



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL SUIT NUMBER 3 OF 2014

JOSEPH KAMIRA WANJAU.....PLAINTIFF

VERSUS

REV. LLOYD K. KABAIYA

PRESBYTERIAN CHURCH OF EAST AFRICA.....1ST DEFENDANT

(NAKURU WEST PRESBYTERY).....2ND DEFENDANT

THE PRESBYTERIAN CHURCH OF EAST AFRICA.....3RD DEFENDANT

JUDGMENT

1. The Plaintiff Joseph Kamira Wanjau filed this suit against the Defendants jointly and severally by his plaint dated the 14th January 2014. He described himself as a businessman in the hotel industry within Nakuru town, being the proprietor of Cool Rivers and Joska Hotels. He was a Presbyterian Church of East Africa Member from the year 1982 where he rose up the ranks to being appointed a Deacon and the Chairman of the Church Development Committee.
2. In 1994 the plaintiff was ordained as a church elder and appointed treasurer in the Rongai Parish and a member of the “**KIRK SESSION**” with huge responsibilities in church activities within the parish including Chairman of the house Caretaker Committee managing church property known as **Nakuru Municipality Block 11/2** comprised of a five bedroom bungalow and servant quarters. This he did faithfully upto 19th October 2013 when he claims he was unceremoniously relieved of his position of church elder and all responsibilities that he held through a letter of even date.
3. That plaintiff states in his statement of claim that the said letter dated 29th October 2013 was written by the first defendant Rev. Lloyd K. Kabaiya under the Direction and express or implied instructions of the second and third Defendants and that it spoke of and published of and concerning the plaintiff to the second and third Defendants and copied to the Moderator the following words:

“Our Ref: NWR/013/078 29th October 2013

To

Joseph Kamira Wanjau

Dear Sir

RE: MILMANI HOUSE

Receive Christian greetings in the name of Our Lord and Saviour Jesus Christ.

When the Presbytery Category 'A' met on 29th October 2013 at P.C.E.A. St. Ninians, the above issue was discussed. The Presbytery noted that:-

- 1. You went at the said house without the consent of the Presbytery and you took the keys for locks tht the Presbytery had bought,*
- 2. That you brought in painters to paint the house and you disregarded the work that the Presbytery was doing,*
- 3. That members of the Presbytery i.e Clerk, Treasurer, and Mr. Wanjohi visited you at your working place(Cool Rivers)so that you can answer why you took the keys,*
- 4. The Presbytery learnt that you were adamant and arrogant to the three officials and refused to hand over the keys.*

*Due to the above, the Presbytery under Min.54/2013 resolved that you hand over the keys that you took, the documents concerning the above, the Title Deed (Nakuru Municipality Block 11/2) and all financial returns that you have been over-seeing by **Thursday 31stOctober 2013 at exactly 2.00p.m. at the Presbytery office.***

Please comply.

Yours in Chris's Vineyard

P.C.E.A. NAKURU PRESBYTERY

.....

Rev. Llyoyd K. Kabaiya

Presbytery Clerk

Cc. . Presbytery Moderator”

4. According to the plaintiff, the said words and phrases were false, malicious and disparaged him as a Senior elder of the church of many years. He further stated that the first Defendant in furtherance of the malice authored another letter dated the 1st November 2013 addressed to the congregants of various churches within the parish to be read in the said churches for three consecutive Sundays after the 29th October 2013 to the effect that the plaintiff was a dissolute, dishonest, fraudulent character who had stolen and converted the church title deed to his own use and used it as a collateral to borrow money from various banks for his own personal use without the approval of the church.

5. The plaintiff continued to state that the said words in their natural and ordinary meaning were understood to mean:

- (i) That the plaintiff was guilty of dishonest and dishonourable character.*
- (ii) That the plaintiff was of a resolute and profligate character.*
- (iii) That the plaintiff was unfit to be a member of the church or a church elder and unfit to associate with the church members and was not a respectable person.*

(iv) *That the plaintiff was racketeer and a fraudulent person who could not be entrusted with church matters and properties.*

(v) *That the plaintiff was unfit to be a senior elder or even a member of the church.*

(vi) *That the plaintiff was unfit to remain and associate with the other members of the church.*

6. It was further stated that the said words meant that the plaintiff was a crook and a thief who thrived in holding onto church property and titles and making profits therefore, and that by the said words his credit, character and reputation in the whole church was brought to public scandal, ridicule and contempt.

