REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO. 341 OF 2007

BETHWEL ALLAN OMONDI OKAL……...……..PLAINTIFF

VERSUS

ROYAL MEDIA SERVICES LIMITED…….....DEFENDANT

JUDGMENT

A. PLEADINGS

1. The plaintiff in this case **BETHWEL ALLAN OMONDI OKAL** filed suit by way of a further amended plaint dated 6th June, 2013 against the defendant media House **ROYAL MEDIA SERVICES LIMITED** seeking for damages for defamation of character. The plaintiff alleges that he was defamed by the defendant through its broadcast on Radio Citizen called '*Wembe wa Citizen'* aired on or about the 14th March, 2007. The plaintiff has reproduced the impugned broadcast at paragraph 5 of the plaint reproduced herein and claims that the publication was malicious as follows:

> *"Wakaazi wa Kasarani wana malalamishi chungu mzima kuhusiana na namna pesa za bursery inavyotumiwa.*
>
> *Wanadai kuwa uwizi wa pesa hizi umezidi sana katika eneo hili la Kasarani ikiongozwa na diwani mmoja wa Korogocho akifwatiwa na mwenzake wa Babadogo. Eti kuna wakati hata wauzaji wa changaa wanapewa bursary wa hadi shilingi elfu kumi, huku watoto wanaostahili waki achwa bila msaada wa kielimu. Yanadaiwa kuwa madiwani hawa huwa na maajenti yao mashinani kutafuta wanafunzi wasioikuweko yaani "ghost students."Mmoja wa maajenti wao ni mzee mmoja ambaye kazi yake ni kuongea na walimu wakuu wa secondary ili wajaze forms za bursery za ghost students kwa nia ya kuiba pesa za LASDAP. Mfano mzuri yadaiwa ni shule ya St Mary's iliyofunguliwa juzi katika mtaa wa Lakisummer- Babadogo. Eti watoto wengi wamelaiwa bursery kujaziwa forms za bandia ambazo zinaonyesha hata report cards za mwaka uliopita ilhali mwaka huo shule hio haikuwa imeanzishwa. Wizi huo wote yadaiwa unafuatiliwa na madiwani hao wawili mmoja wa Korogocho na mwenzake wa Babadogo. Sasa wazazi wanalalamika kuwa ufadhili wa masomo unatilowa kwa msingi wa ukabila. Wembe!*
>
> *Swali ni moja tu ni nani atawasaidia wakaazi wa Kasarani ikiwa wanaoaminiwa kusimamia pesa hizo wao ndio wanaiba zaidi?*

(**English translation)**

"Residents of Kasarani have raised concerns about how bursary funds are being distributed." they claim that theft if this bursary money is on the increase in Kasarani area the main culprits being the councilor of Korogocho followed by his counterpart from Babadogo.

Eeh infact even chang'aa sellers are given a bursary funds to the tune of ten thousand shillings yet children in dire need of the funds are left without any educational assistance.

It is claimed that these councilors have their own agents in the works whose work is to look for non-existent students, i.e ghost students.

One of these agents, it is claimed, is an old man whose work is to conspire with secondary school head teachers so that they can process fake bursary forms for these ghost students with the main of stealing funds.

It is claimed that one of such schools is St Mary's Secondary School which was opened recently within Lucky Summer Estate, Babadogo. Apparently many pupils have been issued with fake bursary forms which show last year's school report cards yet the school was not yet established then. This whole theft is claimed to be orchestrated by these two councilors; one from Korogocho and his accomplice from Babadogo.

Now parents are complaining that educational assistance is based on tribal backgrounds.

The major question is who will help the residents of Kasarani if those trusted with his money are the same people who are stealing it?

2. The plaintiff alleged that the above radio broadcast words, in their natural and ordinary meaning meant and were understood to mean that the plaintiff is;

a. a fraudster

b. a corrupt public officer

c. a person not fit to hold and be entrusted with a public office

d. a person not fit to be entrusted with and manage public funds.

e. a tribalism who uses his public to benefit members of his ethnic community.

3. The plaintiff averred that the above broadcast injured his character, reputation, integrity, public and social standing and esteem and that he had been subjected to public ridicule, contempt, opprobrium, embarrassment and his public esteem greatly lowered in the eyes of his electorate and the general public; had suffered considerable distress, hatred, ridicule, contempt and embarrassment and as a result, his reelection bid in his ward and his general future political career prospects had been immensely prejudiced and put in jeopardy. That despite demands the defendant had refused to offer a public apology or withdraw the offending broadcast hence the suit.

4. The defendant entered an appearance and filed defence dated 15th May, 2007 to the suit. The defendant denied any liability and relied on the defenses of ***qualified privilege, fair comment on a matter of public interest and the rule in New York Times vs-Sullivan 376 US 254 (1964).***

5. The plaintiff filed a reply to the statement of defense dated 24th May, 2007 claiming that the broadcast complained of was false and malicious.

