



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 336 OF 2013

RAPHAEL KITUR.....PLAINTIFF

VERSUS

THE STANDARD GROUP LIMITED.....DEFENDANT

JUDGMENT

1. The plaintiff Raphael Kitur sued the defendant the Standard Group Limited vide a plaint dated 15th August 2013 and filed in court on 15th August 2013.
2. The plaintiff's claim against the defendant is for general damages, Exemplary damages, punitive and aggravated damages; an order for publication of an apology; costs of this suit and interest; and any other relief the court may deem fit to grant.
3. The plaintiff's claim is predicated on the tort of defamation (libel). In the said plaint, the plaintiff averred that on or about the 18th day of September 2012 at page 12 of the "Standard Newspaper" captioned "***Ex MP in court over bouncing cheque***", the defendant maliciously published the following words of and concerning the plaintiff

“ former Transport and Communications Assistant Minister Raphael Kitur was charged in a Nairobi court for issuing the Intercontinental Hotel a cheque for kshs 450,000/- to the Intercontinental Security Manager John Maina Muraguri on June 6th, last year. The money was drawn on the MP's Equity Bank Mama Ngina Street account which according to the charge sheet, he knew did not have sufficient funds to settle the amount.
4. The plaintiff averred that the aforesaid words in their natural and ordinary meaning and in the context in which they were written and published by the defendant had defamatory connotations and were maliciously published.
5. The defendant entered an appearance and filed defence dated 20th September 2013 through the firm of Guram & Company Advocates, denying each and every allegation leveled against it by the plaintiff. In the alternative, and without prejudice to the specific denials by the defendant, it contended that the words complained of were facts, true in substantive and fact and that they consisted of opinions, were fair comment on a matter of public interest namely, issuing of bouncing cheques.
6. The defendant also pleaded particulars under Order VI Rule 6A of the Civil Procedure Rules

contending inter alia, that the plaintiff an Ex MP for Konoin constituency and a former Assistant Minister for Transport and Communication was a public official and that he had been arraigned in a Nairobi court over issuing a bouncing cheque of shs 450,000 to Intercontinental Hotel when he knew that the account did not have sufficient funds.

7. The defendant also relied on Section 15 of the Defamation Act Cap 36 Laws of Kenya; pleaded the defence of justification; that the plaintiff had failed to exercise his right of reply under Section 7 'A' of the Defamation Act, Cap 36 Laws of Kenya; failed to mitigate his alleged loss under Section 7 'A' of the Defamation Act Cap 36 Laws of Kenya and that although it received demand and notice of intention to sue, it was of no consequence in view of the defences raised.

8. The plaintiff filed reply to defence dated 25th September 2013 joining issues with the defendant and reiterating the contents of the plaint as pleaded.

9. On 15th March 2014, the plaintiff's counsel filed an application under Order 2 rule 15(1) (a), (b), (c), (d) Order 51 of the Civil Procedure Rules Sections and sections 1A, 1B and 3A, of the Civil Procedure Act seeking for the striking out of the defendant's defence and that the judgment be entered for the plaintiff against the defendant as prayed in the plaint. It was averred that the defence by the defendant disclosed no reasonable cause of action as the plaintiff was never charged with the offence as published; the defence was scandalous, frivolous, vexatious and an abuse of the court process and that the matters published were so obviously libelous of the plaintiff since the defendant never sought any clarification and information from the plaintiff, it was further averred that the defences of fair comment and justification are totally inappropriate to the case and that the defendant had not complied with Order 3 of the Civil Procedure Rules (2010).

10. When the application came up for hearing before Honourable Onyancha J on 22nd September 2014, the defendant's counsel conceded and the defendant's defence was by consent struck out; and judgment as prayed was entered in favour of the plaintiff against the defendant on liability at 100% with costs. The plaintiff was then directed to fix the suit for assessment of quantum of damages.

11. The plaintiff testified as PW1 stating that his name was Raphael Kiprono Arap Kitur. That he was a businessman and lives in Muthaiga, Naivasha Lane, Nairobi. He relied on his witness statement filed on 15th August 2013 which he had signed, and which was adopted as his evidence in chief.