He therefore sought:

(a) General damages,

(b) Exemplary damages

(c) Aggravated damages together with costs of the suit against the Defendants jointly and severally.

7. The defendants filed their joint defence on the 20th February 2014. It is stated therein that the offending letter was in accordance with the proper procedure and was intended to demand from the plaintiff the church property in possession of the plaintiff. It is denied that the contents of the letter carried the meaning attached to by the plaintiff and that the plaintiff was defamed or suffered any injury and if so, the plaintiff substantially contributed to the same by disobedience of the constitution of the Presbyterian Church which resulted to his demotion as an Elder, and therefore is not entitled to any damages.

The plaintiff recorded his statement in support of his case on the 14th January 2014 and another on the 23rd June 2015 and filed the same on the same day, together with his list of documents.

The Defendants too filed their witness statements and documents on the 31st March 2014.

8. The Plaintiff's case The plaintiff, Joseph Kamira Wanjau testified as PW1.

His testimony was that he joined the PCEA Church in 1982 and rose through the church ranks to being elected as the chairman of the Development Committee of St. Ninian's Church Nakuru in 1993 and becoming a Church Elder in 1994.

That the church desired to build a bigger church house. That as the chairman he oversaw the construction of the church and personally contributed to its development. He testified that once appointed an elder, he was to oversee the entire parish and also joined the "KIRK SESSION" which is the body which handles all the parish of the P.C.E.A and that the "KIRK SESSION" Chairman is the Moderator of the Church, and is tasked with handling all matters relating to discipline. He testified that he was also appointed as the parish treasurer and that his role was to ensure that all funds collected from all the churches in the parish were properly accounted for by the "KIRK SESSION" which would authorise use of the funds.

9. That the post of treasurer was for three years and after a break of one year, one would be re-appointed. He testified that as the treasurer he was to manage the property situated at Milimani Estate in **Nakuru Municipality Block 11/2** a five bedroomed bungalow sitting on a one acre land with eight other people, the Caretaker Committee to which he was the Chairman.

He continued to testify that the church had a procedure of appointment and removal of Elders. That his appointment was announced three times in the church prior so that anybody with complaints may

bring them forth, and if there was any dispute, it would go to the “KIRK SESSION.” He stated if there was a dispute the issue would first be heard by the “KIRK SESSION”, that determines whether there is a case or not and if so, it would recommend removal of a person as an elder.

10. He testified that an elder is not paid any salary and upon removal, there is no financial loss if there are good reasons.

He stated that upon removal, he made an appeal to the General Assembly of the church but he was never called to attend the hearings. He stated that if he is not found guilty, he ought to be returned as a church elder.

It was the plaintiff's testimony that the offending letter dated 1st November 2013 was read three times in all the churches – and **reasons for removal as elder was given as disobedience of church orders**. He produced the letter as PEx I. It was his evidence that the said letter was copied to the Moderator of the P.C.E.A Church, Nakuru, and not to anybody else. He testified that the dispute was over the Milimani House that was managed by the Caretaker Committee who had appointed an agent and who had the keys to the house.

11. He testified that at the material time in 2009, the house was vacant so he decided to repair the house and bought paint, that the committee did not meet to authorise him to do the repairs, but told the court in the past he could use his own money for repairs and would get refund from the committee, and this he did as he did not want the house to be damaged.

He stated that he was not happy when asked to handover the housekeys which were with the repairer(*fundi*) but told the church secretary and elder who demanded the keys that they should seek authority from the Caretaker Committee to authorise him release the keys to them as that was the procedure, that if he handed over the keys and the house was sold, he would be answerable. He stated that he did not have any documents in respect of the house and in particular the Title Deed.

12. It was his testimony that he was unhappy about the letter that was read to the churches and do a result of his removal from church leadership, he stated that many faithfuls left the church because of the house matter and the letter read to them which he said was defamatory.

13. Upon cross examination, the plaintiff stated that he had a good reason to take the church to court, because of the letter dated 29th October 2013 as it defamed him as he is not a thief and did not disobey Court orders and that he was faithful. He however stated that the said letter did not say he was unfaithful or had disagreed with the other Christians nor that he was a robber or not a reputable person. He stated that his complaint was on the procedure used to remove him and the false allegation that he had disobeyed an order yet he had replied to the letter. On his hotel business, he stated it was his personal business without church limitations. He stated that he was not given any minutes or a resolution to remove him as an elder nor was he invited to the church “court.” On the Milimani House, it was his testimony that he had no personal interest in the same but only to managed it for the church benefits. In the eyes of the church, it was his testimony that the letter read to the church portrayed him as a thief who had stolen church property, was unfaithful and disobedient to church orders. He stated that the disciplinary procedure of the church was not followed in his removal as an elder and as a result, he suffered loss and damage to his reputable character.

