



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 7 OF 2012**

**RAPHAEL LUKALE.....PLAINTIFF**

**VERSUS**

**ELIZABETH MAYABI .....1<sup>ST</sup> DEFENDANT**

**ROYAL MEDIA SERVICES LIMITED .....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By a plaint dated 9<sup>th</sup> January 2012 and amended with leave of court on 22<sup>nd</sup> day of June 2015, the plaintiff herein Raphael Lukale instituted this suit against the defendants Elizabeth Mayabi and Royal Media Services Limited claiming for general damages and exemplary damages, costs and interest and any other remedy deemed appropriate by the court.

2. In the said amended plaint, it is claimed that on or about the 9<sup>th</sup> day of August 2011 after the 9.00 O'clock news, the first defendant who hosts a programme on "Mulembe" a Luhya FM Radio station entitled "AKOMWITALA" (literally meaning - matters of family life) did falsely and maliciously broadcast to the public of and concerning the plaintiff and of him in his position as a head teacher the following statements in the Luhya language:-

a) *Nakokhuchenyie mbu aliho mama mulala mue eria ye Eshatieta –ebutere awalekha omusatsawe mbu James Anunda nanyakhana okhula nafwa.*

b) *Olunyuma lwookhufwa unoyamala omukhasi uno yamala nacherera hango was marehemu. Omukhasi tsana alangungwa mbu Ruth Anunda, namenyire mu eria ye shatieta Eshirembe Sub-Location Township Location Butere district Kabolekhananga mbu mwalimu Raphael Lukale yamenya hango yahoo. Ne liokhuchenyia iri mbu mwalimu yakhoonya mama mukha-marehemu okhurusia amapesa ka marehemu kho barusinjia amapesa tsana nibanywera amalwa, balira tsinyama ne akandi Mwalimu oyo asomeliamwo abaanabe. Kobolekhananga mbu Mwalimu yasomeliamwo abaanabe mpaka nibamala tsikoleji nende tsisekondari ne abaana ba marehemu bekhala hango shibasomanga ta mana banyakhananga.. Kho Mwalimu atabakasinjia litaala liowashie, ne Kenya mbu amanye mbu abaana be shibanyala okhuba netsikhabi tawe.*

c) *Elindi liokhuchenyia liri mbu Mwalimu uno yakatia omukhasi wa marehemu ni bakusia oluchina lwa marehemu nabalia amapesa ne omwana mbu M A ali hango shasomanga tawe khulwa okhubula ifisi, Kata Assistant Chief yakhatema okhwikhasia khwo mama oyo nende*

*mwalimu ne bamukhaya.*

*d) Mwalimu yachira nyinamwana abaana ba marehemu olwa alondanga abaana abo nibetsa hango, nabalonda malupanga mana abaana bamenya mubajirani.*

*e) Omwami weieria eyo nende abamenyani ba mama oyo bakwanire okhubukuliwa mama oyo nende mwalimu uyo hatua kata kali kanyalikha basitakwe mana Mwalimu oyo aleshe sibwe emirimo .*

*f) Khandi mwalimu yabukula omukunda kwa marehemu alimanga narusiamwo ebindu nayira ewuwe abanabe okhulia ne abaana ba marehemu ni banyakhana.*

3) According to the plaintiff, the English translation for the above words is as follows:

*a) It is shocking that there is a woman in Eshatieta village in Butere who deserted her husband called Mr James Anunda, leaving him shocked and miserable which led to his death.*

*b) Later after the death of the late James Anunda his widow returned to her late husband's home. That widow who is called Ruth Anunda lives at Shatieta village, Eshirembe Sub-location Township location- Butere District. It is said that Mwalimu Rapheal Lukale lives in the deceased's home. But what is surprising is that Mwalimu Raphael Lukale abetted the widow to withdraw the deceased's funds. Mwalimu Raphael Lukale and the widow drew the deceased's funds and they squandered on drinks and buying beef meat and some of those funds were used by Mwalimu Raphael Lukale to educate his children. It is said that Mwalimu Raphael Lukale used the deceased's funds to educate his children up to college and secondary level while the deceased's children dropped from school due to lack of school fees and live in misery. Mwalimu Raphael Lukale is retarding or ruining the family of the late James Anunda and he must know that his children will be cursed or have bad luck.*

*c) Another surprise is that Mwalimu Raphael Lukale tricked the deceased's wife and colluded with her to sell the deceased's posho mill and they squandered the proceeds of such sale while the deceased's daughter one M A dropped out of school due to lack of school fees. Even the Assistant Chief has tried to advise and restrain the widow and Mwalimu Raphael Lukale from continuing with the wanton squander of the deceased's wealth to no avail.*

*d) Mwalimu Raphael Lukale has caused the widow to be so hostile to her own children that anytime they try to come to their home their mother armed with a machete (panga) chases them away and they now live with neighbours.*