12. The plaintiff testified that he had sued the defendant for publishing an article that the plaintiff had issued a bouncing cheque, which allegation was not true. He stated that the article as reproduced herein above was on page 12 of the defendant's publication The Standard on National News Tuesday 18th September, 2012 which was a Quick Read Column. The plaintiff produced the said entire Newspaper as Exhibit 1.

13. The plaintiff stated that he was never charged with any offence as reported by the defendant's publication. That between 1997 and 2002, he was a member of Parliament and an Assistant Minister for Transport and Communications, Assistant to Honourable Musalia Mudavadi. He represented d Konoin Constituency in Bomet County. That he was surprised to read himself in the papers yet he had never issued any bouncing cheque.

14. Further, that people called him after reading the publication and one such person was Koros who asked the plaintiff whether he (the plaintiff) had done what was alleged in the said publication. That the defendant never contacted the plaintiff to verify the correctness of the story before publishing it. The plaintiff stated that he was a member of several clubs which include Parklands, Kericho Sports Club, Muthaiga Golf Club and that his fellow members were shocked when they learnt that he had issued a bouncing cheque since they knew that he settled his bills by credit card and cheques.

15. The plaintiff also produced a copy of a charge sheet as PEX2 and copy of his National identity card as PEX 3 after the court verified its original. He also produced copy of demand letter mailed to the

defendant dated 19th September 2012 as PEX4.

16. The plaintiff further testified that the defendant never apologized to him. He therefore urged the court to clear his name and order the defendant to pay him damages. He stated that the publication spoiled his chances of becoming a senator as his opponents used the false publication to disparage him by photocopying it and supplying copies to the constituents to read.

17. In cross examination by Mr R. Billing counsel for defendant, the plaintiff responded that he became an MP in 1997 and was appointed a Minister until 2002. He stated that from 2003 he was not an MP and that he is engaged in the clearing and forwarding business since the year 2003.

18. The plaintiff also testified that in 2012 he decided to rejoin politics to vie for Senatorial seat on a Jubilee affiliated party. That he went through the normal process of becoming a senator including filling of forms and vetting approval, but that when the impugned publication was circulated to the people, his reputation was damaged.

19. He restated his membership to various clubs including Muthaiga, Nairobi, and Parklands, stated that to be accepted as a member of those clubs, one must be a reputable person.

20. The plaintiff stated that committee members of the respective clubs know him as a reputable person although he denied that they took to him the article in question. He stated that he was still a member of the said clubs. He stated that he read the publication in the Standard Newspaper and was upset because it was false. He stated that apart from his advocate's demand letter, he did not call the standard. That he was still in business to date but that he had lost business with the Ministry of Health for a tender worth 12 million.

21. In re-examination by Mr Mahoho the plaintiff stated that his fellow club members talked about the article and he had to explain to them the truth. Further, that the article was used by his political opponents to his disadvantage during political campaigns.

22. The plaintiff also called PW2 Mr Bernard Kibet Koros who testified that he was a businessman in Konoin, Bomet County. That he knew the plaintiff Raphael Kitur. The witness relied on his witness statement signed on 25th July 2013. He stated that the article was published before the 2013 general elections. That he knew the plaintiff as a very straight forward person and honest. That on 18th September 2012 he bought the Daily Nation and the Standard Newspapers and that on perusing the Standard Newspaper for that day, he saw a publication on Raphael Kitur that he had been charged in a Nairobi Court for having issued a bad cheque. PW2 called Mr Kitur and informed him of the publication and asked him what the status was as the publication would affect his political standing and reputation. That the plaintiff informed PW2 that he had not been charged with any criminal offence as published and that the story was false and malicious.

23. The plaintiff's witness testified that from the name and description in the publication, he believed that the publication referred to the plaintiff. That as the chief campaigner for the plaintiff, he knew that the plaintiff had vied for a senatorial seat in Bomet County but that the electorate were questioning the credibility of a person who issues bad cheques.

24. PW2 stated that the plaintiff's political foes used the publication to spread propaganda that the plaintiff could not be trusted with a public office in view of lack of financial honesty and discipline. That the publication greatly negatively affected the standing of Mr Kitur before his former constituents and his political opponents made political capital out of it leading to him losing in the nominations for Bomet County senatorial seat.