14. **Defendants Evidence**

DW`1 was Reverend Lloyd K. Kabaiya the first defendant. He recorded his statement on the 28th March 2014 and filed on the 31st March 2014. He admitted that the church had made a resolution to sell its Milimani property which was under the management of the House Committee, whose Chairman was the plaintiff. He stated that following the resolution, the church appointed two persons as secretary and finance chairperson to oversee the sale, that they went to see the house that was vacant in 2009 and bought new locks, padlocked it and left keys with the caretaker, that in October 2009 the plaintiff went and took away the keys from the caretaker and without their authority commissioned painting of the

house. They then requested the plaintiff to give them back the keys but he refused. When asked about the title deed to the house, DW1 stated that the Title Deed was in good condition and they presumed it was in his possession.

15. It was his testimony that the presbytery “court” instructed him to write a letter to the plaintiff demanding return of the house keys and all documents he was in possession of. That is the letter dated 29th October 2013. It was his further testimony that by the said letter, the plaintiff was requested to appear before the church officials on the 31st October 2013 but he failed to, following which a resolution was passed on the 1st November 2013 to demote him and remove him from being an Elder of the church. He did not produce any of the resolutions or minutes of the meetings. The Defendant admitted receipt of the plaintiff's advocates letter requesting that all letters be addressed to the Caretaker Committee and not to the plaintiff in person. The defendant proceeded to testify that following the resolution he wrote the letter which was circulated to all the parishes within Nakuru. He stated that the plaintiff did not appeal against the decision neither did he appear before the presbytery officials as had been requested to.

16. He stated that the announcement contained in the letter dated 1st November 2013 to the churches gave reason for removal of plaintiff as disobeying the presbytery and that it was in accordance with the church Constitution and procedure.

He testified that the letter did not portray the plaintiff as a thief, dishonest or any such defamatory reference. He stated that the church does not permit anybody to use personal funds for church work and that the house was raising its own money and that the Caretaker Committee used to authorise all repair works. He testified that the plaintiff used to sell alcohol in his hotel yet the Christian faith does not condone such practice, and therefore the plaintiff did not qualify to be an elder.

17. On cross examination DW1 stated that when hearing disciplinary matters the “Kirk Session” consisting of Ministers and ordained Elders is a closed session and issues of discipline are raised in the meeting after which the presbytery is informed in writing. He stated that in the case of the plaintiff, disciplinary issue was the work of the presbytery after the “Kirk Session.” He stated that in the case of the plaintiff, the Kirk Session did not communicate to the plaintiff but the presbytery took it upon itself to take the disciplinary action by informing him of the complaints.

18. DW1 admitted that he never informed the plaintiff of the meeting of 29th November 2013 or any complaints against him. He further admitted that he did not invite the plaintiff to the disciplinary committee meeting on the 31st October 2013 but that by his letter dated 1st November 2013, he communicated the committee findings that he had disobeyed orders of the church and further that he did not reply to the plaintiffs letter by his advocate.

Asked about the impact of the offending letter upon the plaintiff, DW1 replied that it had a far reaching impact in the society as a church elder is a respected person of the society and if removed, his respect goes down, but not always, as it depends on the elders reputation and defended the church procedure of removal of elders without their participation in the process. He stated that notwithstanding the above the plaintiff is still a member of the church.

19. Parties filed written submissions which they highlighted.

In his submissions for the Defendants, Mr. Waiganjo Advocate submitted that the plaintiff is not entitled to the reliefs sought as he did not prove that the defendants letter dated 29th October 2013 was defamatory of his character and reputation. He further submitted that the plaintiff failed to show how the said letter was false, malicious or how it defamed him, that it was not copied to third parties, but only to the church Moderator and therefore its contents could not be defamatory.

20. Referring to the innuendo stated in the plaint, it was submitted that no such words were pronounced by either the defendants and they could not carry such meanings in their ordinary meaning.

It was argued that the only reason the plaintiff came to court was because the letter was read to the churches congregation three times and that the plaintiff admitted in his evidence that the said letter did not refer to him as a thief or dishonest. He further stated that on appointment, it was announced three times to the church and upon removal, the same procedure ought to be followed. It was submitted that the plaintiff did not prove to having been defamed to the required standards.