6. Both parties complied with the pre-trial requirements under Order 11 of the Civil Procedure Rules. The

plaintiff who was unrepresented in these proceedings relied on the documents contained in his list of documents dated 23rd May, 2011 while the defendant relied on the documents contained in its list of documents dated 8th June, 2011.

7. The suit was heard on 8th October, 2015.

B. EVIDENCE

8. The plaintiff testified on his own behalf and called one witnesses, Samuel Oyaro. They both relied on their witness statements dated 23/5/2011 and 31/5/2011 respectively. On the other hand, the defence called one witness Peter Kanyeki who relied on his witness statement dated 30th May, 2011.

9. The plaintiff testified on oath as PW1 and stated that he was a former Councilor for Babadogo Ward and that on the material day, he was called by his friend Samuel Oyaro, that there was a broadcast which was scheduled for 8.30 pm by the Citizen radio and that it would be repeated at 6.30 am the following morning attacking the plaintiff's personality. That the plaintiff listened to the repeat of the broadcast in Kiswahili and copied it. He took it to his former advocates who translated it for him in English. The advocate also wrote a demand notice to the defendant seeking an apology but none was forthcoming so he filed this suit. The plaintiff testified that he was not contacted by the defendant before the radio broadcast was made. That the broadcast was false and malicious. He stated that the information that the defendant was sending was that the plaintiff was a fraudster, thief who had stolen Kasarani bursary fund. That the word theft was repeated more than 8 times in the broadcast and that the defendant wanted to paint the plaintiff as a person who could not be trusted with public funds as a Councilor at that time. That the publication which was repeated concerned him and disparaged him. He denied that he had ever stolen any money. He stated that he had worked with Telkom Kenya and left with a clean record in 1997 following a retrenchment exercise. The plaintiff stated that the publication referred to spoke of St Mary's Keris School. He stated that Lucky Summer Secondary School opened its doors in 2007. That the defendants concocted their documentation as they referred to St Mary's Secondary School and St Mary's Keris School which were different schools.

10. The plaintiff further stated that the broadcast alleged that he had stolen from and defrauded the poor families of Kasarani. He further stated that the broadcast was false and malicious and that the media had impeached him. He stated that he was not the Councilor for Marura Ward but for Kasarani Babadogo/Utalii Ward. He stated that the bursary fund application form produced by the defendant as an exhibit had no student signature or date and that therefore the form was not authentic since there was even no signature that the information provided therein was correct. That the procedure for application for bursary fund was that he would receive the application form personally and take the application form to City Hall to the Zonal Education Officer to sign and date it. He stated that the details in the form produced by the defendant which included the ward, location and sub location were all fake as they did not belong to his former administrative unit of Babadogo Ward. That he lost his seat as his attempts to come back as a Councilor did not bear fruit. He produced the exhibits 1-Transcript of the broadcast, Ex 2 Demand Notice, and audio script as EX3 after the defence counsel conceded that they had listened to the broadcasts as scripted and confirmed the accuracy with which the broadcast was recorded. The plaintiff prayed for damages and an apology.

11. On cross-examination by Miss Muhoro Counsel for the defendant, the plaintiff stated that the broadcast was made in 2007 and that after the broadcast he served his full term as councilor but that following the broadcast, he received a tongue-lashing from his constituents; that there were public demonstrations against him although there was no formal motion against him for impeachment. He stated that he knew that misappropriation of funds was a common occurrence in the country and that such allegations have been made against several people. He denied knowing anybody at the defendant's media house. He stated that he used to address press conferences but never disagreed with the defendant. He stated that the defendant should have given factual information. He denied that there was any misappropriation of any funds at his ward and also denied that the St Mary's Keris School was in his ward or at all. He stated that bursary was ward-based.

12. Samuel Okumu Oyaro testified for the plaintiff as PW2 and stated that he lived in Siaya County at Rarieda. That between 2003 and 2007 he lived in Nairobi and that the plaintiff was his Councilor. PW2 adopted his signed and filed witness statement as his evidence in chief wherein he stated that he heard the broadcast complained of as reproduced by the plaintiff in the plaint on the material day. The witness then called and alerted the plaintiff of the broadcast. He said that although he himself had benefited from the issuance of education bursaries, he did know the procedure of issuing them. He said that he and the plaintiff cannot visit Kasarani because of the broadcast.

13. On cross examination by Miss Muhoro, PW2 stated that the plaintiff was and remained his friend. He reiterated that he lived in the plaintiff's ward and knew the plaintiff as a good person who did a good job for the Ward and that he had many other friends. The witness further stated that Radio Citizen was broadcast country wide and that he used to listen to it in Nairobi. Further, that those who listen to Radio Citizen must have heard the news on ***"wembe wa Citizen****.'' He* conceded that the public have a right to know what is happening and that the media informs the public. He stated that he heard the plaintiff being defamed by the defendant and that as a Councilor it was defamatory of him because the broadcast was not true and that there was no complainant for alleged misappropriation of funds. He denied that he was involved in the bursary fund.

14. In re-examination, PW2 stated that he also benefitted from bursary fund and he used to see many people from all tribes receive bursary. He denied hearing that the plaintiff used to give bursary to brewers.