25. In cross examination by Mr R. Billing counsel for the defendant, the witness stated that he was the chief campaigner for the plaintiff Mr Kitur and that Mr Kitur complied with and went through all the nomination processes for candidature but that his opponents photocopied the article and circulated it saying the plaintiff was untrustworthy. That the article was distributed throughout the county. The

witness stated that his main opponent was Professor Lesan. He also conceded that during election process, people use very opportunity to tarnish the reputation of others. He denied that they reported the matter to the police or the IEBC.

26. In re-examination by Mr Mahoho, PW2 stated that he had not read any retraction by the defendant.

27. At the close of the plaintiff's case, the defendant did not tender any evidence since judgment had been entered against it following the striking out its defence by the consensus reached on 22nd September 2014 between the parties' respective advocates.

28. Both parties' advocates were directed to file and exchange their written submissions both soft and hard copies within 21 days and the matter was scheduled for mention on 8th February 2016 to confirm compliance.

29. Regrettably, by 8th February 2016 only the plaintiff had filed his submissions and despite leave of 30 days granted to the defendant's counsel to file and serve their written submissions, by 7th March 2016, and a further enlarged period to 24th March 2016, bore no fruit as they had not filed any submissions hence his court had to set down the matter for judgment.

30. In the plaintiff's written submissions filed on 5th February 2016, the plaintiff reiterated his pleadings and evidence in court and urged the court to rely on **HCC 1706/96 JP Macharia V Wangethi Mwangi & Another** where the court explained what constituted malice and in **CA 9/1975 (Kitto V Chedwick & Another [1975] CA 141** where the Court of Appeal made it clear that where the allegations made are false and the same are not disputed by correspondences or evidence and in the absence of any attempt to show some belief in the truth of the allegation, then malice is established and there is not sustainable defence. Further reliance was placed on **HCC 102/2000 Daniel Musinga V National Newspapers Ltd** Where the court cited with approval **Godwin Wachira V Okoth [1977] KLR 24** that failure to inquire into the facts is a fact from which inference of malice may properly be drawn; and in **Machira** (supra) where it was held, inter alia, that deliberate lies can also be evidence of malice. The plaintiff also relied on **HCC 1896/99 Mueke Nguli t/a Nguli & Company Advocates V Nation Newspapers & Printer** where it was stated that, malice can be inferred from deliberate or reckless or even negligent ignoring of facts. The plaintiff urged the court to find the defendant liable for the tort of libel.

31. On quantum of damages, it was submitted by the plaintiff's counsel that an action for defamation is essentially an action to compensate a person for the harm to his reputation and no apology or retraction or withdrawal can ever be guaranteed to completely undo the harm done of the hurt caused by a defamatory publication. That in libel, the tort is actionable perse and the sum to be awarded are said to be at "large."

32. It was further submitted by the plaintiff's counsel that the following considerations should guide the court is assessing damages:

1. *The plaintiff's position and standing in society vis vis what has been published of him;*
2. *The mode and extent of publications.*
3. *The apology offered and at what time in the proceedings.*

33. It was submitted that in the instant case, the plaintiff at the material time had served as former Assistant Minister in the Kenya Government; that he was vying for Bomet County Senatorial seat; that the article referred to him using his previous government position and constituency; that the defendant did not bother to confirm with the plaintiff whether it was him who was charged in court for issuing a bouncing cheque before publishing the article; and the offending article had never been withdrawn and no apology has ever been tendered. Reliance was placed on **Chirau Ali Makwere V**

Nation Media Group & Another [2009] e KLR citing with approval **John V Ms Ltd [1996] ALL ER 35** on what damages a successful plaintiff in a defamation action is entitled to.

34. The plaintiff's counsel also prayed for aggravated damages where compensatory damages are not sufficient and where it's proved that the defendant knew when publishing the article that he was committing a tort or was reckless, whether his action was fictitious or not and decided to publish because the prospects of material advantages outweighed the prospects of material loss; that the defendant was actuated by malice as it insisted on a flimsy defence of justification and fair comment and never apologized.