Several authorities were cited, among them **Phinelias Nyagah -vs- Hon. Gitobu Imanyara HCCC 697 of 2009, and Daniel N. Nguma -vs- KGGCU Ltd C.A No. 281 of 1998.**

21. Citing the above authorities, the defendant submitted that the words complained of must bear a defamatory meaning concerning the plaintiff which there was no evidence of any defamatory meaning in the words used in all the letters referred to.

It was also submitted that the said letters did not lower the plaintiffs reputation in the right thinking members of the society as none or no evidence was tendered to that effect, that no witness was called to buttress such assertion that the plaintiff's reputation was injured.

22. Mr. Waiganjo further submitted that the plaintiff disobeyed orders to handover the keys of the house and therefore there was justification to have him removed as an elder for disobedience of the church order.

In its totality, it was the defendants submission that the plaintiff failed to prove any of the elements of defamation. The court was urged to dismiss the suit.

23. The plaintiff's submissions were that the letters subject of this suit were defamatory of the plaintiff and he is entitled to damages as prayed in the plaint.

To prove what was defamatory in the said letters, Mr. Karanja – Mbugua Advocate cited the case **Ssejjoba -v-s Rwabigouji HCB 41** where the Learned Judge stated what constitutes defamation as:

a) a statement that has a tendency to injure the reputation of the person to whom it refers to by lowering him in the estimation of right-thinking members of the Society --- to cause him feelings of hatred contempt, ridicule fear, dislike and disteem--- by attributing to him any form of disgraceful conduct such as crime, dishonesty---

The above sediments are also found in **Winfield and Jolowkz on Tort, 9th Edition Chapter 13.**

24. The plaintiff referred the court to the case **Oyaro -vs- Alwaka t/a Weekly Citizen & 2 Others (3003) e KLR** where he stated the court held:

- a) that in all actions for libel and slander, the law presumes the plaintiff has suffered harm.*
- b) that although the persons reputation has no actual cash value, the court will form its own estimate of the harm in light of all circumstances of the case.*
- c) that the publication in respect of the plaintiff was untrue, malicious and intended specifically to cause damage to him personally, and in his employment as well as professionally.*

25. Many other authorities were cited all to the effect that the plaintiff proved, by his evidence, that he was indeed defamed and therefore the reliefs sought ought to be granted.

In particular, the plaintiff submitted that the defendants did not plead:

- a) Qualified privilege under **Section 7 of Chapter 36***
- b) Unintentional defamation under **Section 13 of the Defamation Act.***

c) *Justification under **Section 14** or*

d) *Fair comment under Section 15 nor did the defendant offer amends under **Section 13 of the Defamation Act.***

The plaintiff has argued the court to find that he was defamed and award Kshs.25 Million as compensatory damages and Kshs.25 Million as aggravated damages with costs of the suit.

26. From the above evidence by both the plaintiff and the defendant, the issues that arise for the determination of the court in my opinion are:

1. *Whether the letter dated 29th October 2013 authored by the defendants was defamatory to the plaintiff's character, credit and reputation in the church and the public generally and whether the said letter brought the plaintiff to public ridicule scandal and contempt.*

2. *Whether the plaintiff is entitled to damages as prayed in the plaint, and if so the quantum.*

3. *Who bears costs of the suit.*

27. **Analysis of evidence and submissions.**

I have extensively stated the background that led to the defendants to write the offending letter to the plaintiff dated the 29th October 2013, and followed with another dated the 1st November 2013 which was read to all the parish churches and congregants in three consecutive Sundays after the 29th October 2013.

28. The letter dated 1st November 2013 was in the following manner.

“1.11.2013

Mr. Joseph K. Wanjau

P.C.E.A Milimani Parish

P.O. BOX 917

NAKURU

RE: DEPOSITION FROM ELDERSHIP

Receive Christian greetings.

In reference to the letter that the Presbytery wrote to you on the 29th October 2013 the Presbytery waited for the said items and you failed to comply.

*Due to the above, the Presbytery concluded that you disobeyed the decision of the Court. In this connection the presbytery under **Min.58/2013** resolved to relieve you of the eldership with immediate effect. You are required to hand over the eldership card to the Session clerk of Milimani Parish.*

By an order of the presbytery of Nakuru West.

Yours in Christ's vineyard.

P.C.E.A Nakuru West Presbytery

(signed)

Rev Lloyd K. Kabaiya

Presbytery clerk

CC. Presbytery Moderator.”

For clarity, the above letter is not reproduced in the plaintiff's pleadings, but it is referred to, and it forms part and parcel of the dispute between the parties herein. The real issues can not be adequately interrogated, and determined without its reference.