15. The defense called one witness DW1 Patrick Kanyeki who testified that he worked for the defendant as a Creative Manager. He adopted his written statement as his evidence in chief. In the said statement, DW1 stated that 'Wembe ***wa Citizen'*** was a radio programme that highlights issues of public interest both positive and negative. He explained that due diligence was exercised by the producer of ***'Wembe wa Citizen'*** before the broadcast was made. He admitted that the broadcast complained of was done by the defendant. He explained that the broadcast was based on a complaint presented to the defendant by a resident of Baba Dogo Ward.

C. SUBMISSIONS

16. Both parties filed written submissions and cited authorities.

i. The plaintiff's submissions

17. In his submissions filed on 2nd November, 2015 the plaintiff asserted at length in very unintelligible submissions and from which I have had to extract a summary that his rights and freedoms are his entitlement and that they are protected under the Constitution. That he is entitled to human rights which are non-derogable and inviolable. The plaintiff reiterated that by the broadcast, the defendant caused damage to his reputation, vilified him through the spread of falsehoods which were torturous and injurious to his personality occasioning him hatred, ridicule and lowering his public stature causing him to be shunned and avoided by voters, political friends, the community, church leaders and the general public. He maintained that the broadcast was a fabrication and motivated by malice since there was no iota of truth in it. That the broadcast was choreographed in a creative grotesque manner which left the plaintiff's character and public standing damaged and his privacy disrespected. That the media was not accurate and fair in its reporting contrary to the Media Act, 2007. That the broadcast also stirred ethnic hatred contrary to the National Cohesion and Integration Act No. 12 of 2008. The plaintiff urged the court to disregard the bursary form produced by the defendant's witness since it had no signature of the Chief, Councilor and City Hall Officers. Further, that the defence witness failed to tell the court the exact school where the alleged bursary scandal took place, whether it was St Mary's Secondary School in Lucky Summer Estate or St Mary's Keris Community Centre or St Mary's High School and that the said witness could not tell why there were two different school fees structures. That the defendant went overboard in its broadcast which was a traversity of justice and never gave him a right of reply. The plaintiff relied on the provisions of the Media Act No. 3 of 2007 and several constitutional provisions to advance his arguments that the defendant had no absolute right to defame him and that the defenses raised were not available to it since there was no accuracy, fairness, accountability and integrity in the broadcast and that

neither was the plaintiff given a right of reply to the spurious allegations. That the defendant had flagrantly infringed on the plaintiff's right to privacy and used hate speech in its broadcast. That his rights to protection against torture, cruel and inhuman and degrading treatment were violated hence a traversity of justice. The plaintiff also relied on several decisions although the principles espoused in some of the decisions referred to were not relevant to this case such as they relate to constitutional petitions on infringement of rights which is not the case here. Other decisions were mere extracts with no full citation of the cases for my reference.

18. On damages, the plaintiff urged this court to award him Kenya shillings ten million(Kshs 10,000,000) general damages for defamation of character, 3 million for exemplary damages and 3 million for pecuniary damages making a total of kshs 16,000,000. He relied on **HCC 117 OF 2004, HCC 1230 OF 2004, Mc Carey v Newspapers Ltd (1964) 3 ALLER 947; 2QB 86, Cassel Co Ltd v Broome & another.** The plaintiff urged this court to apply the principles of restitutive and restorative justice and award him the damages claimed.

ii. Defendant's submissions

19. The defendant's counsel submitted framing issues for determination as follows-

a) Whether the broadcast was defamatory and whether the defenses raised protect the defendant

b) Whether the plaintiff is entitled to the reliefs sought in the plaint.

20. On whether the broadcast was defamatory and on the defenses raised, the defendant's counsel submitted that by its paragraphs 6 and 7 of its defence, the defendant pleaded defences of *qualified privilege, fair comment* and *constitutional privilege* which has been known as the rule in **New York Times –v- Sullivan in the US**, and as the **Reynold's Privilege in England**. That by virtue of the plaintiff's status as a Councillor for Baba Dogo Ward, he had within the meaning of section 79 of the former Kenya Constitution, (which was in force when the suit was instituted) consented to a robust debate and discussion of his personal life during the period he served as a Councillor.

21. The defendant further contended that section 79 of the former Constitution embodied the rule in **New York Times -v- Sullivan, 376, US, 254 (1964**) and, consequently, a publisher is not liable for publishing pertinent facts pertaining to a public figure upon investigation of the circumstances of the facts published of the public figure. That the constitutional privilege relied on by the defendant was recognised by this court in **HCCC No. 1333 of 2003, Hon. Mwangi Kiunjuri –v- Wangethi Mwangi, Nation Media Group, and Royal Media Services Ltd.** Where the court discussed this defence as follows,

