



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL CASE NO. 16 OF 2015

ANNE OMOLLO.....PLAINTIFF

VERSUS

ODUOR ONGWEN.....1ST DEFENDANT

RONALD NG'ENY.....2ND DEFENDANT

BETH SYENGO.....3RD DEFENDANT

DR. DAVID OLIMA.....4TH DEFENDANT

NAIROBI STAR PUBLICATIONS LIMITED...5TH DEFENDANT

JUSTUS OCHIENG..... 6TH DEFENDANT

JUDGMENT

1. The Plaintiff's claim against the Defendants is for –

- “a) general damages for defamation of character.**
- b) an order for written apology on local daily newspaper for three consecutive days.**
- c) Cost of the suit.**
- d) Interest on (a) and (c) at court rates.”**

2. The claim arises from two publications the first one being a report by a Task Force of the 1st – 4th Defendants which stated inter alia –

“On June 9, 2014, a sum of Shs.1,620,000 was remitted to bank account of one Ms. Anne Omolo by FACTOR CONNECT. Ms Omolo is said to be a Senior jurist and close friend of the Speaker.”

3. Second is an article by the 5th and 6th Defendant at page 19 of the Star Newspaper of 24th February 2015 which stated –

“A judge denies she received sh.1.6 m cited in Kisumu task force report. A judge mentioned

in the ODM task force report on financial improprieties in the Kisumu County Government has distanced herself from the report. Justice Ann Omolo denied knowledge of sh.1.6 million said to have been deposited into her account irregularly... on June 9, Sh1,620,000 was remitted to Omolo's account by Factor connect. Omolo is said to be a senior jurist and a close friend of the speaker," says report."

4. It is the Plaintiff's case that the words in those two publications were in their natural and ordinary meaning understood to mean that she is a corrupt person, is not fit to hold public office, has been associating with corrupt individuals and is a beneficiary of the alleged corrupt dealings at the County Government of Kisumu.

5. It is also her case that as a result of the 1st – 6th Defendants publishing those words she was greatly injured in her character, credit and reputation and in her occupation as a Judge and she has been brought into hatred, ridicule and contempt. It is further her case that despite demand being made to the Defendants to withdraw the defamatory publications and offer a written apology the Defendants have not complied.

6. At the hearing the Plaintiff testified that she is a Judge of the Environment and Land Court currently stationed in Mombasa; that, prior to her appointment in 2012 she practiced as an Advocate in Kisumu and also taught Law at the Maseno University. She was also a member of the Board of Governors of several schools. She stated that she first learnt about the report of the Task Force through articles in the Nation and Standard Newspapers but did not bother as she did not think she was the Anne Omolo that was being referred to. It was not until she got a text message from the 6th Defendant on 19th February 2015 asking for her comment regarding the report that she realized it concerned her. She testified that the 5th and 6th Defendants published the report of the Task Force in an article dated 24th February 2015 and added –

“A Judge denies she received Shs.1.6 m cited in Kisumu task force report”

She stated that the 1st – 4th Defendants as well as the 5th and 6th Defendants played a role in the publication of the defamatory words which are the genesis of this suit. She testified that the report of the 1st – 4th Defendants was presented to their Chairman the former Prime Minister Raila Odinga. The Plaintiff contended that no member of the Task Force contacted her prior to publishing the report even though one of them (the 2nd Defendant) knew her personally. She stated that the report which alleged a sum of Shs.1,620,000/= had been wired into her account by Factor Connect was defamatory of her as it was intended to mean that her account was used by corrupt people to siphon out money from public coffers. That it also meant she is corrupt and not fit to hold public office. She denied that she had received any money from Factor Connect and contended that she did not even know them. She stated that the transaction transferring the cash dated 9th June 2014 refers to Anne Omolo but does not state that the said Anne Omolo is a jurist. She testified that at the material time she was working at Bungoma as a High Court Judge and reiterated that the report referred to her because having been admitted to the Bar in 1996 she is a Senior Advocate or jurist: Anybody who knows her would know the report concerned her. She contended that although she knew many Anne Omolos none was an Advocate like her.