The two letters dated the 29th October 2013 and 1st November 2013 are the subject of this suit.

29. There is no doubt that the letter of 29th October 2013 was authored by the first Defendant under authority of the second and third Defendants. The letter dated 1st November 2013 too was equally written under the authority of all the defendants. This letter was addressed to all the congregations within the Nakuru West Presbytery to whom a large number of the congregations were read to, not only once but three consecutive Sundays on the 3rd November 2013, 10th November 2013 and 17th November 2013.

It is this letter that gave reasons for the demolition and removal of the plaintiff from eldership to the church, stated as disobedience to an order of the Nakuru West Presbytery. That order was stated in the earlier letter dated the 29th October 2013.

By that letter, the plaintiff was required to hand over keys and documents concerning the Milimani House and all financial returns by 31st October 2013, at exactly 2.00p.m. at the presbytery office.

This letter was handed to the plaintiff on the same day.

30. Upon receipt of the same, the plaintiff moved to reply by his Advocates letter dated 31st October 2013, to the effect that the letter should have been addressed to the Caretaker Committee under whose Management the Milimani House fell and not to the plaintiff personally. The letter further sought further particulars of the documents requested for and made it clear that the plaintiff could not individually and ably respond to the letter. It was received by the defendants on 1st November 2013 and indicated as read to the Presbytery Category A.

Apparently no response was sent and the next thing was that the Presbytery proceeded to write under its hand and on the same day the letter dated 1st November 2013 removing the plaintiff from his eldership position – stating that the Presbytery Nakuru West held a meeting on the 1st November 2013 same day and resolved to demote the plaintiff. It is to be noted that the plaintiff's letter by this advocate requesting for better particulars was not replied to.

31. Further on the 5th November 2013, the plaintiff wrote to the Defendants and referred to the 1st November 2013 letter that was read to all the congregation of Nakuru West Presbytery and explained himself that he did not disobey any orders of the church and that he had sought for clarification of which documents and what title he was required to hand over. He made it clear that he had no record of disobeying orders of the presbytery. As such, he sought an explanation why he was demoted and removed from eldership of the church. He copied this letter to the Moderator, Nakuru West Presbytery, Milimani Parish Minister, Moderator of General Assembly, the Secretary General and Deputy Secretary General of the church.

This letter too was not responded to.

32. I have seen numerous letters concerning the Milimani House that suggest that there was a

disagreement between the members of the Presbytery, the elders and Leadership of the church as to the proposed sale of the church property. One such letter is dated 27th July 2013 and another dated the 29th October 2013. The Caretaker Committee Secretary one Mr. Hutchson Muriuki wrote to the Presbytery clerk, the first Defendant and referred to some issues concerning the Milimani House, and stated clearly that the Caretaker Committee under the Chairmanship of the plaintiff had the mandate of running the affairs of the House that included renting and taking care of the house on behalf of the Rongai, Milimani and Barachah parishes. In the letter, the Committee disapproved the first Defendants actions of interfering with the management of the house by the Committee by demanding the keys and documents of the house from the plaintiff on the same day, and advised that he should have approached the Committee for any inquiries. This letter too was not replied to.

33. The first defendant in this evidence admitted that the alleged offending letters were written to the plaintiff and only copied to the Moderator of the church. He admitted having requested for the documents and keys of the Milimani House on the 28th October 2013 and that on the 29th October 2013 a Presbytery Meeting Category A – which he said is the court of the church met and resolved to demote and remove the plaintiff from eldership for failure to handover the documents and keys of the house. He however did not produce the said resolutions nor the minutes of the Meetings stated as **Min 54/2013** and Minute 58/2013.

34. Upon cross examination the first Defendant stated that on disciplinary issues, the accused is only informed of his misdeed and is not supposed to respond. He informed the court that all titles and assets of the church are kept under key and lock by the church trustees, that when he and another official visited the plaintiff to enquire about the Titles on the 28th October 2013, the plaintiffs promised to help them trace the title. That indicated that he did not have the title documents to the Milimani House. DW1 stated that he did not have the mandate to write the letter dated 29th October 2013 to the plaintiff, and that he did not notify the plaintiff of the meeting convened to discuss and his conduct, nor did he notify the house Committee that it had been dissolved as it had apparently been dissolved. He owned up that this dissolution was not notified to the plaintiff, his lawyers or the court. He also confirmed that he did not invite the plaintiff to attend the disciplinary committee meeting on the 31st October 2013, but sent to him the letter of 1st November 2013 communicating the committees resolution that he was to be removed as an elder of the church.