> ***"Qualified privilege in this sense has been elevated above the conventional common law apprehension that a publication duty-free made in the public interest and without malice, is to be accorded protection, elevated to assume the level of a democratic and constitutional principle where the public interest has been served by the publication in question. Qualified privilege in the context of the new defence to a suit in defamation, in my opinion, reposes in the Judge a wider discretion than had been recognized in the past: to weigh the relevant issues and to draw a judicious balance between the claims of the democratic cause and of the public interest as against the rights of the complainant to keep an unsullied reputation. It is clear to me that the growth path of the law and the consideration of contemporary developments must stand on the side of such a progressive reformulation of the defence to claims in the tort of defamation.***
>
> ***As already noted, section 79 of the former Constitution of Kenya guaranteed the freedom of expression – "freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference …" This freedom so broadly defined points to the popular as well as the private context of social life, and as regards the popular context, it is obvious that the media as the agent and the purveyor of mass information, must be involved.***

No doubt, therefore, section 79 of the former Constitution presupposed the existence of an effective and vibrant press. Since the press has its professional methods of work and as it interplays so much with the private domain, in relation to the pursuit and publication of information, the press must exercise responsibility and ensure it does not unreasonably injure private reputations as it seeks to inform the public at large.

This is the principle now established in the new line of cases that have set the pace in defamation jurisprudence and which is not possible to overlook: New York Times -v- Sullivan 376, US, 254 (1964) and Reynolds –v- Times Newspaper Ltd. (2001)2 AC, 127, Theophanous –v- the Herald and Weekly Times Ltd. & Another (1994)3, LRC, 369, Kumalo & Others –v- Holomisa (CCT) 53/01, … Jameel & Others –v- Wall Street Journal (2006) 4, ALL. ER, 1296, Bonnick –v- Moris & Others (2003)1, AC, 300, PC, … but the more relevant question is whether the third defendant can benefit from this constitutional privilege for publication of matters in public interest."

22. It was respectfully submitted by the defendant's counsel that the law was stated correctly but in its application, the position was as before the recognition of the defence. That the defendant in the above Kiunjuri case had appealed against that judgment on the application of the new privilege. The defendant therefore urged this court to find that the defences as pleaded by the defendant apply in this case.

23. The defendant further submitted that in determining whether or not a publication is defamatory, the court has to consider the public interest which the media claims existed. That consideration should be given to the thrust of the article which the publisher has published. That if the thrust of the article is true and the public interest condition is satisfied, the inclusion of an inaccurate fact may not have the same appearance of irresponsibility as it might if the whole thrust of the article is untrue.

24. The defendant urged the court to first consider whether the broadcast was in the public interest by examining the broadcast as a whole and not isolate the defamatory statement. That the broadcast tells the public that there is misappropriation of the bursary fund which most of the residents were yearning to benefit from hence it was in their interest to know what was happening to the fund.

25. The defendant urged the court not to forget that it is the right and indeed a vital function of the press to make available to the community, information and criticism about every aspect of public, political, social and economic activity, and thus contribute to the formation of public opinion. That the press and the rest of the media provide the means by which useful, and that sometimes useful information about the daily affairs of the nation is conveyed to its citizens – from the highest to the lowest ranks. Conversely, the press often becomes the voice of the people as their means to convey their concerns to their fellow citizens, to officialdom and to government.

26. The defendant relied on **Clerk & Lindsell on Torts, 20th Edition,** where the learned authors stated the law as follows at page 1498 - 1499 :

"Responsible journalism in ..... the court of appeal considered the question of the liability of newspapers in the light of Reynolds and held that there was the necessary duty in the press and a corresponding legitimate public interest in being informed of the material in question then subject to the Reynolds test, the defence of qualified privilege will apply. This would be subject only to the requirement that the defendant must have fulfilled the test of responsible journalism; such a standard should not be set too high or too low. Lord Philips said "once Reynolds privilege is recognized as it should be, a different jurisprudential creature from the traditional form of privilege from which it sprang, the particular of the interest and duty which underlie it can more easily be understood" he accepted that a responsible journalist might equally decide to publish or not to publish an item and disapproved the test of whether to publish suggested by Gray J. in the court below namely that publication would be in accordance with a duty to publish. If the journalist would be open to criticism if he did not publish it. In the Jamaican case of Bonnick –v- Maurice the issue was whether a newspaper report published by the defendants was covered by qualified privilege. The Privy Council held that in considering the Reynolds

qualified privilege, the law should apply a flexible meaning to the standard of responsible journalism. "

27. Further reliance was placed on the **6th Edition of Tort Law, S Deakin, A Johnston and B Markesinis,** where this defence OF ***qualified privilege*** is described as follows at page 798 - 799:

"Journalistic Privilege- the Reynolds breakthrough.

This defence of qualified privilege... was in practice of little use to the mass media for in most cases that concerned them the publication was made not to a particular person but to the world at large... the common convenience and welfare of society in modern British Democracy required the ample dissemination to the public of information concerning and vigorous discussion of matters relating to the public life of the community and to those who participated in it."

28. The defendant therefore urged the court to find that the defendant herein was just disseminating information for the public interest and that the defences pleaded protected the defendant.