7. The Plaintiff disputed that the report is fair comment saying that no one bothered to get a clarification from her to know if it was true. She contended that the report caused her stress and that she was contacted by some friends and colleagues concerning the same and one would not know what impression they got of her. She stated that the report reached many people and despite demand and notice of intention to sue no apology has been published. She contended that the 1st – 4th Defendants were not apologetic as even in their defence they still denied liability. She however conceded that she is still a Judge and that she has not been demoted or questioned either by her employer or a third party concerning the publication. The Plaintiff further testified that when the 6th Defendant sent her a text message asking for her comment she told him she knew nothing of what he was talking about and asked him to verify from his sources. She maintained that it was defamatory to publish that one was corrupt. She urged this court to order that the Defendants publish an apology, to award her damages for defamation and the costs of this case.

8. The Plaintiff called 3 witnesses a Judge of the High Court (PW1), a University lecturer (PW2) and an Advocate of the High Court (PW3) who all testified that they have known her for a long time and that their understanding of the article in the newspaper was that the Plaintiff is a corrupt person, has been associating with corrupt individuals and that she is a beneficiary of the alleged corrupt dealings at the County Government of Kisumu. Samson Okong'o (PW1), a Judge of the High Court testified he learnt of the article from a media summary circulated to all judicial officers through an email and when he called the Plaintiff who is his colleague she sounded distressed and promised to call him back. She did not and he was left wondering whether the allegations in the article were true. Pamela Odhiambo (PW2), the University lecturer and a friend and former client of the Plaintiff, testified that when she read the newspaper article her view of the Plaintiff completely changed and she now sees her as corrupt, unfit to hold public office, who associates with corrupt individuals and a beneficiary of corrupt dealings at the County Government of Kisumu. It was her evidence that she did not know about the report and that she has never seen it.

9. Mr. Jude Ragot (PW3), an Advocate, testified that it was the newspaper article which drew his attention to the report of the Task Force. He testified that the article, in his view, portrayed the Plaintiff as corrupt and dishonest and as the bridge between the Speaker and Factor Connect in the corrupt dealings. He stated that he took time to call the Plaintiff as he feared it would embarrass her. When he finally did she denied having anything to do with the Speaker but whereas he was relieved to hear her say so the allegations in the article still lingered.

10. The 1st – 4th Defendants called only one witness – the 2nd Defendant. He testified that the committee of the 1st – 4th Defendants were tasked by the Orange Democratic Movement Party (ODM) to probe what was causing problems in the County Assemblies in their strongholds of Kisumu and Makueni and if possible to make recommendations on how to solve those problems. Among the issues they were to look into was corruption. He stated that they took three weeks to carry out the mandate which they did through memoranda and hearing testimonies from various people. If there were allegations against people who were not members of the County Assembly they were free to contact them to get their version. Initially they summoned the people who were directly concerned and in the course of so doing they interacted with one Hon. Ndolo a Member of the County Assembly of Kisumu who gave evidence concerning Factor Connect and who had a copy of an Electronic Funds Transfer from FACTOR CONNECT bank account to the accounts of Anne Omolo and one Elijah Adul. He stated that it was the said Hon. Ndolo who described Anne Omolo as a jurist. The said Hon. Ndolo however refused to part with the proof of the funds transfer but later the committee obtained copies of the same from a record of one of the anti-corruption cases. The 2nd Defendant testified that a sum of Kshs.1,620,000/= was indeed transferred into the account of Anne Omolo by Factor Connect. He stated that after gathering information they prepared a report. He contended that they merely recorded what they gathered but did not pass any judgment regarding the payment and did not attach any impropriety to the said Anne Omolo or Anne Omolo who is the Plaintiff in this case. He contended that the 5th Defendant did not contact them when writing the article and neither did they participate in its publication. He further contended that although he knew the Plaintiff well he did not know she was a Judge. He stated that he tried to contact her but could not reach her. He explained that the critical importance of the report to the people of Kisumu was to sort out the problem at the County Assembly so as to bring sanity to the County. He confirmed that the report of the Task Force was presented to the Chairman of the Orange Democratic Movement Party (ODM) in the presence of the media. He denied it was him who said the Anne Omolo involved was a jurist. He denied that the report was defamatory of the Plaintiff.