35. The plaintiff also prayed for aggravated damages in addition to general injury going beyond that which would have flowed from the words complained of but for the presence of the aggravating circumstances. The plaintiff further prayed for exemplary damages which are meant 'to punish' the defendant. He relied on the **Machira and Chirau Ali Makwere** (supra cases). The plaintiff quantified damages as follows:-

- a. General compensatory damages shs 25,000,000
- b. Aggravated damages shs 5,000,000 for refusal to apologize.
- c. Shs 5,000,000 in lieu of an apology.

36. The above proposals were guided by the following cases: HCC 420/2011 Samuel Mukunya Ndungu V Nation Media Group Ltd & Another where shs 15,000,000 general damages was awarded, shs 1.5 aggravated damages and damages in lieu of apology; JP Machira case (supra) where shs 8,000,000 general damages was awarded and shs 2,000,000 aggravated damages and the two latter awards were upheld by the Court of Appeal; and in **CA 148/2008; Chirau Ali Makwere** where shs 10,000,000 general damages was awarded and in **HCC 1068/99 Nicholas Kiprono Biwot V Ian West & Another** where shs 30,000,000 general damages was awarded as a global sum whereas shs 7,000,000 general damages was awarded to the plaintiff in **HCC 1230/2004 Francis Ole Kaparo v The Standard Limited**. The plaintiff proposed an award of shs 32,000,000 plus costs and interest.

37. I have carefully considered the case herein, the pleadings, evidence both oral and documentary and the submissions filed by the plaintiff both on liability and on quantum; and the supporting authorities.

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

- a. Whether the plaintiff has proved on a balance of probabilities that he was defamed by the defendant and if so;
- b. what damages is he entitled to;
- c. what orders should this court make; and
- d. who should bear the costs of this suit.

39. On the first issue of whether the plaintiff has made out a case for defamation (libel) against the defendant, the law is clear that he who alleges must prove, even if the case proceeds by way of formal proof. But I must first determine what defamation is and its essential elements.

40. Defamation is the publication of a statement which tends to lower a person's reputation or character in the estimation of right thinking members generally and which makes them shun and avoid him. The burden of proof lies on the claimant to establish that the published words or statements as published of and concerning the plaintiff are defamatory of him or her. The claimant must prove, on a balance of probabilities, that the words complained of were published of and concerning him; that they were published by the defendant; that they were false; and that they were defamatory in character of the

claimant by tending to lower him in the estimation of right thinking members of the society generally, making them shun or avoid him). Finally, the claimant must prove that the publication was done with malice(see **Wycliffe A. Swanya V Toyota East Africa Ltd & Another [2009] e KLR.**

41. In the instant case, the defendant's defence was struck out and judgment on liability entered against it in favour of the plaintiff at 100% by consent. It therefore follows that the issue of liability of the defendant for libeling the plaintiff is settled and I will therefore only assess the evidence via avis the pleadings for purposes of determining what damages are awardable.

42. The mere fact that there is a publication to the effect that the plaintiff was charged in court with the stated offence would in itself not be defamatory if it was indeed true that the plaintiff had been charged in court with the disclosed offence, as that would be reporting of proceedings pending in court which reporting is protected by the doctrine of qualified privilege. Nonetheless, having considered the material that was published in the Standard Newspaper "*Kenya's Bold Newspaper*" for Tuesday, September, 2012 at page 12/National: courts at the extreme left side of the page titled "*Quick Read*": Nairobi: *Ex MP in court over bouncing cheque*" and the publication there under as reproduced in the plaintiff's pleadings and in this judgment; and considering the evidence adduced by the plaintiff, which evidence was not rebutted or at all that he was never charged with any criminal offence as reported by the defendant's newspaper, I am persuaded that the words as published were ordinarily defamatory of the plaintiff as they meant in their ordinary sense that the plaintiff had been arraigned in court and charged with the offence of issuing a bouncing cheque valued at shs 450,000 to the Intercontinental Security Manager Mr John Maina Muraguri on June 6th 2011.

43. I am also in agreement with the plaintiff that the said words were clearly understood to mean that the plaintiff was a criminal and had committed an offence under the Penal Code Cap 63 Laws of Kenya; and was an untrustworthy person who does not service his debts.

44. Considering that the plaintiff was clearly named in his former capacity as the former member of Parliament for Konoin Constituency and a former Transport and Communications Assistant Minister and by his two names Raphael Kitur, I have no doubt that the publication referred to the plaintiff and was intended to paint him as a person who was untrustworthy and not fit to hold public office.