29. On quantum of damages payable, the defendant submitted that should this court find that the broadcast was defamatory; the issue which arises is with regard to the correct award of damages which should be made. In their view, the correct approach is as has been discussed by the Court of Appeal in **Johnson Evan Gicheru–v- Andrew Morton & Another, Court of Appeal at Nairobi Civil Appeal No. 314 of 2000,** where the Court of Appeal accepted as correct, the following statement of the law, from a decision of the High Court of Australia in **Uren –v- John Fairfax (117) Commonwealth Law Reports, 115:**

"It seems to me that properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways – as a vindication of the plaintiff to the public and as a consolation to him for a wrong done. Compensation here is a solatium rather than a monetary recompense for harm measurable in money."

30. As regards the quantum of damages in defamation cases, it was submitted that there had been an error in award of exorbitant damages. This was before the decision of the Court of Appeal in **Gicheru v- Morton** (supra) as summarised in the Gicheru Case as follows:- In the Kulei case, the plaintiff was awarded Kshs. 10 million. In the **Nicholas Biwott v- Clays Ltd,** the plaintiff was awarded Kshs. 30 million. In Charles Kariuki case, the plaintiff was awarded Kshs. 20 million. In Obure case, the plaintiff was awarded Kshs. 17 million; and that when disapproving that trend, the Court of Appeal stated the law as follows:

"The common denominator in the first sic aforementioned cases and awards are that first they concern prominent political elite a majority of them being a politician of considerable clout of high ranking civil servants and advocates; secondly, the publication condemned in damages are mostly what qualify to be gutter press. Thirdly, the defendants in almost all the cases did not defend the suits. Finally for unknown reasons, no appeals have been filed and if lodged not yet heard by this court at least so far. My considered opinion of the awards so made is that they lack judicial basis, they may be found to be manifestly excessive and should not at all to be taken as persuasive or guidelines of award to be followed by trial courts since the trial judges concerned appear to have ignored basic fundamental principles of awarding damages in libel cases."

31. The defendant also cited **Kenya Tea Dev. Agency Ltd v- Masese T/A Masese & Co. Advocates 2008 (KLR) 149,** where the Court of Appeal reduced from Kshs. 10 million to Kshs 1.5 million an award made in favour of an advocate. And that in **Lakha v- the Standard Ltd 2009 (KLR) 432,** the Court of Appeal raised an award of damages for defamation from Kshs. 500,000/= to Kshs. 2 million.

32. The defendant's counsel submitted that therefore in assessing damages, the guidelines of the post Gicheru decisions applied. Citing the case of **Johnson Evans Gicheru v. Andrew Morton & Anor (2005) 2KLR 332** it was submitted that the Court of Appeal at Nairobi stated that to arrive at what is fair and reasonable award the learned trial Judge should draw considerable support in the guidelines in **Jones v. Pollard 1997] EMLR 233-243** where a checklist of compensable factors in libel actions were enumerated as:

> *i. The objective features of the libel itself, such as its gravity, its province, the circumstances of the medium in which it is published and any repetition;*
>
> *ii. The subjective effect on the plaintiffs feelings not only from the prominence itself but from the defendants conduct thereafter both up to and including the trial itself;*
>
> *iii. Matters tending to litigant damages such as a publication of an apology;*
>
> *iv. Matters tending to reduce damages;*
>
> *v. Vindication of plaintiff's reputation past and future.*

33. The defendant therefore submitted that if the court were to find that the defendant is not entitled to journalistic privilege, the defamation was not grave as no concrete evidence was given to show that the plaintiff suffered grave loss and that taking into account the relative mildness of the defamation, an award of Kshs. 200,000/= would be sufficient compensation. Reliance was placed on the case of **J.P. Machira T/A Machira & Company Advocates v. Kamau Kanyanga and The Standard Limited [2005] eKLR** where the plaintiff was awarded Kshs. 1,250,000/= as general damages and a further sum of Kshs. 250,000/= as aggravated damages; in the case of **Fred Ojiambo v. Standard Ltd. & 2 others [2004] eKLR** the plaintiff, a Senior Counsel and a prominent Advocate was awarded the sum of Kshs. 1,000,000; in **George Oraro v. Eston Barrack Mbajah [2005] eKLR** an award of Kshs. 1,500,000/= was made in favour of the plaintiff, also a prominent Advocate and Senior partner in one of the leading firms in Nairobi.

34. In this case, it was submitted that the plaintiff was a holder of a junior office and was only known to the people of the Ward he represented. This should further lower any possible amount awarded to him.

35. The defendant urged the court to consider what His Excellency the President Uhuru Kenyatta, in his Mashujaa Day, 2015 Speech, observed that the media should be left to do their job. That the President observed that the media talks about him negatively on a daily basis but that did not matter to him since they are doing their job and therefore the same approach should be adopted by this court and grant no more that Kshs 200,000 damages should this court find the defendant's broadcast to have been defamatory of the plaintiff.

D. DETERMINATION

36. I have carefully considered the pleadings, evidence adduced and the rival submissions by both parties both on liability and on quantum. In my humble view, the following issues flow for determination.