11. The 6th Defendant admitted he penned the impugned article. He stated that he did not contact the members of the task force but merely relied on their report. He stated however that since it was clear in his mind that the report referred to the Plaintiff he sent a text message to her to comment before he published the article. He explained that there was only one Anne Omolo in the LSK (Law Society of Kenya) list hence the reason he reached out to the Plaintiff. He contended that she did not complain about the mode he used to reach her. He denied that his article republished the report and stated that it merely reported the Plaintiff's position on the matter.

12. The Advocates for the Parties summed up their cases through written submissions.

13. Counsel for the Plaintiff submitted that the words complained of which directly referred to the Plaintiff in their natural and ordinary meaning meant and were understood to mean among other things that the Plaintiff is a corrupt person and a person not fit to hold public office. That the words also meant that the Plaintiff has been associating with corrupt individuals and that she is a beneficiary of the alleged corrupt dealings at the County Government of Kisumu. Further that due to their publication the Plaintiff has been greatly injured in her character, her credit and reputation and in her occupation as a Judge and she has been brought into ridicule and contempt. Counsel contended that based on the evidence both oral and documentary the Plaintiff has proved her case on a balance of probabilities and is entitled to the prayers sought in the plaint. Counsel for the Plaintiff further submitted that the 1st – 4th Defendants did not demonstrate that their report was published in the public interest and that the words complained of were supported by evidence. He urged this court to find that the defence of the 1st – 4th Defendants has no basis. On this he relied on:-

- **Gideon Mose Ochwati V. Kenya Oil Company Limited & Nation Media Group Limited, [2015]eKLR.**

14. As for the 5th and 6th Defendants Counsel for the Plaintiff submitted that the 5th Defendant had a duty to ensure that there was evidence the Plaintiff was involved in the alleged corrupt activities before they published the report in their paper. Counsel submitted that there was evidence not only from the Plaintiff but from her witnesses that they only became aware of the report after reading the 5th Defendant's article in the 6th Defendant's Newspaper. He submitted that since it is the 5th and 6th Defendants that brought the false report in the public arena the 5th and 6th Defendants are equally liable. Indeed that it was they that added the words - **"A Judge"** to the statement.

15. Counsel submitted that the fact that the Defendants have totally refused to publish an apology despite demand and notice of intention to sue is proof that the publication was actuated by malice.

16. Counsel urged this court to find the defenses of fair comment and justification and qualified privilege not proved. He submitted that the Plaintiff has proved all these elements of defamation, to wit, that the statement is defamatory, that it refers to her and that it was published. He urged this court to find all the Defendants liable.

17. On damages Counsel proposed an award of Kshs.35,000,000/=. He submitted that this will compensate the Plaintiff for damages to her reputation; vindicate her name and take account of the distress, hurt and humiliation which the defamatory publication has caused her. Counsel urged this court to find the following cases persuasive:-

1. Alnashir Visram V. The Standard Limited [2016] eKLR

2. Samuel Ndung'u Mukunja V. Nation Media Group Limited & Another [2015] eKLR.

He submitted that the Plaintiffs who are also Judges were awarded Shs.26,000,000/= and Shs.15,000,000/= respectively as damages for defamation. He urged this court to however take inflation into account. Counsel also urged this court to award the Plaintiff aggravated damages of Shs.10,000,000/= and Shs.3,000,000/= for non-apology stating that the same were awarded in the **Alnashir Visram V. The Standard Limited** and **Gideon Mose Ochwati V. Kenya Oil Company Limited & Nation Media Group Limited** cases.