45. That the article was published is not in doubt since it was published in the Standard Newspaper of Nationwide circulation. That the said defamatory material or article as a whole was published by the defendant is not in doubt as the Standard Newspaper, on its last page 68 of PEX1 clearly states that the paper is published and printed at the Standard Group Centre, Mombasa Road, Nairobi –Kenya, by the Standard Ltd. I therefore find that the defendant, the Standard, is the appropriate party to these proceedings as the publisher and printer of the impugned article.

46. In addition, PW2 Mr Koros who knew the plaintiff read the said publication and called the plaintiff to find out if what had been published of and concern9ing the plaintiff was the truth.

47. The plaintiff pleaded and testified to the fact that the defendant's actions of publishing the article was actuated by ill will and malice which was demonstrated by certain facts namely: that the publication was false; that no clarification was sought from him; that the plaintiff was never consulted or given an opportunity to defend himself or to respond to the allegations before the defendant published the article; no apology was given nor a correction made; the defendant referred to the plaintiff by name and his previous capacities and status in life.

48. In his evidence, the plaintiff denied that he was ever charged with any offence or offence related to issuing of the bounced cheque. His witness PW2 clearly stated that he read the article and was shocked at the contents because he knew the plaintiff as an honest and trustworthy person who could not have committed the offence alleged. That PW2 was the plaintiff's chief campaigner. In the charge sheet PEX2 vide OB No. 68/14/9/2012 Police Case File No. 111/449/12 date to court on 17th October 2012, the person charged in that charge sheet is Raphael Kupkurui Kitur male adult Kenyan care of Nairobi with the offence of cheating contrary to Section 315 of the Penal Code.

49. In count 1 it was alleged that on the 6th day of June 2011, at Intercontinental Hotel, Nairobi, within Nairobi County, by means of fraudulent tricks, obtained kshs 200,000 from John Maina Muraguri by falsely pretending that you could incorporate him in your business of supplying diaries, calendars to the Kenya Medical Training Institute a fact you knew to be false.

50. Count two read as follows: Issuing a bad cheque contrary to Section 316 A of (1) (a) as read with Subsection 4 of the Penal Code. The particulars of the offence were that: Raphael Kipkurui Kitur on the 6th day of June 2011 at Intercontinental Hotel, Nairobi, within Nairobi county, issued a certain cheque No. 000029 for kshs 450,000 to John Maina Muraguri drawn on account No. 0296839100 of Raphael Kipkurui Kitur at Equity Bank Limited Mama Ngina Branch knowing that the account has insufficient funds. The charge sheet was signed by OCS Central Police station on 17th October 2012.

51. The plaintiff also produced his original national identity card which the court had an opportunity to verify before accepting a copy thereof. It is National identity card No. 000080 serial No. 237065496. It in the name of **Raphael Kiprono Kitur** male adult from Sotik District.

52. What I gather from the above evidence is that the defendant publishing an article on a page dedicated to happenings in the courts as shown by the larger article in the middle of that page 12 “Former MP charged for defiling schoolgirl, 15, intended that the article be read by many of the newspaper readers who would want to know what was trending in the national news in our courts. And noting that the impugned publication was a **Quick read, ie “Nairobi : EX MP in court over bouncing cheque.”** The question is, did the defendant ensure that the publication was accurate and that it referred to no other person but the plaintiff as the person who was charged in court with the above stated offences?

53. From the plaintiff’s evidence, I have no doubt in my mind that he is not Raphael Kitur who was charged in court with cheating and issuing a bad cheque. I am also persuaded that the article specifically referred to the plaintiff herein since it mentioned his former position in top government circles and as a former Konoin legislator. The naming of the plaintiff by his two names and his former status in my view, was done recklessly and without verification of the facts. Had the defendant verified the facts from the court or police records, or even attempted to reach him since he was a renowned politician, they would have established as a fact, that the plaintiff was never charged with any offence in a court of law and that the charges relating to cheating and issuance of a bad cheque related to a totally different person from the plaintiff herein.