> 1) whether the broadcast was defamatory of the plaintiff; and whether there was malice against the plaintiff
>
> 2) how much quantum would the plaintiff be entitled to
>
> 3) Who should bear the costs of the suit?

37. In answering the first issue, on whether or not the broadcast complained of was defamatory and or whether it was malicious, that issue will be considered alongside the defenses raised by the defendant, those of qualified privilege and public interest. Whether the defendants were within their duty of

impacting public information and whether the broadcast was carried out in the public interest to inform the members of public of corrupt and dishonest people/leaders in their community and that it was made without malice. I must however first establish what defamation is and or its ingredients. In a suit founded on defamation of character, the plaintiff must prove the following elements:

a. There must be publication of the words to a third party

b. The words as published must refer to the plaintiff;

c. The words must be defamatory i.e. they must tend to lower or actually lower the plaintiff's reputation in the eyes of the right thinking members of the society generally;

d. The words must be false such that truth is an absolute defence to an action in defamation; and

e. In slander., there must be proof of resultant damage

f. The plaintiff must also demonstrate that the words were published maliciously

38. On the first element, the defendant does admit that it published the impugned broadcast in its Citizen Radio Programme ***"Wembe wa Citizen"*** in the exercise of its inherent constitutional right to freedom of the media and freedom of expression and to inform the public of the facts and claims surrounding the controversial issuance of bursary funds within the plaintiff's are of jurisdiction.

39. On the second element, it is also admitted that the broadcast referred to the plaintiff who was the then Councilor for Babadogo Ward. The said broadcast was produced in evidence by consent of both parties.

40. On the third element of whether the broadcast words were defamatory of the plaintiff, **Gatley on libel and slander 8th Edition paragraph 4 page 5** defines defamation as:

"Any imputation which may tend to lower the plaintiff in the estimation of right thinking member of society generally……..or to expose him to hatred contempt or ridicule."

41. Winifield in J.A. Jolowicz and T. Ellis Winfield on Tort 8th Edition at page 254 defines defamation as:

" ***The publications of a statement which tends to lower a person in the estimation of right thinking members of society generally or which tends to make them shun or avoid that person."***

42. **Halsbury's Laws of England 4th Edition VOL 28 paragraph 10** states:

" A defamatory statement is a statement which tends to lower a person in the estimation of right thinking members of 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."

43. The above definitions do not impose an obligation on the plaintiff to prove that the defamatory words actually caused him to be shunned or avoided or treated with contempt. What the plaintiff needs to prove is that the publication tended to lower him in the estimation of right thinking members of the society generally.

44. In **Jones V Skelton [1963] 1 WLR 1362 P 1371** the court stated:

" The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader guided not by any special but only be general knowledge and not fettered d by any strict legal rules of construction would draw from the words. The test of

reasonableness guides and directs the court in its function of deciding whether it is open to a jury in any particular case to hold that reasonable persons would understand the words explained of in a defamatory sense."

45. In **Hayward V Thomson & Others [1982] 1QB 47 at 60** it was stated inter alia:

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

46. In **Clerk & Lindsel on tort 17th Edition 1995 page 1018** it is stated that:

" Whether the statement is defamatory or not depends not, as has been pointed out already, upon the intention of the defendant, but upon the probabilities of the case and upon natural tendency of the publication having regard to the surrounding circumstances If the words published have a defamatory tendency it will suffice even though the imputation is no believed by the person to whom they are published."

47. Applying the above principles to this case, the question is whether the broadcast which is admitted was true of and concerning the plaintiff and whether the defenses of qualified privilege and public interest are available to the defendant. The impugned broadcast was in very clear Kiswahili language as translated in English that the plaintiff who was the Councilor for Babadogo ward in Kasarani was engaged in fraudulent dealings relating to bursary disbursement, aimed at denying the needy students of his Ward the bursary fund. That he was doing so using agents who procured fake documents from nonexistent students and using those documents to get the fund misappropriated. That he practiced tribalism by awarding bursary to people of his tribe and that even chang'aa sellers received the money which was meant for school bursary and that parents had complained of the occurrences.

48. The plaintiff initially denied the broadcast in its written defence but at the hearing admitted the entire broadcast and its full tenor save that it contended that the broadcast was based on complaints by concerned residents and therefore the defendant had a duty to inform the public of the actions by their elected leaders and the happenings in those publicly elected offices.

49. Section 70 of the former Constitution of Kenya embodied the rule in New **York Times v Sullivan 376 US 254(1964)** that a publisher is not liable for publishing pertinent facts pertaining to a public figure upon investigations of the circumstances of facts published of the public figure. The defendant therefore claims that it did carry out investigations before broadcasting the impugned words concerning the plaintiff who was an elected Councilor in Babadogo Ward in Kasarani.