*e) Again Mwalimu Raphael Lukale has taken over the deceased's parcel of land which he tills and takes to his family the harvested produce while the deceased's children live in poverty.*

*f) The area leader and neighbours of that widow ought to take action against the widow and Mwalimu Raphael Lukale and if possible they be taken to court and Mwalimu Raphael Lukale ought to be sacked.*

4. The plaintiff claimed that the above words were uttered by the 1<sup>st</sup> defendant and aired by the second defendant's radio station in their natural and ordinary meaning meant and were understood to mean that:

*a) The plaintiff is a dishonest person and had taken advantage of a naïve widow to misappropriate the widow's dues from her late husband's retirement benefits, his posho mill and farm.*

*b) That the plaintiff being such a dishonest person should be dismissed from his employment as a teacher.*

5. It was therefore averred that by reasons of the aforesaid statements the plaintiff was greatly injured in his credit, character and reputation and that he had been brought into hatred, contempt and ridicule and his reputation greatly lowered in the estimation of the right thinking members of society generally. Further, that the plaintiff had, as a result thereof suffered public ridicule and odium and loss of esteem and that he suffered distress and great embarrassment.

6. The defendants entered an appearance dated 13<sup>th</sup> February 2012 on 14<sup>th</sup> February 2012 and filed a joint statement of defence the same day. They vehemently denied broadcasting or airing or publishing the story/words/broadcast set out in length at paragraph 7 of the plaint and put the plaintiff to strict proof of those allegations.

7. The defendants nonetheless pleaded that if at all they broadcast or aired the impugned words, then same were aired in good faith, without malice, in public interest and not intended to injure the character of the plaintiff. The defendants therefore contended that the publication was privileged and a fair comment on a matter of public interest and relied on the defences of qualified privilege and fair comment on a matter of public interest.

8. The defendants further pleaded that the publication was protected by Articles 33 and 34 of the Constitution in disseminating information that shocks and disturbs their conscience about public figures in positions of the plaintiff. The defendants also contended that the plaint disclosed no reasonable cause of action and that the suit should therefore be dismissed with costs.

9. On 28<sup>th</sup> February 2012 the plaintiff filed reply to defence reiterating the contents of the plaint as pleaded and denying that the defences of qualified privilege or Articles 33 and 34 of the Constitution on free speech were relevant or available to the defendants.

10. The plaintiff attempted to have the defence filed by the defendants struck out but on 5<sup>th</sup> June 2012 both parties advocates consented to have the application withdrawn with costs of shs 10,000 to the plaintiff. Parties complied with Order 11 of the Civil Procedure Rules, and the suit was certified as ready for trial on 18<sup>th</sup> April 2014 by Honourable Waweru J.

11. The suit commenced for hearing before me on 22nd June 2015. The plaintiff testified as PW1 on oath and adopted his witness statement filed on 9th January 2012 as his evidence in chief. He testified that he was the head teacher, Bulanda A.C Primary School in Butere Sub County of Kakamega County. That he used to teach at Ekendero Primary School from 2003-2011 and that he has been a teacher for 33 years.

12. That on 9<sup>th</sup> August 2011, his friends and relatives who included his son Readon Wetende called him saying that a programme called "Akomwitata" was being aired on Mulembe FM Radio station and that the said programme was discussing the plaintiff. That upon receiving that information, the plaintiff called one of the Radio Broadcasters and switched off his radio at about 10.00 pm, and listened to the programme being broadcast which was being aired by Elizabeth Mayabi the 1<sup>st</sup> defendant's voice and that although he did not know her personally, but that he was familiar with her voice since she had hosted the programme which he had listened to on many other occasions.

13. That the programme was being hosted/broadcast in the *Luhya* language and that that being the case, the audience must be the *Abaluhya* community. The plaintiff testified that although he knew Ruth Anunda the widow to the deceased James Anunda who was his fellow teacher, he was shocked to learn from the broadcast that it was being alleged that the plaintiff had enticed Ruth Anunda to desert her husband leaving him shocked and miserable which led to his death. Further, that the plaintiff was shocked to hear that after Ruth's husband's death, the said Ruth Anunda returned to her late husband's home at Shatieta village, Eshirembe Sublocation, and that the plaintiff had moved into the deceased James Anunda's homestead and house of the deceased to live with Ruth Anunda as husband and wife and that he had abetted her misappropriation of her husband's benefits and squandered the said benefits on brew and educating his own children whereas the deceased's children had dropped out

of school and or even been chased from the home and that the said children of the deceased James Anunda were living destitute lives. That the broadcast further alleged that the plaintiff had even taken over the late Anunda's house and property including the posho mill and land which he cultivated and carried away all the proceeds to his other home while the children of the deceased Anunda were suffering.