54. It was incumbent upon the defendants to demonstrate that the person charged in court with the named criminal offences was the plaintiff. They did not. It therefore follows that the defences of justification, truth, fair comment and or publication in the public interest were not available to the defendants even if their defence had not been struck out and moreso, with the defendant’s consent for being scandalous, frivolous, vexatious, disclosing no reasonable defence and being an abuse of the court process.

55. In my humble opinion, the plaintiff proved, on a balance of probabilities, that the defendant, in publishing a false article without verifying the facts, was actuated by malice. I find the publication by the defendant so irresponsible and reckless that it cannot be protected by the constitutional right of freedom of the media, and of the press as espoused in Article 33 and 34 of the Constitution.

56. The freedom of the press, like all other rights, carries with it responsibilities, and one of these obligations is not to abuse the public trust by knowingly or recklessly publishing defamatory falsehoods of and concerning individuals.

57. The constitutional right of freedom of the press does not encourage falsehood reporting. Neither does it cover persons who write with the intention of vilifying or disparaging others. Malice in this case can be inferred from failure to inquire about whether or not the person actually charged in court was the plaintiff, former Assistant Minister for Transport and Communications and former Member of Parliament of Konoin Constituency.

58. The reckless manner in which the defendants published the impugned article without verifying the facts and its refusal to tender/publish an apology or correction, even after receiving a demand letter; and failing to contact the plaintiff to establish the truth before publication is a clear evidence of malice. In **Rosenblatt V Bear**, 383 US. 75,86 [1966], the US court held:

“ Society has a pervasive and strong interest in preventing and redressing attacks upon reputation” Stewart J, concurring in the above case stated that the right of an individual to maintenance of his or her good name “ reflect no more than our basic concept of the essential dignity and worth of every human being, a concept at the root of any decent system of ordered liberty.”

59. The law of defamation reflects the long standing interest in protecting reputation. According to Gerald R. Smith **“ of malice and men: The Law of Defamation” [1992] VOL 27 No 1 Valparcuso University Law Review page 39-93**, (available at <http://scholar.valpo.edu/vulv/VOL27/iss1|2>; at page 41. It is stated that:

“Reputation is a dignitary interest worthy of protection apart from any other harm that might attach. Additionally, specific types of harm resulting from damage to the reputation justify legal protection. Reputational damage involves the loss of esteem in the eyes of others, a threat to existing and future relations with third persons, a threat to an existing positive public image, and a potential for development of a negative public image for one with no previous public reputation. Loss of reputation may also result in lowered self esteem and personal integrity and may lead to public embarrassment, humiliation, and mental anguish. Defamation law allows a plaintiff to mitigate these damages by setting the record straight in a public forum.....”

60. Article 33 and 34 of the Kenya Constitution 2010 recognizes the importance of free speech upon which all other constitutional freedoms depend. (see **Whitney V California** , 274 US. 357, 375[1927] Brandels, J that:

“ free speech is essential to discovery and spread of political truth.” It promotes receiving or importation of information or ideas. However, the interests protected by free speech must be balanced with other interests which include the right to inherent dignity and the right to have that dignity respected and protected; the right not to be vilified by others “

61. Where, like in the instant case, it is clear that the publication concerning the plaintiff was false and overtly incorrect, the plaintiff had a right under Article 35(2) of the Constitution to the correction or deletion of untrue or misleading information that affects the person (plaintiff) in this case. However, even after being notified of the falsity of the publication, the defendant insisted that the information was true, that it was justified in publishing that information and that it was in the public interest that the information be published.

62. In my humble view, that insistence, without stopping to investigate into the falsity of the publication as pointed out by the plaintiff, was a clear manifestation of malice on the part of the defendant. The publication, in my view, was a statement of fact and not of opinion. Read as a whole, that statement of and concerning the plaintiff tended to harm or injure the reputation of the plaintiff in the eyes of right thinking members of the society generally or deter other persons from associating with the plaintiff (shun him). Libel is actionable *per se* without proof of any loss or pecuniary damages. The statement as published by the defendant concerning the plaintiff was, in my humble view, without any lawful justification. It was intended to disparage the plaintiff’s character.