35. When asked to state what orders the plaintiff disobeyed, DW1 stated that it was failure to hand over the house keys and house documents. He confirmed that he did not reply to the plaintiffs letter asking for particulars, nor was it discussed by the Presbytery.

On the offending letter, the first Defendant stated that he knew the far reaching impact it would have when read to the churches, that a church elder is a respected person and if he is removed as such, his respect goes down but that depended on his reputation.

He affirmed that removal of an elder without his participation was the procedure of the church.

36. From the above narration and analysis, it is evident that the removal of the plaintiff from Eldership of the church by the manner of the letter dated 29th October 2013 and followed by the public announcements in all the parish churches vide the letter dated 1st November 2013 was actuated by malice, and not an innocent request for keys and title documents of the Milimani House as the defendants submitted. If indeed DW1 had dissolved the House Caretaker Committee, meaning the plaintiff and the other members were no longer members, Justice demands that they ought to have been informed and requested to hand over the keys, and any other documents they may have been holding in their custody .

The defendants knew these facts and without disclosing the same to the plaintiff, and knowing what they wrote was false, and perhaps to find a way of removing the plaintiff from church leadership, it would only be construed that they had malice, ill-will and spite. They did not believe in the truth of the contents of the letters. See **P.J. Macharia -vs- Wangethi Mwangi HCCC No. 1709 of 1996** and the court holding below. The manner of the request for the documents, followed by the short time given to the plaintiff to

provide and hand over the same after one day including financial statements and documents could not be said to be innocent and practical. The language of the letter, commanding the plaintiff to handover the documents, the short period, none communication of meetings and resolutions by the first Defendant, and by implication all the defendants was a well calculated mischief made to oust the plaintiff from leadership of the church by using falsehoods and malice.

In their submissions, the defendants stated that the alleged defamatory letter was not demonstrated to be false, malicious or how it defamed the plaintiff when the plaintiff did not call any evidence to prove such defamation.

It was submitted that the innuendo stated were of the plaintiffs making and perception of himself as no right thinking member of the society and the congregation could import the innuendo stated in the plaint.

37. Defamation is defined in **Winfield Jalowicz, 15th Edition** as

“---- a publication of a statement which reflects on a persons reputation and tends to lower him in the estimate of right thinking members of the society generally or which tend to make them sun or avoid that person---”

This definition was followed and expounded in the case **Phinehas Nyagah -vs- Hon. Gitobu Civil Suit No.697 of 2009**. The court observed that three elements must be proved to succeed in a libelous defamation suit, that:

(1) That the words must refer to the plaintiff

(2) They must be malicious, and malice does not necessarily man spite or ill-will but recklessness itself may be evidence of malice,

(3) and that evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts.”

38. In the case **J.P. Machira -vs- Wangethi Mwangi & Another, HCCC No. 1709 of 1996**, the court held that:

“Any evidence which shows that the defendant knows the statement was false or did not care whether it is true or false will be evidence of malice----- 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 the knowledge that it was false. I have no hesitation in finding the publication being malicious.”

If a publication or allegations are false and the same are not disputed by correspondence or evidence and the party publishing or making them knows them to be false or baseless in the absence of any attempt to show some belief in the truth of the allegations the malice is established and there is no sustainable defence. The above was held in **Civil Appeal No. 9 of 1975 Kitto -vs- Chadwick and Another (1975)EA 141**.

39. I have considered the defence raised by the defendants. It is a general denial that the words in the offending letters did not in anyway defame the plaintiff and that the innuendo stated are personal interpretation of the plaintiff and were not malicious or actuated by ill motive nor were they intended to ridicule or embarrass the plaintiff. DW1 admitted having had no mandate to write the offending letter, which was very reckless and tainted with ill-motive.

The defendants did not plead any of the defences provided under the **Defamation Act, Chapter 36**. They did not allege qualified privileged under **Section 7** or Justification under **Section 143** of fair comment under **Section 15**.

The offending publication subject of this case are obtained in the letter dated 29th October 2013 as stated in Paragraph 5 of the Plaintiff and the follow up letter dated 1st November 2013. The letter is reproduced in Paragraph 3 above, and in Paragraph 7 and 8 thereof, the plaintiff gives the innuendo and his interpretation of the said publication. The innuendo is reproduced in Paragraph 4 and 5 above.