14 The plaintiff further testified that the broadcaster was appealing to area leaders and neighbours to take legal action against the two love birds and urging that the plaintiff should be sacked, which was very offensive and defamatory of the plaintiff.

15. The plaintiff testified that there was absolutely no truth in the allegations contained in the broadcast by the defendants. He denied that Ruth Anunda had ever deserted her husband during his lifetime and that neither did she elope with the plaintiff. The plaintiff also denied ever moving into James Anunda's home to cohabit with Ruth and that neither did he assist Ruth to take away her husband's money from her account for self enjoyment.

16. The plaintiff also denied ever farming on Ruth Anunda's land and or taking away the farm produce to feed his own children. He also denied tricking Ruth to sell her late husband's posho mill and that neither did he know that Anunda had a posho mill. He also denied stirring Ruth to become hostile to her children.

17. The plaintiff testified that he suspected that the broadcast story was initiated by one Peter O'wandati a local activist who was also a local electrician. He stated that prior to hosting the programme, the defendants never called him to verify the truthfulness of the matters (allegations). The plaintiff also stated that he called the host of the programme being aired on that night to substantiate what she was airing and that she responded that she was airing information that she had received from Ruth's children and other people. He further stated that Ruth's children never told him that he had caused them misery.

18. The plaintiff further testified that the "AKOMWITALA" programme on "Mulembe" FM Radio Station was popular and runs on Tuesdays and had run for a long period of time. That about 10 people called him after listening to the impugned broadcast including his colleagues, his son, daughters who are married, and businessmen in Butere County and that the 1<sup>st</sup> defendant recommended in the said broadcast that the plaintiff should be sacked. That the broadcast depressed and humiliated the plaintiff as there were calls ins with many people commending on his character. That as a teacher, the plaintiff had never been disciplined yet the callers were calling him a beast and monster while cursing him, while others sympathized with him. He prayed for damages and costs.

19. On being cross examined by Mr Gacheru counsel for the defendants, the plaintiff stated that he was a teacher albeit he had not availed any document to show that he was one and that neither had he availed any evidence of promotions. He also stated that the broadcast was brought to his attention by his son who lives with the plaintiff in the same compound and that the said son went to the plaintiff's house to inform him of what was happening. That he heard the entire broadcast which was as reproduced in this plaint although he had not produced the clip to court as he did not tape the broadcast, but that he had captured the entire episode in his memory. He also stated that there were interjections or calls-ins by other people. He maintained that the words were being uttered by the 1<sup>st</sup> defendant as per the plaint.

20. The plaintiff stated that he had not availed the clip showing the callers or M, Ruth Anunda's daughter. He also confirmed knowing Ruth Anunda and her husband James Anunda who had since died. He admitted that the late James Anunda and Ruth had children but denied ever eloping with Ruth Anunda after her husband's death. He also denied that he and Ruth had chased away her children including M. The plaintiff also denied that he was living in Ruth's House. He also denied the allegation that the area chief had given him 3 months to vacate Ruth's house and to let her children in.

21. The plaintiff also denied that neighbours had spoken to him concerning the issue and calling on him to

leave Ruth's home. He admitted that the witnesses he had lined up were all his relatives- his son Readon Wetende and Emmanuel his younger brother; and Geoffrey Omachi, the Assistant chief who was his father in law while Mukonyi Atitwa was his maternal cousin. He denied that other people were not supporting him.

22. The plaintiff further denied using money to influence people and the area chief not to pursue the matter concerning his involvement with Ruth Anunda. He admitted that *Mulembe* FM was listened to by his neighbours. He also stated that he was still a head teacher since the broadcast was aired and that his career had not been affected or at all.

23. In re-examination by Mr. L.M. Ombete advocate, the plaintiff stated that paragraph 7 of the amended defence pleads justification and truth, although he did not avail any tape. He also stated that the people who were calling in mainly came from Butere and Mumias areas. He also reiterated that the utterances as pleaded were made by the 1st defendant and that those words affected him psychologically and mentally.

24. The plaintiff also called PW2 Readon Andrew Wetende who adopted his witness statement written on 9<sup>th</sup> January 2012 as his evidence in chief. PW2 testified that he was a constituency clerk with the Independent Electoral and Boundaries Commission and lives in Butere, in the same compound with PW1 who is his father. That on the material date, he was listening to the Radio Citizen and heard the offensive broadcast then he went to his father's house and told him to switch on the radio and he returned to his house where he continued listening to the said broadcast with his wife. He stated that the words were shameful and that they received telephone calls from many people. He stated that his father, the plaintiff, was an upright teacher and that is the reason why he was promoted to a head teacher. He stated that his father lives in his own home, is a chairman of their church and that he is a person of integrity. That his married sister and friends called him over the broadcast and that the witness had lost respect from people in Butere and at his work place.