63. However, although the plaintiff testified that he lost nomination for senatorial seat due to the publication which his political rivals took advantage of and photocopied and circulated to the citizens in the county, there was no single photocopied/distributed material produced in court. However, in libel, publication is sufficient and proof of damage is not a must although where there is specific damage or loss it would increase the award of damages.

64. It is not in dispute that the impugned article was read by other people including PW2, the plaintiff's chief campaigner and who esteemed and respected the plaintiff and described him as an honest and trustworthy person. He called the plaintiff after reading the article, to establish whether the plaintiff had indeed been charged in court with issuing a bad cheque.

65. What I gather from the article and the charge sheet produced in evidence is that the defendant selectively and deliberately isolated only count II of the charges that faced the person who was accused in that case, and left out the first count of cheating. The only inference I can make of that selection by the defendant of the plaintiff from the charge sheet is that the defendant acted with malice. It knew that the status of the plaintiff could fit in very well with issuance of bad cheques and not that of cheating which is a more simplistic offence.

66. On the whole, I find that the plaintiff has proved, on a balance of probabilities that he was defamed by the defendant; that the impugned publication was capable of bearing defamatory meaning, and that the recipients such as PW2 understood the meaning to be defamatory and intended to spoil the plaintiff's chances of winning nomination for senatorial seat for Bomet County, as the publication came a few months before the last general elections held on 4th March 2013; which conduct of the defendant was incompatible with the plaintiff's trade-business and as a former and aspiring political leader.

67. I further find that the subject impugned publication was not of public concern or otherwise qualified for a conditional privilege.

68. Accordingly, the defendant is hereby found to be 100% liable for defaming the plaintiff's character and reputation.

69. Having so found that the plaintiff has established that the published statement was defamatory of him, the next issue is whether he is entitled to damages and if so, how much.

70. A successful plaintiff in a defamation case is entitled to recover the general compensatory damages of such sum as will compensate him or her for the wrong suffered. The award must compensate him for damages for loss of reputation. Section 16A of the Defamation Act Cap 36 Laws of Kenya provides that:

“ 16A 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 .”

71. In **Chirau Ali Makwere Vs Royal Media Services Ltd CA 283/2005 [2013] e KLR** the Court of Appeal stated 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 may 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 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.”

72. The above checklist was also set out in **Johnson Evan Gicheru V Andrew Morton & Another [2005] e KLR**. In **Standard Media V Kagia & Company Advocates** where the court observed 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 instill 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.

73. Applying the above principles to the instant case, I Must note that false, malicious, disparaging and vilifying speech has no value. It does not inform or impart information. That is why the Constitution of Kenya, 2010 detests it. Such malicious, disparaging and vilifying speech must be deterred.

74. The plaintiff was a public figure as described in the article as published. It was not difficult for the defendant to carry out investigations before publishing an article that was false and defamatory concerning the plaintiff. The conduct of the defendant, in my view, was highly unreasonable and constituted an extreme departure from the standards of investigation and responsible reporting ordinarily adhered to by responsible publishers.

75. I would therefore find that not only is the plaintiff entitled to general compensatory damages but to punitive damages to deter such irresponsible media reporting in future. The defendant fabricated inaccurate publication concerning the plaintiff and anybody reading the impugned article would form the opinion that the plaintiff was a criminal and an untrustworthy person who did not honor his financial obligations. As seen from the charge sheet belonging to someone else, issuing a bouncing cheque is a criminal offence and a person found guilty would be liable to a fine of not exceeding fifty thousand shillings, or to imprisonment for a term not exceeding one year or to both, under Section 316A of the Penal Code. Section 197 of the penal Code provides that;

“ Any publication of a defamatory matter concerning a person is unlawful within the meaning of the Chapter unless:

The matter is true and it was for the public benefit that it should be published or

It is privileged on one of the grounds hereafter mentioned in Chapter XVIII of the Code.