18. Counsel for the 1st – 4th Defendants submitted, firstly, that the 1st – 4th Defendants have proved that they were appointed by the Orange Democratic Movement Party to make an inquiry into issues relating to management at the Kisumu County Assembly; that they carried out their mandate and prepared a report. Secondly he submitted that the Plaintiff did not prove the elements of defamation as established in the celebrated case of **John Edward V. Standard Limited** (citation not given) in that she did not show that

the words were **(a) defamatory** and **(b) false**. Counsel submitted that the words reproduced in the Plaint and which appear at page 42 of the Task Force Report:-

“On June, 9th 2014 a sum of Shs.1,620,000 was remitted to bank account of one Ms. Anne Omolo by FACTOR CONNECT. Ms. Omolo is said to be a senior jurist and close friend of the Speaker.”

are not defamatory and do not in their ordinary sense and meaning contain a statement of fact or expression of opinion which would lower the Plaintiff in the estimation of the general public. Counsel submitted that the words taken in their ordinary meaning do not have any insinuation of impropriety. Counsel cited a passage from **GATLELY ON LIBEL AND SLANDER 6th Edition at page 6 -**

“A defamatory statement must be false and it must also be defamatory to the plaintiff, that 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.”

Counsel further submitted that the statement that a sum of Shs.1,620,000/= was paid to one Anne Omolo’s account by Factor Connect was proved and that it was therefore a statement of truth and fact. Counsel submitted that the Plaintiff did not contest the statement or challenge the bank statements relating to the transaction. Counsel further submitted that the Plaintiff, despite being given an opportunity to demonstrate how the words complained of subjected her to hatred, ridicule or contempt, did not demonstrate any nexus between the said words and a defamatory connotation or that the words caused her to be shunned or injured in her office, profession or calling. Counsel contended that the particulars of innuendo the Plaintiff seeks to rely on were not specifically pleaded as required in Order 2 rule 7(1) of the Civil Procedure Rules. Counsel further contended that the words were not published with malice and to support his submissions he cited Order 2 rule 7(3) of the Civil Procedure Rules and **Phineas Nyaga V. Gitobu Imanyara [2013] eKLR** where Odunga J observed:-

“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 inference 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.”

19. Counsel for the 1st – 4th Defendants further submitted that in so far as the words complained of were published under a sense of public duty and without malice to the Plaintiff in the honest belief that the information contained therein was true the defence of justification and fair comment is available to his clients. He submitted that reasonable conduct to verify the information was undertaken by the 2nd Defendant in line with the Australian case of **Lange V. Australian Broadcasting Corporation [1997] 189 C. C.R. 520** where it was held that for privilege to apply **“reasonable conduct”** by the publisher must be proved and reasonable conduct includes steps to verify the information.

20. Counsel contended that the matters in respect of which the 1st – 4th Defendants were mandated to inquire into and the evidence adduced at the inquiry were of paramount public interest and therefore it

was important that the facts be made known in the public interest.

21. As to whether the 1st to 4th Defendants were responsible for the publication of the words complained of in the Star Newspaper Counsel submitted that the Newspaper was an independent publication and that the 1st – 4th Defendants or Orange Democratic Movement for that matter did not contribute to the content, publication and dissemination of the article in the Star Newspaper.

22. On the issue of damages Counsel for the 1st – 4th Defendants submitted that:-

a) “All of the Character witnesses presented by the Plaintiff confirmed that they had not had sight of the Task Force Report and therefore their evidence on the alleged defamation and degradation of the Plaintiff’s status and character was not based on the Report. This is also admitted by the Plaintiff’s Counsel in their submissions.

b) The Plaintiff has not been able to establish that the publication in the Task Force Report was actuated by malice.

c) The Plaintiff agreed that her position, status and character as a Judge of the High Court and a distinguished member of Society had not been affected by either the publication in the Task Force Report.”

23. Counsel submitted that the above are material considerations in this matter. Counsel also drew the attention of this court to the observation of the Court of Appeal in **C A M V. Royal Media Services Limited [2013] eKLR** that:-

“No case is like the other. In the exercise of discretion to award damages for defamation, the court has wide latitude.

The factors for consideration in the exercise of that discretion as enumerated in many decisions including the guidelines in Jones V. Pollard (1997) EMLR 233-243 include objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published and any repetition; subjective effect on the Plaintiff’s feelings not only from the prominence itself but from the Defendant’s conduct thereafter both up to and including the trial itself; matters tending to mitigate damages for example, publication of an apology, matters tending to reduce damages; vindication of the Plaintiff’s reputation past and future.”