25. In cross examination by Mr Gacheru, PW2 stated that he always listened to the programme and that on the material day, it begun after 9.00 O'clock news and that the presenter was repeating the words for listeners. He reiterated that the words uttered by the 1<sup>st</sup> defendant who was saying she had recorded the words from M A whom he did not know were as pleaded by his father, the plaintiff in his plaint. He stated that he had not heard about Ruth Anunda but knew her husband who was a teacher. That he usually passed by her home but did not know her children. He stated that the 1<sup>st</sup> defendant spoke about Ruth's relationship with PW2's father but that the utterances were false because he had never known that his father had a relationship with Ruth and if he had, then the witness would have known. He reiterated that many people in Western Kenya listened to *Mulembe* FM. He also stated that his father was still a teacher. He denied that he recorded the broadcast.

26. In re-examination by Mr L.M/ Ombete, PW2 stated that the broadcast was in *Kiluhya* and that he also spoke *Luhya*. He also denied ever hearing villagers talking about his father taking Ruth as his wife. He maintained that the utterances concerning the plaintiff were false.

27. The plaintiff also called PW3 Mr Emmanuel Lipuku who testified on oath and adopted his witness statement of 9<sup>th</sup> January 2012 as his evidence in chief. PW3 stated that he was the plaintiff's younger brother and that he heard the impugned broadcast from *Mulembe* FM on the material day at 10.00pm on the Tuesday programme "*Akomwitata*" He confirmed that the broadcaster was Elizabeth Mayabi who is the first defendant in this case and that many people called the Radio station and contributed to the debate, which shocked him so he called the plaintiff since he had never heard of those allegations against him in the village. He denied that the allegations against his brother were true. He stated that the allegations were spiteful and malicious. He stated that he was the last born brother of the plaintiff and that it is the plaintiff who educated him. He denied that the plaintiff used the deceased's wealth educate them. He also denied that the plaintiff sold the deceased's posho mill or ploughed the deceased Anunda's land. He stated that the story defamed his brother, the plaintiff herein.

28. In cross examination by Mr Gacheru counsel for the defendant, the plaintiff's witness stated that he

was a Records Management Officer and that he heard the entire broadcast at 10.00am on the material date after the 9.00 O'clock news broadcast and that all the words in the plaint were spoken by Elizabeth Mayabi. He denied hearing M A speak. He also denied that the broadcast was pre-recorded. He denied having any clip of the broadcast. He stated that from his home to the plaintiff's home is 1½ kilometers and that he knew what the plaintiff did on a daily basis since he worked at Butere Law Courts although he denied that he was with the plaintiff throughout the day.

29. In re-examination, PW3 stated that the programme related to the incident that had occurred on several days and concerned family matters but that they were defamatory. He also stated that he had never met Elizabeth Mayabi but that she introduces herself in the programme and so he knew her voice as she did the broadcast daily. Further, he stated that it was the said Elizabeth Mayabi who broadcast the false words concerning the plaintiff. He stated that he would have known if the plaintiff had done all those things he was alleged to have done to James Anunda's home.

30. The plaintiff also called Johnfray Omachu as PW4 who testified that he was the Assistant chief for Khwisero Sub county and that the plaintiff was married to his niece. He adopted his witness' statement as his evidence in chief, which statement restates what the other witnesses for the plaintiff stated in chief. PW 4 stated that he heard the broadcast at 10.00am and called the plaintiff. The broadcast was said to have been at 10.000 am which allegations he knew were false since the plaintiff had lived with PW4's niece as husband and wife for many years and that PW4 had not heard that the plaintiff was living in the home of a deceased person with a widow. PW4 stated that the broadcast story was highly damaging and defamatory of the plaintiff.

31. In cross examination by Mr Gacheru, PW4 stated that although he was an Assistant Chief, he had come to testify on what he had heard on radio concerning the plaintiff. He denied knowing who Ruth Anunda was. He stated that he came from Khwisero whereas the plaintiff lives in Butere and that he always listened to the programme at 10.000 pm. That on that material night he arrived home at about 10.05 pm and found the programme going on with Elizabeth Mayabi talking, repeatedly and mentioning the plaintiff's name and his place of work. That when he called the plaintiff, the latter confirmed that he was also listening to the programme.

32. The plaintiff also called PW5 James Mukonyi Atitwa who testified that he knew the plaintiff who taught him at Butere High School. He also adopted his witness statement as his evidence in chief, which reiterates what the other witnesses stated concerning how they received or heard the broadcast being hosted by the 1<sup>st</sup> defendant. That on that night the witness was at a funeral of his brother's child and on hearing the broadcast, he called the plaintiff and notified him of what was being broadcast about him and even put it on the speaker for the plaintiff to hear directly from the radio.