Considering the circumstances analysed hereof, can the said publication be said to be defamatory of the plaintiff in terms of the interpretation and meaning attached by the plaintiff thereof and denied by the defendants?

40. Before the above question can be answered, it is important to determine whether the said publication was false or actuated by malice.

The first Defendant and author of the offensive letters knew that the plaintiff did not have the keys and Title Deed and documents of the Milimani House. He stated that the plaintiff had told him that he could assist them trace the whereabouts of the title. He testified that the Titles of all church properties were kept by the Trustees of the church. As to the keys of the house and other financial documents, it came out in evidence that the same were in the custody of the Caretaker Committee and that the plaintiff could not ably provide such documents in his personal capacity.

The defendants failed to respond to the plaintiff's letter, a day after the offending letter was written, to give further and better particulars of the documents they required from the plaintiff. Even assuming that the plaintiff had such documents, the language used in asking for the said documents and the timelines given could not be said to have been innocent. Events that followed thereafter, and admission by first Defendant in his evidence that he had no mandate to write the letters and that he never informed the plaintiff of the meetings where his conduct was discussed and a verdict passed that he be dethroned from eldership of the church, the none participation of the plaintiff in the proceedings and the disclosure that he had dissolved the house Caretaker Committee and did not inform the plaintiff and the committee of the dissolution all combined persuade me to come to the conclusion that the defendants knew that the publication was false, reckless and was actuated by ill-motive and malice and they did to care whether it was true or false or the impact it could have on the plaintiff, given the circumstances of the matter.

As stated in the J.P. Macharia case above, this was evidence of malice.

41. I find that the publication by the letter dated 29th October 2013 and followed by the letter dated 1st November 2013 malicious and intended to defame the plaintiff in his character and reputation as church elder. It is evident that the defendants had their agenda to take away the keys and the house documents by hook or crook.

The first defendants evidence in its totality was to the effect that he himself did not believe in the truth of the said publication and knew it was false, knew the far reaching impact it would have on the plaintiff's character as a reputable Church elder.

Having made a finding that the letter dated 29th October 2013 and aggravated by the subsequent letter dated 1st November 2013 was malicious and defamatory of the plaintiff, I now have to determine whether the said publications dented the plaintiff's character, credit and reputation in the church and the public generally.

42. The first defendant was heard to testify that the plaintiff was a respected church elder and he knew the far reaching impact of the letters read to the churches. He stated that if a member is removed as an elder, his respect goes down, but that would depend on his reputation. The letter dated 29th October 2013 read in part:

“--- you went to the said house without the consent of the presbytery --- the presbytery learnt that you were adamant and arrogant---”

The plaintiff admitted that the letter under reference did not refer him as a thief or dishonest. He stated that follow up letter of the 1st November 2013 which is not quoted as defamatory in the plaint but said to have been written in furtherance of the malice, and which was read as an announcement to all churches in the parish and written both in English and Kiswahili to bring out the intended impact well to the church members, stated that the plaintiff had disobeyed the decision of the court and has resolved to relieve him of eldership with immediate effect.

43. The plaintiff did not call any evidence to show how the publication lowered his reputation in the eyes of right thinking members of the churches and the public in general.

To prove that his character and reputation had been lowered and suffered injury and loss as a result, the plaintiff ought to have called third parties to testify to the same. He did not do so. Even when he said that his business was affected negatively, he did not produce his financial statements to prove the loss. To the contrary he told the court that his business had improved and his hotel occupancy had arisen from 60 bed capacity in 2013 to 90 bed capacity in 2015.

44. In the case **George Mukuruu Muchai -vs- the Standard Limited HCCC No. 2539 of 1997**, the court stated:

“In my view, the most important ingredient in a defamation case is the effect of the spoken or written words in the mind of third parties about the complaint and not how he/she feels the words portray about him/her.”

Nobody testified that the plaintiff was shunned or disrespected or lost his business following the publication of the offensive letters. He is still a member of the defendant church and goes to the said church as an ordinary member.

His main complaint was that the procedure used to remove him from the leadership position was not fair as the allegations were false and malicious and that having served the church for over nineteen years, he did not deserve such treatment by the same church. The plaintiff had an option to appeal to the church leadership over the decision to remove him from Leadership position was not fair. His appeal was not responded to.