24. Counsel submitted that the decisions cited by Counsel for the Plaintiff are distinguishable as the facts therein are distinct from those of this case. He urged this court to exercise its discretion sparingly and judiciously taking into account the unique and specific circumstances of this case and award a sum of **Shs.250,000/=** across all the heads of damages. He urged this court to find that as malice was not demonstrated aggravated damages should not lie. In conclusion he urged this court to find defamation was not proved against his clients and dismiss the case with costs to the 1st – 4th Defendants.

25. Counsel for the 5th and 6th Defendants started by stating that the publication in the Task Force Report and in the Star Newspaper should be treated separately. He then submitted that it is a recognized principle in Defamation Law that every person who takes part in the publication of defamatory matter is prima facie liable. He however contended that when read in its entirety the article by the 5th and 6th Defendants is not defamatory of the Plaintiff and that in any event the defence of qualified privilege avails to the 5th and 6th Defendant.

26. Counsel also submitted that it was wrong for the Plaintiff to isolate a passage in the article leaving out the context within which the passage is contained. To buttress this argument Counsel relied on **Martha Karua V. The Standard Limited & Another [2007] eKLR** where quoting **Duncan & Neill** on defamation (2nd edition 1983 page 13, paragraph 411) Khamoni J stated:

“In order to determine the natural and ordinary meaning of the words of which the Plaintiff complains, it is necessary to take into account the context in which the words were used and the mode of publication. Thus a Plaintiff cannot select an isolated passage in an article and complain of that alone if other parts of the article throw a different light on that passage.”

27. Counsel also relied on the English case of **Charleston and Another V. News Group Newspaper Limited and Another (1995) 2 All ER 313** where the House of Lords unanimously held:-

“A prominent headline or a headline and photograph could not found a claim in libel in isolation from the related text of an accompanying article which was not defamatory when considered as a whole, because it was contrary (i) to the law of libel for a plaintiff to sever, and rely on, an isolated defamatory passage in an article if other parts of the article negated the effect of the liver and (ii) to the principle that if no legal innuendo was alleged the single natural and ordinary meaning to be ascribed to the words of an allegedly defamatory publication was the meaning which the words taken as a whole conveyed to the mind of the ordinary, reasonable, fair-minded reader. Accordingly, a plaintiff could not rely on a defamatory meaning conveyed only to the limited category of readers who only read headlines.”

28. Counsel invited this court to consider the context of the passage by reading the entire article – from its headline to its body and see that the article reports the Plaintiff’s denial of what is in the Task Force Report. He submitted that an accusation of impropriety and a denial of such accusation cannot be interpreted in the same manner for purposes of defamation law. Counsel contended that while the former is defamatory the latter is not and for that reason the 1st – 4th Defendants report and the 5th and 6th Defendants newspaper article should be treated distinctly and the latter should not be found to be defamatory.

29. On the defence of qualified privilege Counsel submitted that the 5th and 6th Defendants adhered to the standards of reasonable journalism in that the 6th Defendant contacted the Plaintiff via text message and sought her comment on the purport of the report. Counsel contended that the Plaintiff’s comment was captured word for word in the newspaper article.

30. On the quantum of damages Counsel submitted that the Plaintiff is entitled to general damages only as that is what she pleaded and the prayer for aggravated damages and damages for non-apology should be dismissed. On the general damages he proposed an award of Kshs.500,000/=. He urged this court to find the Kshs.35,000,000/= proposed by the Plaintiff excessive and urged this court to be persuaded by the observation of Mbogholi J, in **Paul Muli & Stella Kanini Mutisya t/a Stepal Dressmaking and Design V. Nation Media Group [2017] eKLR** that -

“In my respectful view awards in defamation cases have recently tended to be disparate and way too much on the higher side. Various learned judges of the High Court have in particular tended to award politicians and lawyers such generous damages in defamation cases as to set them apart as a special breed of people, notwithstanding the fact that they, particularly politicians, often thrive upon the free publicity they receive from newspapers. Damages in defamation cases must be kept at reasonable levels lest they impinge upon the freedom of expression and the citizens’ right to information.”