33. PW5 stated that he was surprised by the broadcast story because he had known the plaintiff who was his cousin to be a straight forward family man and that those who heard and knew their relation wanted to know from the witness whether the broadcast was true and he told them that it was not and that he did not know where the presenter had got the story from. He stated that the story ridiculed his cousin who was a head teacher and role model in the community.

34. In cross examination by Mr Gacheru, PW5 stated that the plaintiff was his teacher and cousin and that he only heard the broadcast which was the truth. He stated that he did not live with the plaintiff. That they lived about 15 kilometers apart and that they would only meet after 2 weeks. He maintained that the broadcast was aired at 10.00 pm by Elizabeth Mayabi not M An and that although he did not record the words used, he memorized the words.

35. In reexamination by Mr L.M. Ombete, PW5 stated that he heard all that Elizabeth spoke but he could not tell whether what she was broadcasting was the truth.

36. At the close of the plaintiff's case, the defendant called three witnesses. The 1<sup>st</sup> defendant Elizabeth Mayabi testified as DW1 that she lives in Nairobi and works as a Radio presenter at the *Mulembe*

FM, owned by the 2<sup>nd</sup> defendant, Royal Media Services Limited where she had worked for the last 11 years. That she presented the programme “Akomwitala” for those 11 years consistently, which programme runs from Monday to Thursday. DW1 adopted her witness statement recorded on 5<sup>th</sup> May 2012 as her evidence in chief and stated that this was the first suit that had been instituted against her and her employer since she started the broadcasting, touching on people’s lives and family issues, thereby helping the society resolve their problems. She also testified that the programme also touches on land issues and child defilement and that they do not abuse people on the programme as it is an educative programme. She stated that before going on air, they verified the information given to ensure that it is strong before airing it.

37. DW1 testified that M A A called the radio station and asked for help to return to school and stated that she had nowhere to stay and no food to eat. That the girl had reported her ordeal to the 2<sup>nd</sup> defendant’s Butere office and that the 1<sup>st</sup> defendant called her when she was with her neighbor and a distant grandmother.

38. DW1 testified that the words that she broadcast were the words of M as contained in her paragraphs 6 and 8 of her witness' written and filed statement. She maintained that those were the words that she used in the broadcast, which were M’s words. She stated that the plaintiff must have heard what the complainant M A and her grandmother spoke and that as the host broadcaster, she opened the forum for callers to comment on the issues raised. That the callers reacted sympathetically and wanted the local administrators to go to the aid of the children affected and that some of the callers cried on air.

39. DW1 stated that after airing the programme, she personally went to the ground and found that children of Ruth Anunda had nowhere to live and had no food to eat. That there was a house and land but that she gathered that after their father’s demise, the children started living like street urchins. That she talked to neighbours of the widow- Ruth and her daughter M and confirmed that indeed the broadcast was true. She stated that she only broadcast that the plaintiff being a teacher, was in a better position to help those affected children go to school and that she did so to educate and inform the public to assist needy children get education.

40. On being cross examined by the plaintiff’s counsel Mr L.M Ombete, DW1 stated that she was an employee of Royal Media Services, the 2<sup>nd</sup> defendant and reiterated that she had broadcast that programme for 11 years as its host, which programme was aired from 10.00pm-11.00pm, which is the “Akomwitala” programme which word is *Luhya* language meaning “*family issues.*” She stated that she is a *Luhya* and *the Mulembe FM is broadcast in Luhya*, which is one of the 13 vernacular FM stations owned by the 2<sup>nd</sup> defendant countrywide.

41. DW1 further testified that M reported her problem to the Butere office of the Royal Media Services and DW1 called her on 8<sup>th</sup> August 2011 and recorded her complaint and aired it on 9<sup>th</sup> August 2011. She stated that their team visited the complainant’s home before she personally visited but that she later visited and verified the truthfulness of that complaint after airing the programme. That she did not know the plaintiff before and when she rung him, he was unreachable. She stated that it was important to get the plaintiff’s side of the story as the head master of a local school. She denied that the information was juicy but that it was urgent since the girl complaining needed to go to school. She stated that the presenter only introduces the topic or subject of discussion for the day and that she did that to the listeners. She stated that she was only reporting what M and her grandmother were saying touching on the problems that M and her siblings were experiencing at their home.

42. DW1 also stated that she learnt that M had attended 3 schools- Butere Girls, Milimani and Bukolwe Girls Secondary School. She also stated that she was not aware that M was a difficult child. She stated that she had learnt that after the broadcast, M’s mother reconciled with the affected children and that she also spoke to their mother, Ruth Anunda. DW1 asserted that Ruth Anunda lived with Raphael Lukale, the plaintiff herein. She stated that what the plaintiff had stated in court was lies since he lives in Ruth Anunda’s house and that he has sired a son and a daughter with her.