50. Upon considering the published words which the court had an opportunity to listen to the radio broadcast as produced in the form of CD, and upon considering the evidence adduced by the plaintiff, his witness and the defence witness, Iam persuaded that the broadcast was false and defamatory of the plaintiff and had the tendency of causing reasonable members of the society shun or avoid the plaintiff. I also hereby find that in their ordinary meaning and in the context in which they were published or broadcast the defendant meant and was understood to mean that the plaintiff was a thief, dishonest, corrupt person who had defrauded poor residents of Babadogo Ward; that he was tribalist who awarded bursary to members of his ethnic group only; he had committed offences which are culpable under the Penal Code such as theft, forgery of documents and under the Public Officers Ethics Act and Anti-Corruption and Economic Crimes Act, such as being corrupt and using his office to misappropriate public funds and therefore not a fit person to be a political leader and representative of the people.

51. In the defendant's defence, it produced DEX1 fees structure for St Mary's Keris Community Centre on which there is nothing to show that the School belonged to Babadogo ward and for which year; for which form/class. The fee structure has no school stamp and is not signed by anyone. The defendant also produced DEX2 another fee structure for 2007 for the same School. The document does not show for which class or form although it asks form fours to pay for KCSE and Mock Examinations as given there under. The document is dated 21/02/2007 about one month prior to the impugned broadcast. The third

exhibit DEX3 is a school progress report for James Gitau Njogu form 1 dated 26/11/2006. The owner of that report form and or author was never called to verify for what purpose it was meant to serve in these proceedings since it does not have anything to do with school fees. DEX 2C simply informs of school account name and is not addressed to anyone. DEX3 is a request for LASDP bursary funds by one James Gitau Njogu form 2 in 2007. His parents' names are provided. His ward is Marura and not Babadogo, yet the broadcast was clear as to which wards were affected by the fraud that is, Korogocho and Babadogo and Marura is not one of the wards named, and neither is the plaintiff the Councilor for Marura Ward which is indicated on the defence exhibits as produced in evidence by DW1. The plaintiff testified and it was not controverted that he was a Councilor for Babadogo Ward within Kasarani area further, he stated that bursary funds were disbursed according to Wards where the needy students resided. The question is, why did the defendant not produce any such fake student and evidence of falsity from Babadogo ward? In addition, that bursary application form is not signed in part D which is for the Bursary Committee recommending or declining the bursary. That Committee comprises the area Councilor and Zonal Education Officer showing the bursary awarded. There was also no evidence that the school in the name of St Mary's Secondary which was broadcast had not been established in 2007. Moreso, there is no evidence linking the plaintiff to the said school or to the scandal involving fraudulent bursary allocations or at all.

52. From the above, I have no doubt in my mind that the defendant was not justified in broadcasting the way it did against the plaintiff and therefore it cannot benefit from the Rule in The **New York Times** case cited by the defendant. The defendant cannot benefit from its falsehood and reckless broadcast. It cannot benefit from the defence of qualified privilege and neither is the defence of fair comment in the public interest available to it. In my view, the broadcast was indeed a grotesque fabricated reckless lie that was calculated and tended to lower the plaintiff's reputation in the eyes of right thinking members of the society generally. Any reasonable person listening to the broadcast would believe that indeed the plaintiff was involved in the theft of bursary funds meant for children of the poor in Babadogo Ward. The plaintiff in my view did suffer injury to his reputation, was humiliated, embarrassed and distressed by the defendant's popular Kiswahili Radio program "***Wembe wa Citizen"*** which disparaged him and painted him as a very dishonest leader. Sufficient evidence was adduced to the satisfaction of this court by the plaintiff and his witness PW2 that what was broadcast by the defendant and which broadcast was admitted by the defendant was totally false and by a demand notice dated 21st March 2007 no rebuttal was made prior to the filing of this suit which has taken a considerable length of time to be heard and determined yet the defendant did not bother to retract or in any way mitigate the damage even during the pendency of this suit.

53. In **Gatley on libel and slander 6th Edition page 706,** the learned author stated that :

> ***" If the words complained of contain allegations of facts, the defendant must prove such allegations of facts to be true. It is not sufficient to plead that he bona fide believed them to be true. The defence of fair comment does not extend to cover misstatement of facts, however bona fide. Bona fide belief in the truth of what is written may mitigate the amount, but it cannot disentitle the plaintiff to damages."***

54. I am further fortified by the decision on **J.P Machira V Wangethi Mwangi & Another** where it was held that:

> ***" Any evidence with shows that the defendant knows the statement was false or did not care whether it be true or false will be evidence i.e. of malice. In the instant case, the plaintiff has supplied the defendant with the true position of the matter before the publication was made. Inevitably, therefore, at the time of publication, the defendant knew or is taken to have known that the relationship between the plaintiff and Ms Grace Wahu Njoroge was not an advocates/client relationship and that there was no relationship of such nature between them. Further , considering also the post publication conduct of the defendant, the correction was made more than a week after the publication, which was made with knowledge that it was false. I have no hesitation in finding the publication being malicious."***

55. In view of the unjustifiable wanton and blatant attacks on the plaintiff, the nature of the details, personal attacks and with a lot of contempt, and the barbed venom and scorn with which the words were broadcast by the defendants' two broadcasters, I find that the publication was not only defamatory of the plaintiff but that it was actuated by outright malice. The statements as reproduced by the plaintiff in the plaint and which I had the opportunity to play over and over as I wrote this judgment establish that indeed the broadcast were calculated to cause the plaintiff pecuniary and political career and source of livelihood as no employer including the electorate in Babadogo ward would give such a thief and corrupt person who practiced tribalism another chance of serving him as their Councilor and since he had already been retrenched from Telkom Kenya, the situation would no doubt worsen for the plaintiff.