76. Although the case before me is not a criminal one, no doubt, the publication by the defendant concerning the plaintiff was unlawful, unjustified and laced with spite and malice. The libel touched on the plaintiff's personal integrity, professional/trade reputation, honour and the core attributes of his personality. As a politician and businessman, the plaintiff was expected not to be an angel for there are none in this world, but to be a person of integrity and law abiding citizen. The publication was made on a page dedicated to National news on what was transpiring in the courts. It was therefore meant to be read by many people since the defendant's paper the Standard Newspaper has nationwide circulation. The significance of that publication was made much greater by the defendant's assertion that it was the truth, and that the defendant was justified in publishing the article and refused to apologize or to retract the publication or to express any regret that the libelous publication took place. (see the holding in **John V MGN Ltd [1966] 2 ALL ER 35 page 42** cited with approval by the Court of Appeal in **Nation Media Group Ltd & 2 Others V John Joseph Kamotho & 3 Others [2010] e KLR.**

77. In determining how much damages should be awarded to the plaintiff, the case of **The Standard Limited V GN Kagia T/A Kagia & Company Advocates CA 115/2003** is instructive. In the said matter, the Court of Appeal stated that there is need in having regard to comparables even in terms of the standing of the libeled person because both the law and the level of awards must of necessity continue to be certain and predictable.

78. However, where the awards appeared to be repressive, the Court of Appeal in **Gicheru V Morton & Another** (supra) observed that the high awards did not have any juridical basis, were manifestly

excessive, could be taken as persuasive or as guidelines of the awards to be followed by trial courts, that they departed from fundamental principles of awarding damages in libel cases.

79. Those principles were summarized by the Court of Appeal in the above **Gicheru V Morton & Another** case as follows:

- a. The court has wide latitude in awarding damages in an action for libel;
- b. In assessing damages in an action for libel, the court is entitled to look at the whole conduct of the defendant from the time of the libel was published down to the time of judgment;
- c. An award in a case of defamation is not compensation for the plaintiff's damaged reputation but is a vindication to the public and a consolation for a wrong done to him.
- d. Where the defendant could have, with due diligence verified the facts of the libelous story or where he was simply reckless or negligent, such recklessness or negligence must be taken into account.
- e. The level of damages, should be such as to act as deterrence and to instill a sense of responsibility on the part of the defendant.
- f. The gravity of the libel; and
- g. The extent of the publication is also a factor to be considered

80. As earlier stated, the Standard Newspaper enjoys wide and nationwide circulation. PW2 read the paper and called the plaintiff to establish the status of the publication –whether it was true that he had been charged with the offence of issuing a bad cheque; the publication was also placed centrally on a page dedicated to court matters nationally. The plaintiff wrote a demand letter to the defendant seeking for an apology and a retraction but the defendants ignored. When the suit was filed, the defendants insisted in their defence that they were justified in publishing the impugned article because the publication was nothing but the truth concerning the plaintiff issuing a bouncing cheque to the manager of Intercontinental Hotel, Nairobi. That defence was struck out after the defendants conceded as to its being scandalous, frivolous, vexatious, abuse of the court process and disclosing no reasonable defence.

81. I note that the publication was only done once. In order to vindicate the plaintiff to the public and give him consolation for the wrong done to him, I would in the premises award him shs 6,000,000 general damages based on **Nation Media Group Ltd and 2 Others V John Joseph Kamotho & 3 others [2010] e KLR** where the plaintiff/respondent (on appeal) was awarded shs 6,000,000 for general damages and shs 1,000,000 aggravated damages. The plaintiff was a Cabinet Minister and a prominent politician with reputation.

82. I also in the circumstances of this case award to the plaintiff shs 1,500,000 punitive damages. As the publication was not repeated after the first publication, I decline to award aggravated and exemplary damages since the plaintiff also failed to demonstrate that his failure to capture Bomet County senatorial seat was entirely due to the publication. No copies of the allegedly photocopied and circulated publication was produce as evidence that all the county residents or voters were necessarily influenced by that publication. I do not think that in the circumstances of this case it would have been difficult to keep those copies of the circulated publications as evidence.

83. I however award to the plaintiff a sum of shs 500,000/- damages in lieu of an apology due to the time lapse since the publication was done, this being any other relief that this court deems fit and just to grant.

84. Total damages awarded shs 8,000,000. I further award to the plaintiff costs of this suit and interest

at court rates on damage to accrue from the date of this judgment until payment in full.

Dated, signed and delivered in open court at Nairobi this 20th day of July 2016.

R.E. ABURILI

JUDGE

In the presence of:

Mahoho for plaintiff

R. Billing for Defendant

CA: Adline