He also quoted Waweru J in **Koigi Wamwere V. Standard Limited & Another [2011] eKLR**:-

“I must point out 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. Freedoms of speech and press are vital ingredients to a vibrant democracy like ours. It is also not the business of the courts to unduly enrich litigants in defamation cases. This would have the effect of encouraging more and more defamation litigation.”

Counsel however urged this court to find the article was not defamatory and dismiss the Plaintiff’s case

with costs to the 5th and 6th Defendants.

31. Whether the 1st to 4th Defendants were appointed by the Orange Democratic Movement (ODM) Party to inquire into issues bedeviling the Kisumu County Assembly and whether the impugned Task Force Report is a product of that inquiry is not in dispute. It is also not in dispute that on 24th February 2015 the 5th and 6th Defendants published the article complained of in their newspaper. The issues for determination, in my view are:-

- a) **Whether the words complained of were of and concerning the Plaintiff;**
- b) **Whether the words are defamatory;**
- c) **If they are defamatory whether the defences of Fair comment, Justification and Qualified Privilege are available to the Defendants – all six Defendants;**
- d) **If not, the quantum of damages awardable to the Plaintiff.**

DETERMINATION

32. (a) Whether the words complained of were of and concerning the Plaintiff

As regards the 1st to 4th Defendants the words complained of and which are published in their report are:

“On June 9, 2014, a sum of Shs.1,620,000 was remitted to bank account of Ms. Anne Omolo by FACTOR CONNECT. Ms. Omolo is said to be a senior jurist and close friend of the Speaker.”

33. The Black’s Law Dictionary, Eighth Edition Page 873 defines a jurist as **“1. One who has thorough knowledge of the law; esp. a judge or an eminent legal scholar –“**. The Plaintiff is a Judge and before that she practiced law in Kisumu City as an Advocate of the High Court and taught the subject in one of the Universities. For all intents and purposes therefore she is a jurist. The Plaintiff testified that though there are many other Anne Omolos none of them is an Advocate or Judge. This was not rebutted. I find it a fact therefore that the report of the 1st to 4th Respondents was referring to the Plaintiff. My finding is supported by the evidence of the 6th Defendant who testified that when he read the report he had no doubt that it referred to the Plaintiff. It was the reason he contacted her and later wrote in the article **“A Judge denies she received Shs.1.6 m cited in Kisumu task force”**

34. Are the words defamatory?

It is my finding that the words of the Task Force Report and of the newspaper article taken together and in their natural and ordinary meaning were defamatory. The words attributed impropriety on the part of the person named and identified in the 5th and 6th Defendants article as the Plaintiff. To understand the context in which the words in the report were published one must look at the entire report. As admitted by the 2nd Defendant and as set out in the report the mandate of the task force was to among other things investigate complaints regarding the management of the County Assembly of Kisumu. It was also to look into the circumstances surrounding the impeachment of the Speaker of the County Assembly. At page 39 the grounds cited for the impeachment are set out as –

- i. **“That the Speaker was involved in the misappropriation of Assembly funds.**
- ii. **That the Speaker was unfit to hold office.”**

35. The allegation that a sum of Shs.1,620 Million was paid to Anne Omolo is made under ground (i). It is given as an example of one of the payments arising from the suspicious dealings between the Speaker and FACTOR CONNECT. The words read on their own do not impute impropriety on the Plaintiff but it is my finding that read in the context of the report they do. The rest of the report in my view only goes to

affirm the defamatory nature of the words complained of rather than negate it and the decisions of Khamoni J in **Martha Karua V. The Standard Limited and Another [2017]Eklr** and of the **House of Lords in Charleston & Another V. News Group Newspaper Limited & Another [1995]2 All ER 313** are distinguishable.