43. DW1 conceded that *Mulembe* FM has a wide range of listeners and it is also found online and that her words carry a lot of weight. She stated that the neighbour to M was her distant paternal grandmother. She also stated that Aggrey Maina who was mentioned by M in her statement telephoned DW1 denying that he had ever assisted the plaintiff to withdraw the deceased James Anunda's money. She however stated that she believed M's statement that her mother could pay shs 2000 to Aggrey Maina every month to silence him from following up on the late James Anunda's children's complaints.

44. DW1 denied concocting the story. She denied being aware of a Mr Wandati being an activist. She stated that she informed the Children's Department after the programme. She denied that her intentions were to popularize her name, station and status in life. She also stated that she had assisted M by living with her for over 6 months but that Mourine now lived with a relative and that she had a child but did not complete her forth form.

45. DW1 also stated that she was aware that M attempted to kill her child but denied being aware that M was on probation for attempting to kill her sister's co-wife. She stated that she was informed that Ruth Anunda was drawing money from her late husband's account.

46. In re-examination by Mr Gacheru, DW1 stated that issues of M's character were not part of the case before the court. Further, that the matters reported by M and as broadcast were the truth.

47. The defendants also called DW 2 M A A a 19 year old girl who testified that she lived in Butere and was unemployed. She testified that she was now living with her neighbour. She adopted her detailed witness statement recorded on 10th May 2015 as her evidence in chief.

48. DW2 testified that her father James Anunda died in 2007 and that her mother is Ruth Anunda. That at the time of her father's demise, she was in class 7 at Shirembe primary school. She stated that her parents separated in 2002 and her mother went to live with Raphael Lukale the plaintiff herein and that her said mother never participated in the funeral/burial of her husband, saying she was married to the plaintiff herein.

49. That after her father's burial, his documents were handed over to one of their cousins to keep but the Assistant Chief ordered him to give the documents to their mother Ruth Anunda who started withdrawing money from the deceased's accounts and chased the children from home. That the children had to live on their own. That in 2011, after her father's demise, her mother Ruth Anunda returned to her late father's homestead with Raphael Lukale the plaintiff herein and they occupied the deceased' house.

50. That her mother and the plaintiff herein sold a posho mill left behind by her father, started farming the land left by her father and took farm proceeds to Raphael's Lukale's home. That DW2 with 3 of her other siblings - E A aged - 27 years, S A 23 years and W A 15 years were all chased away from home so they went to live with their step grandmother and their blind grandfather. That their mother Ruth Anunda went and chased the children from their refuge therefore the children kept moving from place to place looking for help.

51. The witness further testified that their situation had not improved to date. That her mother Ruth and Raphael Lukale demolished the house which the children of the late Anunda had been living in and constructed 2 houses for themselves. That DW2 had gone to the Assistant Chief seeking for help but that her mother boasts of influencing the said Assistant Chief ( Aggrey Maina) with money so that he does not intervene.

52. DW2 testified that she sat for her KCPE in 2007 and obtained 365 marks and was admitted to Butere Girls High School. That she witness was sponsored by a Canadian Harambee Bursary Fund until form 2 when she was told that her sponsor had died so she sought for another bursary and moved to Milimani Girls where the Principal assisted her. However, that in her term 2, her mother and Raphael Lukale went to the said school and she was summoned to the Principal's Office and questioned on her relationship with Raphael. That DW2 told the Principal that the plaintiff herein was not her father and that from then the Principal of the School told her that her sponsorship had ended because she had able parents. That

DW2 left the school and sought help from the Constituency Development Fund (CDF) through Bukolwe Secondary School. However, she could not pay the fees difference as the Assistant Chief refused to fill for her the bursary forms upon intervention by her mother. DW2 therefore dropped out of school in form 3 term 2. That her mother refused to assist her and chased her away from home telling her to go get married so that her mother could be paid dowry. That DW2's younger sister also dropped out of school in class 8 after performing poorly and with no one to assist her.

53. DW2 further narrated that while she was going through that entire ordeal, she met one Peter Wandati who asked her why she was not in school. That after explaining to him her problems, he urged her to accept to raise the matter to be aired by the media which she did as was recorded by Elizabeth Mayabi in her paragraph 6 of DW 1 witness statement.

54. The witness, DW2 also stated that had this case been filed in Butere, the court would have been flooded with the whole truth since the children of Anunda have no home and that they live like birds. She stated that her grandmother who was hosting them died while their grandfather was blind hence, her and her siblings had to rely on an elderly neighbour who gives them food.

55. That other neighbours tried to assist them but her mother is too hostile to any good Samaritan who tries to assist the children of the late Anunda. She stated that she is the one who called the *Mulembe* FM Radio Station seeking to be assisted over her family matters and emphatically asserted that all that was broadcast was the truth.