56. Section 79 of the Old Constitution did not give the defendant media a license to make and or publish slanderous and libelous statements which are false, and actuated by ill will and malice and geared towards the destruction of another person's name, character and reputation. An individual has the right to his good name, character and reputation and the law of the land must be available to protect him. Being a politician and therefore a public figure is not being open to vilification and assassination of one's' character and reputation by the media for ulterior motives. There should be truth in whatever the media says about public figures in order for them to enjoy that qualified privilege as set out in the law. A politician is a representative of the people who cede their sovereignty and delegate it to him to represent their interests by electing him. A politician has no license to steal, to be corrupt or to practice nepotism or tribalism. There are laws that deal with thieving and dishonest public figures entrusted with public resources. The media should report such occurrences freely but where they have evidence of such thievery. In their reporting, the media is expected to be fair, objective and truthful. I do not find that in this case there was truth, fairness and objectivity in the broadcast which was done with finality. The broadcast was a personal, cruel and callous attack on the plaintiff. It was in my view a calculated and orchestrated move to hound the plaintiff out of his politically elected office. Although he was not impeached by the electorate, but he testified that he received tongue lashing from the electorate when he tried getting back into that office when elections were held that same year 2007. From my own observation and assessment of the broadcast, it was venomous and distasteful and calculated to injure the plaintiff's character and reputation. The defendant in broadcasting such words of and concerning the plaintiff never paused to reflect on the impact of those statements made in Radio Citizen which has a nationwide reach and aired at prime moments.

57. I find that the defenses raised are not available to the defendant since there was no evidence of truth adduced. The documents produced were contradictory, not signed and no evidence of who the author was. It was not evidence against the plaintiff at all. In the end, I find that the plaintiff has established on a balance of probabilities that the broadcast was defamatory of him and that the broadcast was malicious.

58. Having considered the plaintiff's standing in society and the defamatory statements and the principles established in awarding damages based on the defendant's own authorities supplied, and circumstances of this case, and as the broadcast alleged commission of criminal offences for which the plaintiff could be charged and convicted in a court of law, and considering the satirical well choreographed lies bereft of truth which is demanded by the laws of journalistic fair play, and therefore the manner in which the broadcast was made, albeit there was no real evidence that the plaintiff lost his seat because of the defamatory words broadcast by the defendant, and or that he incurred special damages as a result thereof, nonetheless; There is no doubt that the allegations contained in the broadcast against him were serious and may have had serious repercussions in his future political life. In addition, Section 3 of the defamation act provides that:

> ***"In any action for slander in respect of words calculated to disparage the plaintiff in any office profession, calling, trade or business held or carried on by him at the time of the publication, it shall not be necessary to allege or prove special damage, whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business."***

59. I find that the words aired by the defendant having been calculated to disparage the plaintiff in his calling, it was not necessary to prove or allege special damages. Accordingly, I award damages as guided by the case of **Chirau Ali Makwere vs. Royal Media Services HCCC No. 57 of 2004** where the

plaintiff was awarded Kshs 3 million general damages for defamation of character inclusive of aggravated and exemplary damages. In the instant case, the plaintiff prayed for general damages, punitive and aggravated damages as well as an apology and an injunction. *Although the defendant urged the court to award the plaintiff Kshs 200,000 should it find the broadcast to have been defamatory, section 16A of the Defamation Act Cap 36 Laws of Kenya provides that :*

> ***In any action for libel, the court shall assess the amount of damages payable in such amount as it may deem just:***
>
> ***Provided that where the libel is in respect of an offence punishable by death the amount assessed shall not be less than one million shillings, and where the libel is in respect of an offence punishable by imprisonment for a term of not less than three years the amount assessed shall not be less than four hundred thousand shillings.***

60. The broadcast which was slanderous of the plaintiff disclosed commission of several criminal offences not only under the penal Code such as stealing but also under the Anti-corruption and Economic Crimes Act and if convicted the plaintiff would be liable to serve not less than three years imprisonment,. For that reason, a sum of Kshs 200,000 general damages would be unlawful. Equally speaking, a sum of kshs 16,000,000 proposed by the plaintiff would in my humble view be excessively exorbitant. I would therefore in the circumstances exercise my discretion and award the plaintiff Kshs 2,500,000 general damages and Kshs 1,000,000 Exemplary damages since the broadcast was not repeatedly done after the date complained of in the plaint. I decline to grant an order for an apology and that of an injunction in view of the time lapse.

61. I also award the plaintiff costs of the suit and interest at court rates from date of this judgment until payment in full.

Dated, signed and delivered in open court at Nairobi this 28th day of April 2016.

R.E. ABURILI

JUDGE