36. I further find that the 5th and 6th defendants article was defamatory of the Plaintiff. It is that article that drew attention of the Plaintiff to the report. It was her evidence that although she had read about the report in the Standard and Nation Newspapers she did not think it referred to her. It is this article that directly connects the Plaintiff to the report. The Plaintiff's witnesses were categorical that they did not see let alone read the report but because of the words in the article they started viewing the Plaintiff differently. Whereas it is factual that on 9th June 2014 a sum of Kshs.1,620,000/= was paid into the account of Anne Omollo by FACTOR CONNECT it is not factual that the said Anne Omolo is a jurist. The bank statements produced by the 1st to 4th Defendants to prove the transaction do not state that the money was paid to Anne Omolo, the jurist. It was the 2nd Defendant's evidence that it was one Hon. Ndolo – one of the people who testified at the committee hearings – who stated that Anne Omolo was a jurist. The 2nd Defendant stated that the said Hon. Ndolo refused to give them evidence of the transaction and they had to obtain the same from the record of a corruption case that was going on elsewhere. It is clear therefore that the committee did not have evidence of the transaction let alone evidence that the Anne Omolo to whom the money was paid was a jurist but they nevertheless went and published the report and stated that she was. The 2nd Defendant testified that he knew the Plaintiff but that efforts to contact her to confirm if she was the one proved futile. He however did not adduce evidence of this effort. My finding is that the Task Force had no good reason to attribute the payment to a jurist, more so because their source Hon. Ndolo had not provided them with the evidence. It was clear from the evidence that proof of the transaction was obtained after the report had been published and it was for purposes of this suit. In cross-examination the 2nd Defendant conceded that the report attributed impropriety to the people whose accounts monies were wired by FACTOR CONNECT. The submission that the words did not cast any aspersions on the propriety of the Plaintiff or her conduct is therefore far from the truth. To say that a Judge is the beneficiary of a sum of money irregularly drawn from the coffers of a County Assembly without proof, as did this report, is defamatory. It can only mean that she has no integrity and is not fit to hold that office.

37. The 5th and 6th Defendants article reproduced the defamatory words. In fact it is that article that directly cast aspersions on the Plaintiff. As I have demonstrated the allegation in the Task Force Report that the money was wired in the account of Anne Omolo, a jurist, was in the first place not supported by evidence. Secondly nobody sought clarification from Anne Omolo, the jurist, and now the Plaintiff in this case, as to whether that was indeed her account. The report itself was therefore defamatory. The 5th and 6th Defendants without applying reasonable conduct i.e. without taking any steps to verify whether the report contained libelous matter reproduced it in their newspaper. It was the Plaintiff's evidence and indeed the 6th Defendant's that when she received the text message her response was that the 6th Defendant get clarification from his sources. That source was the publisher of the report the 1st – 4th Defendants. Between the Plaintiff and the publishers of the report it is the publishers of report that would have confirmed the truthfulness of the words whether it was indeed Anne Omolo the Judge they referred to. There is no evidence that 6th Defendant contacted the 1st to 4th Defendants to confirm the accuracy of their statement. The 1st to 4th Defendants cannot be heard to say that they did not contribute to the publication of the newspaper article. What did they expect when they handed over the report in the presence of the media? Obviously they expected that the media would certainly take it up hence the reason they had the media there as that is its work.

38. On their part the 5th and 6th Defendants ought to have verified whether the report contained libelous matters before they referred to it in their article. In so far as they did not verify the information in the report they were reckless. In my view it is as if the 6th Defendant was saying even if the Judge denies it this is what the report says. Though the article and the report were published at different times and by different people they cannot in the circumstances of this case be separated.

39. (c) Do the defences raised avail the Defendants?

It is my finding that so far as the 1st to 4th Defendants and the 5th & 6th Defendants did not enquire or verify the truthfulness of the allegation or words complained of they acted maliciously. As I have stated in so far as the report stated that the Kshs.1.620 Million was paid into Anne Omolo's the jurist's account they were not true and the defence of fair comment does not avail. It may be that the task force was doing a report in the public interest but that does not justify their publishing a libelous report. It is also clear from the conduct of the 5th and 6th Defendants that they were actuated by malice. The Defendants even upon been served with a demand and notice of intention to sue refused to publish an apology and it is clear that they cared not whether what they were publishing was true or not. In **Daily Nation V. Mukundi & Another [1975] EA 311 at 316** the Court of Appeal for Eastern Africa held that:

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

I dare also add that the conduct of the 1st to 4th Defendants as well the 5th and 6th Defendants amounts to what Muli J (as he then was) described as **“reckless indifference as to whether it was just or not”** see **Godwin Wanjuki Wachira V. Othoth [1977] KLR 24.**

40. I do agree with Counsel for the Plaintiff that the 1st to 4th Defendants and the 5th & 6th Defendants having failed to verify their facts and having been very clear of whom they referred to should not be allowed to hide under the defence of fair comment and qualified privilege. The Court of Appeal had occasion to examine this defence in **Mwangi Kiunjuri V. Wangethi Mwangi & 2 Others [2016] eKLR** and their conclusion was that for it to avail the publisher must prove reasonable conduct which **“includes steps to verify the information and the opportunity for response by the Claimant.”** The 1st to 4th Defendants did not bother to verify the truth of the statement by Hon. Ndolo that the Anne Omolo who received the Shs.1.620 Million was a jurist and likewise the 5th and 6th Defendants did not bother to verify whether the report was true before they published it in their paper which obviously has a wide circulation. Sending the Plaintiff an SMS to comment though affording her an opportunity to respond was not enough.

(d) The issue of damages

41. I have already found that to say that a Judge has benefited from a sum of money drawn irregularly from public coffers imputes criminal culpability as it means that the Judge is corrupt. It imputes lack of integrity on the Judge and means that the Judge is not fit to hold public office. In this case the Plaintiff called three witnesses who were her close friends and associates who testified that they viewed her differently after reading the article in the newspaper. They gave evidence that the Plaintiff was emotionally affected by the publication of the libelous matter. This being libel the Plaintiff need not have proved actual damage but she nevertheless did. Having proved that the words complained of referred to her and that they were defamatory and this court having found that the defences pleaded by the Defendants do not avail I find that the Plaintiff is entitled to damages.

42. I have considered Counsel's submissions on the quantum of damages. I am also guided by the Court of Appeal in **C A M Royal Media Services Limited [2013] eKLR** where it observed:-

“No case is like the other. In the exercise of discretion to award damages for defamation the court has a wide latitude. The factors for consideration in the exercise of that discretion as enumerated in many decisions including the guidelines in Jones V. Pollard (1997) EMLR 233-243 include objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published and any repetition; subjective effect on the Plaintiff's feelings not only from the prominence itself but from the Defendant's conduct thereafter both up to and including the trial itself; matters tending to mitigate damages for example,

publication of an apology; matter tending to reduce damages, vindication of the Plaintiff's reputation past and future.

In the case of **Standard Media V. Kagia and Co. Advocates** (supra) the court took the view that in situations where the author or publisher of a libel could have with due diligence verified the libelous story or in other words, where the author or publisher was reckless or negligent, these factors should be taken into account in assessing the level of damages. The court also stated that the level of damages awarded should be such as to act as deterrence and to instil a sense of responsibility on the part of the authors and the publishers of libel and that personal rights, freedoms and values should never be sacrificed at the altar of profiteering by authors and publishers.”

I am also persuaded by the observations of my brother Judges Mbogholi J and Waweru J in **Paul Muli & Stella Kanini Mutisya V. Nation Media Group** (Suppra) and in **Koigi Wamwere V. Standard Limited & Another** (Suppra) where they caution against giving very high awards.

43. The Plaintiff testified that she is still a Judge and that she has not been questioned by her employer or by any other law enforcement body regarding the publication. In the circumstances I find that the sum of Kshs.35 Million proposed is way on the higher side and award her Kshs.6,000,000/= as general damages. The prayer for publication of an apology in the newspaper for three consecutive days shall also be allowed. Aggravated damages and damages for non-apology were not pleaded and shall not be awarded.

44. Accordingly I enter judgment for the Plaintiff against the six defendants jointly and severally for:-

- I. **General damages in the sum of Kshs.6,000,000/= (Six Million Shillings);**
- II. **An order for written apology in the Star Newspaper for three consecutive days.**
- III. **Costs of the suit.**

It is so ordered.

Signed, dated and delivered at Kisumu this 21st day of December 2017

E. N. MAINA

JUDGE