45. The procedure of removal that he complained about, and particularly the announcements of the removal in all the churches three times, is the same procedure that the defendants undertook when the plaintiff was appointed an elder. The procedure as I have stated above where the plaintiff was kept out of fair hearing and decisions taken and condemned unheard is subject to challenge without his participation but in a different forum.

46. In cases for libel and slander, the law presumes that the plaintiff has suffered harm. The court while determining whether harm has been caused to the plaintiff it is to take into account the plaintiff's profile as opposed to the publication, whether true, false or malicious and whether it was intended to specifically cause damage to the plaintiff personally. See **Oyaro -vs- Iswaka t/a Weekly Citizen & 2 Others (2003) e KLR**.

I have considered the above case and in the circumstances obtaining thereof. I have made a finding that the publications were false and malicious and that the plaintiff failed to show what negative effect they had on the plaintiff's reputation or character as he failed to call evidence on this. He was not shunned by any member of the society of the church, his business was not affected negatively, nor was evidence of change of social status adduced.

47. It is trite that libel in all cases is actionable *per se* and no proof of damage is necessary but if damage is suffered, then this aggravates the wrong and increases the damages which the plaintiff is entitled to.

Having so stated and that being the law it is my finding that the plaintiff's claim in defamation succeeds and the defendants are consequently liable in damages.

48. In assessing damages, I have considered that no proof of damage or loss to the plaintiff was adduced. I have also considered that the offending letter of 29th October 2013 was circulated to a very limited group of people as it was only copied to the church Moderator, though authored under the authority of the defendants. I have also considered the follow-up letter dated 1st November 2013 demoting the plaintiff that was read to all the congregants of the church and the reasons given for the removal in the said letter.

I have also considered the status in society of the plaintiff as a respected business man within Nakuru Town, and also respected church elder of over nineteen years.

The plaintiff has proposed compensatory damages in the sum of Kshs.25 Million and aggravated damages of Kshs.25 Million.

The defendants have argued dismissal of the case on the basis that the plaintiff did not suffered any loss and no injury of such loss were proved.

49. In **John -vs- MGN Ltd 1966 2 All Er 35** and cited with approval by the **Court of Appeal in Nation Media Group Ltd and 2 Others -vs- Joseph Kamotho & 3 Others (2010) e KLR**, it was stated:

“in assessing appropriate damages for injury to reputation the most important factor is the gravity of the Libel, the more closely it touches the plaintiff's integrity, professional reputation, honour, courage, loyalty and the core attributes to his personality, the more serious it is likely to be. The extent of the publication is very relevant. A libel published to Millions has greater potential to cause damage than a libel published to a handful of people.---”

In the matter of **Phinehas Nyagah -vs- Hon. Gitobu Imanyara** (Supra), the court held that the plaintiff did not prove all ingredients of the tort of defamation on a balance of probability, but held that had he proved the same, it would have awarded Kshs.3 Million in general damages. That was in August 2013.

In **Civil Case No. 586 of 2009 C Mehta & Co Ltd -vs- Standard Bank Ltd (2014) e KLR**, the court in October 2014 awarded a sum of Kshs.3 Million to a business man the plaintiff whose credit and reputation were injured by the defendants dishonour of his cheques for no good reasons.

In **Patrick Nyoike -vs- People Limited (2013)** the plaintiff was awarded Kshs.4 Million and Kshs.100,000/= in aggravated damages while in **Ken Odondi & 2 Others -vs- James Okoth Ombura T/A Ombura & Co. Advocates (2013) e KLR** an award of a sum of Kshs.7.5 Million in general damages was reduced by the Court of Appeal to Kshs.4 Million in July 2013.

50. Exemplary damages are awarded where compensatory damages are not sufficient when the plaintiff proves that the defendant made the publication knew that he was committing a tort or was reckless whether his action was tortuous or not. Aggravated damages on the other hand are awarded to compensate the plaintiff for additional injury going beyond that which would flow from the words complained of, and would ordinarily be awarded against a defendant where it is proved that the publication was actuated by malice, and instance of a flimsy defence or failure to apologise.

I have considered the damages awarded in the above cases among others. I am persuaded that the plaintiff is entitled to both compensatory damages and aggravated damages for the reasons given above. To that end, I shall make the following awards which I deem as fair and reasonable in the circumstances:

1. **Compensatory General damages - Kshs.5,000,000/=**
2. **Aggravated damages - Kshs. 500,000/=**
- Exemplary damages - NIL**
3. **The plaintiff will have costs of the suit.**

Dated, signed and delivered on this 29th day of September 2016.

JANET MULWA

JUDGE