56. On being cross examined by Mr L.M. Ombete, DW2 reiterated that she was 19 years old and that she was about 12 years old when her father died in 2007 and that at that time, their mother had left them in 2002 when DW2 was only 9 years old and in standard 2. She also stated that her father did not remarry so they lived well with him until his death. DW2 also stated that when her mother deserted their home, she went to live in Musanda in rental houses with Raphael Lukale the plaintiff herein, and that Musanda was about 27 kilometers away from their home. She stated that when her mother deserted the home, she already had a child with Raphael Lukale and that presently they have 2 children – a boy and a girl.

57. DW 2 also stated that her elder sister is not her father's real child and that she is about 32 years old. She was emphatic that she knew that her mother was having extra marital affairs in 2002 and that her relationship with her mother deteriorated in 2002 when her mother started despising them. Concerning her other sisters, DW2 stated that one of them, Esnas had breast cancer diagnosed when she was in form 2 at Shiatsiala Econdary School and that she never returned to school while Susan finished form four but was in form one when their father died.

58. DW2 firmly stated that she is the one who gave her statement to Elizabeth Mayabi. On being questioned about her father's accounts, she stated that it was a FOSSA Kakamega account although she did not know how much money was in the said account. She also reiterated that they gave their father's documents to their cousin Nelson who handed them over to the then Assistant Chief Aggrey Maina who in turn gave them to their mother Ruth Anunda. She stated that the documents included death certificate, national identity card, TSC employment card, retirement certificate and insurance card among others. She also stated that she did not know to whom their posho mill was sold and for how much.

59. She also stated that their father's land which was about one acre belonged to their father who bought it but that it is Raphael Lukale who ploughs it. She also responded that she was of *Marama* clan of Shianda whereas Raphael is a *Mutere* and that from Raphael's home to DW2's home is 7 kilometers. She also stated that the plaintiff was teaching at Ekendero School not Eshirembe primary School as erroneously stated in Elizabeth Mayabi's statement.

60. DW2 stated that in all, they are 7 children of their mother but was quick to state that herself and her sister Winfred had dropped out of school. Further, that her late father left property which was misused by her mother and the plaintiff herein, albeit the witness could not tell how much money was in the bank and how it was withdrawn by the her mother and the plaintiff herein.

61. DW2 stated that the posho mill used to be operated from their homestead. She reiterated that the plaintiff and her mother demolished her father's house and constructed two houses in the same compound.

62. When asked why no relative intervened in their matter, the witness answered that it was because that land was purchased by her late father and that her only uncle pre-deceased her father. She also stated that her elder siblings tried to object but they could not go far.

63. DW2 also reiterated that her mother and Raphael interfered with her school fees sponsorship by alleging that she had stolen their shs 10,000 and even told her sponsor in her presence that she was a thief and as a result, the Principal told her that her sponsorship was over because she was able to pay fees. That she therefore left for Bukolwe Secondary School in 2011 in form 2 term 3, where her paternal aunt paid part of her fees. She denied paying shs 8,000/- when she joined Bukolwe Secondary School. She stated that the fees for third term was only shs 2,500/- and not shs 8,000/-.

64. DW2 denied being a truant. She also denied being called upon by the village elder (a lady) to agree saying that their village elder was not a lady. She also stated that they also tried to talk to their mother and the plaintiff not to destroy their house.

65. DW 2 admitted that she had a child, a boy. She also conceded that she was charged with child neglect and convicted by a Butere Court to serve 6 months imprisonment but a Kakamega High Court released her on revision. She added that she neglected her child because of poverty. She denied ever assaulting her sister's co-wife or being charged and or being placed on probation with regard to any case.

66. DW2 stated that she knew Peter O'wandati. She also stated that she went to the Children's Rights Office in Butere seeking for help and provided to it information because of the problems that she was going through with her siblings.

67. DW2 painfully recounted that her mother abandoned her father giving him stress. She stated that she is the one who provided Elizabeth Mayabi the 1<sup>st</sup> defendant herein with all the information which was broadcast and that she knew the plaintiff very well.

68. She denied hating the plaintiff but emphasized that he had oppressed them while his family progressed. She also boldly told the court that all that she had stated and as broadcast by the defendants was the whole truth that is why the plaintiff could not file his case in Butere Court. She further stated that it is the plaintiff and Ruth (her mother) who boast that they bribed the Assistant Chief so that he does not intervene in the problems facing the witness and her siblings.

69. In re-examination by Mr Gacheru, DW2 stated that she had gone through so much trouble after her mother chased her from their home and that is why she became pregnant at age 19. That she could thereafter not care for her child due to stress and not that she is a truant. She blamed the plaintiff for causing disintegration of her family and that he lives there to date, after destroying their house and constructing his, and selling off the posho mill left by her late father, which matters she had narrated to the 1st defendant and as broadcast which was the whole truth.

