:

"Thirdly, the words must be malicious. Malice here does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice. 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 but the law does not weigh in a fair balance and it does not follow merely because the words are excessive, there is therefore malice. Malice may also be inferred from the relations between the parties before or after publication or in the conduct of the defendant in the course of the proceedings. Malice can be founded in the publication itself if the language used is utterly beyond the facts. The failure to inquire into the facts is a fact from which inference of malice may properly be drawn. Any evidence, which shows that the defendant knows the statement was false or did not care whether it be true or false will be evidence of malice." (Underlining added).

48. Thus, a statement published out of recklessness may evince malice.

49. From the evidence, the plaintiff does not deny that he was convicted; he instead asserts that the conviction had been quashed. This is also not contested as he was able to exhibit the judgment, dated 16th November, 2010, in **High Court Consolidated Criminal Appeals Nos 385, 386/09 Josiah Masaki Achoki and Evans Arthur Mukolwe v Republic**. There, Khaminwa J, set aside and quashed the judgment of the lower court in CM ACC No 5 of 2006. The plaintiff asserts that that is the only fact that was relevant for release to the IEBC, as the decision was delivered by the High Court as far back as 16th November, 2010. He also asserts that the setting aside decision was in the knowledge of the defendant by the time of the publication.

50. Thus the question is whether the plaintiff was justified in releasing the older facts concerning the conviction when there were more recent facts showing the conviction had been quashed. It is a fact that there was a judgment establishing the plaintiff's conviction. This fact came into the defendant's knowledge, according to their evidence, in response to the plaintiff's letter to the DPP of 20th September, 2012, and the DPP's response of 12th October, 2012 attaching a list with, among others, the plaintiff's name disclosing that he had been convicted of abuse of office in the Chief Magistrate's court.

51. On 12th October, 2012 the Ethics and Anti-Corruption Commission sent to the defendant a letter, received by them on as shown by then defendant's date stamp on 15th October, 2012, attaching another list. That list showed that the plaintiff conviction had been quashed and the sentence set aside I Consolidated Cases 385/386 of 2009.

52. With all this information in hand, the defendant wrote a further letter to the Chief Registrar of the Judiciary on 27th November, 2012, requesting her to clarify whether any appeals had been preferred by any persons mentioned. The defendant forwarded the list of convicted officers including the plaintiff. The letter reads in part:

"….the Commission successfully requested for a list of individuals who have been convicted of abuse of office from the Ethics and Anti- Corruption Commission and the Office of the Director of Public Prosecutions.

However, the Commission is of the considered opinion that the since these cases were determined by the Judiciary, it is incumbent upon the Commission to seek confirmation from the Judiciary whether appeals have been preferred by any of the individuals convicted for abuse of office before proceeding to enter their names in the 'Black Book'.

It is in this regard, therefore, that we have written requesting you to kindly confirm whether the said convicted individuals have lodged appeals against their convictions and the status of their appeals, if any. We would also appreciate if you could favour us with copies of their conviction judgments to enable us proceed with the execution of this noble idea. Kindly find herewith the enclosed list of public officers convicted of abuse of office for your kind perusal and consideration."

53. The response received by the defendant came by a letter from the Chief Registrar twenty-three days later on 20th December, 2012. The letter clarified that the plaintiff's conviction had in fact been quashed and set aside on 16th November, 2012. This date of setting aside in the Chief Registrar's list was proved to be wrong through the cross examination of the plaintiff and the judgment exhibited by him, and should have read 16th November, 2010.

54. However, on 14th December, 2012, and without waiting for the response from the Judiciary, the defendant sent a letter to the IEBC, forwarding inter alia, the list of persons – including the plaintiff – convicted for abuse of office. To their credit, the defendant stated in that letter:

"While the Commission sought to confirm that none of those named may have had their convictions overturned on Appeal, the Commission was not able to reach each of the individuals to cross check the information".

55. Despite coming to this creditable position in their said letter, the defendant nevertheless went on to make a conclusive recommendation to the IEBC in the following words:

> ***"In this respect, the Commission hereby forwards to you the following three categories of serving Public Officers, or persons who previously served as such, and who, in the respectful view of the Commission, fail the integrity test and ought to be disqualified from running for office for the General Elections of 4th March, 2013 on account of failing the moral and ethical requirements of the Constitution (A.99(1));"*** (underlining added).

56. In his cross examination, DW2 Edward Okello, a Director of the Defendant and Advisor to the Chairman, testified that he was aware that the conclusive status of a person arises after the conclusion of the appeal process. He also admitted that the defendant wrote to the IEBC before the Judiciary had given them a response because, he explained, they were constrained by timelines set by IEBC for nominations which were for some time in December, 2012. He further admitted that the ideal situation would have been to ascertain the information they had. Further, he said:

> ***"I think if we had told the Plaintiff about the information we had, he would have corrected the information……"***

and later he stated in cross examination:

> ***"The statement by the Daily Nation of 18th December 2012, is a statement of fact.***
>
> ***The statement of the Daily Nation portrays that as at 18th December, 2012, the Plaintiff was a convict. Having seen the 2010 judgment of the High Court quashing the conviction, the plaintiff had been acquitted at that date"***

57. It appears to me that the defendant did not make any serious effort to clarify the information they had received from the DPP prior to communicating it forward to IEBC. Clearly also the defendant admitted in cross examination that the statement they published to the IEBC gave the impression that the plaintiff was a convict as at the date of the publication. This impression was not a correct impression, for the plaintiff had by November, 2010, been cleared by the High Court. And even going by the erroneous information in the list received on 15th October, 2012, by the defendant from the Ethics and Anti-Corruption Commission, that the plaintiff had been acquitted by the High Court as at 16th November, 2012, there should have been cause for hesitation by the defendant to publish the information of conviction of the plaintiff to the IEBC on 14th December, 2012.

58. The defendant did not pause. Instead they went headlong to publish the factual evidence of the conviction of the plaintiff but not the evidence they also had that the conviction had been quashed. The defendant should have exercised some caution given the facts that were in their knowledge with respect to the plaintiff.

59. To this extent, the defendant can be said to have been guilty of *reckless* publication of a statement containing misinformation or non-factual information. This reckless abandon is evidenced by the fact that the defendant had in its possession information in – and exhibited with its documents – a letter from the Ethics and Anti- Corruption Commission stating that the plaintiff's ***"Conviction quashed, Sentence set aside"*** letter that gave rise to doubt on the plaintiff's conviction.

60. In **Godwin Wanjuki Wachira v Okoth [1977] KLR, 24** Muli, J, (as he then was) held:

> ***"I may go further and hold that failure to check court records to ascertain the true position may very well be negligence on their part……the defendants must be deemed to have acted recklessly in publishing the distorted story…….. I hold that the author published the defamatory statement complained of ….with reckless indifference ….."***

61. Accordingly, I find there was recklessness on the part of the defendant.

62. This leads naturally to the next issue as to whether the defendant made attempts to verify the information they desired to publish prior to publishing it.

Whether the defendant verified the truthfulness or otherwise of any such allegations prior to the publication and whether there was absolute privilege and justification

63. It is not in dispute that the defendant, is empowered in accordance with the Constitution to, among other things, investigate any conduct in state affairs or any act or omission in public administration in any sphere of government, including complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. It is also not disputed that the defendant and others stated to have abused office are public officers. On this basis the entire matter falls into the space of public interest.

64. I am of the view that where issues concerning the exercise of constitutional power the public interest is concerned arise, as in this case, there is a special right of scrutiny and information to be made accessible to the public. Even then, however, the disclosure of information in the public interest must meet the qualifications of justification and privilege.

65. A number of cases will suffice to discuss the issues of justification and privilege. In the English case of **Fraser v Evans & Another [1969] 1ALL ER 8** the court stated as follows**:**

> ***"It all comes back to this, there are some things which are of such public concern that newspapers, the press and indeed everyone is entitled to make known the truth and make fair comment on it. This is an in an integral part of the rights to free speech and expression. It must not be whittled away. [It is] asserted that in this case there is a matter of public concern. They admit that they are going to injure the plaintiff's reputation but they say that they can justify it, that they are only making fair comment on a matter of public interest….."***

66. In the case of **Uhuru M. Kenyatta v Baraza Leonard [2011] eKLR** Rawal J as she then was held:

> ***"While taking defence of justification of qualified privilege in the 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. However, it was contended that the defence of qualified justification, in any event, does not avail to the Defendant because it refused to accede to the request from the Plaintiff to publish a correction, specifically in the face of the fact that the Defendant's crew were present during the visit of the mortuary, and that both the statement of the visit and the Speaker were recorded on camera."***

67. In the case of **Ndung'u Njoroge & Kwach Advocates & Another v Standard Limited & 8 Others [2018] eKLR** the court stated that qualified privilege, like its more exalted sibling, absolute privilege, finds basis in public policy and common convenience, common good, or welfare of society. Whilst in **Henwood v. Harrison [1872) LR 7 CP 606, Willes J**. stated the proposition thus:

> ***"The principle on which these cases are founded is a universal one, that the public convenience is to be preferred to private interests and that communications which the interests of society require to be unfettered may freely be made by persons acting honestly without actual malice notwithstanding that they involve relevant comments condemnatory of individuals."***

68. And in **Gerhold v. Baker [1918] WN 368** privilege was explained thus:

> ***"It is in the public interest that the rules of our law relating to privileged occasions and privileged communications were introduced, because it is in the public interest that persons should be allowed to speak freely on occasions when it is their duty to speak, and to tell all they know or believe, or on occasions when it is necessary to speak in the protection of common interest."***

69. The privilege is therefore not intended to protect the defendant *per se*, but rather the occasion, when it is deemed for reasons of public policy, that a person should be able to speak without risking an action on defamation. Unlike in the case of absolute privilege, the defence of qualified privilege is destroyed if it is proved that the respondent was actuated by malice.

70. In the present case, I have already found that the defendant acted at least *recklessly* in disclosing unverified information about the defendant. If recklessness evinces malice, the defendant was, to that extent, malicious. But to be fair to the defendant, it did state that it sought confirmation from the Judiciary of the information they were disclosing on the plaintiff. In so doing, however, they did not wait for a response to be received from the Judiciary. They should have waited to make verification in respect of the defendant, because they in fact had information from the Anti-Corruption Commission stating that the defendant's conviction had been set aside.

71. DW1 for the defendant stated that the defendant could not wait to give better information because of the timeframe given for election nominations by IEBC, and that the information required had therefore to be disclosed urgently. Constitutional bodies are in my view required, by virtue of the important and critical role they play in protecting constitutionalism and the affairs of the state and on account of the impact they may have on the body politic and on third parties, to exercise great care and attention in respect of the information they publish or cause to be published. Such bodies are frequently the last line of hope or defence for the citizenry; they are, like the defendant, the constitutional bastion of protection, and the balm for administrative justice. There is therefore a higher responsibility and expectation that they will, in disseminating information, exercise such care and responsibility as has the stamp of verification and truth.

72. Nevertheless, on 20th December, 2012, just before the Christmas holiday, the defendant received a letter from the Chief Registrar of the Judiciary. It confirmed that the defendant's conviction had been quashed in November, 2012, a wrong date. The defendant thus promptly wrote to the IEBC on 7th January, 2013, forwarding the letter and list from the Judiciary, and stated inter alia:

> ***"From the list, you will note that Mr Evans Mukolwe was acquitted on appeal on 16th November, 2012, subsequent to the communication from the Director of Public Prosecutions. As such, Mr Evans Mukolwe's name is to be expunged from the list of persons recommended as persons ineligible to hold public office…..we herein enclose the judgments as obtained from the Judiciary".*** (Underlining added).

73. To their credit this was a corrective action that was expeditiously and candidly carried out by the defendant. In my view, it had the effect of diminishing the perception of reckless abandon and malicious intent that could be attributed to the defendant in the circumstances shown in this matter.

Whether the plaintiff is entitled to the reliefs sought

74. In his first prayer, the plaintiff seeks general and exemplary/ aggravated damages. Such damages are presumed to flow in the ordinary course of events if a person has been libeled without lawful justification. Further, I have noted that the Nation newspaper, having published the substantial material in issue but not having been sued, damages for the same cannot be awarded herein.

75. I am persuaded that the only damages awardable in the circumstances of this case are nominal damages arising out of the defendant's recklessness in disseminating information on the conviction when they had contrary information from the Anti-Corruption Commission. That information could well have been verified by waiting for the Judiciary to respond to the defendant's letter so they could provide the accurate

information to IEBC, which they eventually did. On this aspect of reckless publication, I am prepared to award Kshs 1,800,000/- as nominal cumulative damages.

76. Prayer number two seeking an injunction to restrain the defendant from further publication was long spent.

77. Prayer number 3 seeking retraction by the defendant of the subject statement is also otiose as the defendant wrote to the IEBC correcting the position on 7th January, 2013, four months before the suit was even filed. Accordingly, no orders are necessary in respect thereof.

78. At the end of it all, I award the plaintiff nominal cumulative damages in the amount of Kshs 1,800,000/= to be paid by the defendant. The defendant shall also bear the costs of the suit.

79. Orders accordingly

Dated and Delivered at Nairobi this 20th Day of December, 2019

SIGNED

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Mr. Ashitiva for the Plaintiff

2. Mr. N. Kitonga For the defendant

3. Court Clerk - Ms. Emily