70. When asked by the court, DW2 responded that she currently lives with a distant relative who is a well wisher. Further, that it is the plaintiff who lives in her home with her mother and their two children. That the rest of her siblings live outside the home. She also stated that when the plaintiff and DW2's mother demolished her father's house, they had chased the children and excluded them from the home.

71. The defendant also called DW3 S N A aged 24 years and unemployed but married. She was DW2's sister. She adopted her witness statement as her evidence in chief. The evidence of DW3 in chief was in all material particulars similar to the evidence as detailed by DW2 on how the plaintiff had troubled them leading to the broadcast which she stated reflected the life they were leading after their father's demise.

72. In cross examination by Mr L.M Ombete, DW3 stated that she schooled at St Stephen's Shiatsiala Secondary School up to form 4 and that she was in form 1 in 2007 when their father died. She stated that she lived with her grandmother who used to do menial jobs for people to fend for her and that she was in class 6 when her mother left them. That they had a posho mill in their homestead. The witness further testified that the plaintiff married her mother while her father was still alive and that after her father's demise, the plaintiff and her mother returned to live in her father's homestead together as husband and wife and that they sold the posho mill, although she did not know its purchaser and how much it was sold for. Further, DW3 stated that her mother and the plaintiff sold the posho mill after chasing the children from home. She also stated that her father had an account with a Co-operative Society in Kakamega. She however did not know how much money was therein and who withdrew it.

73. The witness stated that she knew Aggrey Maina Makokha, the area Assistant Chief and that it was M who gave his name to Elizabeth Mayabi. She confirmed that Mildred, their elder sister was not a child of their father and that their first born of their father is E aged 27 years and is unmarried. She emphasized that they complained to the media because the plaintiff disrupted their life. She also stated that she knew Nelson who was their cousin, aged about 35 years and that it was him who had their father's death certificate but that the Assistant Chief compelled him to surrender the documents to their mother Ruth and the plaintiff herein.

74. DW3 denied knowing the title number to their father's land which she stated was still intact. DW3 stated that it was her grandmother who paid her fees for 2 years but stopped in 2008 when the plaintiff went to their home with Ruth and they took over the home. That when the children reported to the Chief and Assistant Chief, they were told that their mother should cultivate the land but that they were concerned that Raphael was taking away the proceeds. DW3 reiterated that their house was demolished by her mother and the plaintiff and 2 houses constructed. She stated that the grandmother she referred to was only a wife to the brother to their real grandfather.

75. DW3 further stated that on 31st December 2014 her family had a meeting at the Assistant Chief convened by Aggrey Chituyi the village elder when the clan members, her mother and other relatives came together and they agreed to live in harmony with their mother and that their mother was implored to welcome back all her children in 3 months but to date she had not taken them back. She confirmed that their father died due to stress after their mother abandoned him and left the children in his sole custody.

76. DW3 denied suggestions that she and her sister M were difficult children. She insisted that their mother and Raphael Lukale the plaintiff herein had chased them from their own home. She stated that after this issue was highlighted by the media, is when their family members met and that all other family members were in support of the children who had raised the complaint with the Media.

77. In re-examination by Mr Gacheru, DW3 maintained that her father lived in their house before his death and that when their mother came in with the plaintiff, they chased away all the children. Further, that they never took away documents relating to the land and the posho mill which used to operate from the homestead but that they sold it. That the children complained to the media after being excluded from their home and their house demolished.

78. On being asked by the court, the witness stated that although they talk to their mother, it is only on phone and that the relationship is not cordial in that she answers them rudely and that they miss motherly love.

79. The defendants called another 4<sup>th</sup> witness Mr Peter Namayi Wandati DW4 who adopted his witness' statement filed in court on 17<sup>th</sup> May 2012. Mr Wandati testified that he knew all parties to this case and the family of the late James Anunda and the plaintiff. That the deceased James Anunda who died in 2007 was his relative. That the witness also knew the plaintiff and the fact that the plaintiff eloped with Ruth Anunda when James Anunda fell ill and they went to live in Samansi in Mumias. That the deceased James Anunda died without a wife. That DW4 lived at a shop in Shitote near the road when the plaintiff moved there and rented a room for Ruth and they lived there as husband and wife

before moving out.

80. That when DW4 met M and W and asked them why they were not in school, they narrated to him their ordeal on their mother's return to their home with the plaintiff. That DW4 then directed the children to the Children's Office and to the Kenya National Union of Teachers (KNUT) offices, Butere, to report and that he also advised them to go and report to the media so that their plight could be highlighted. That when the witness heard the broadcast, he confirmed that it was the whole truth concerning the children of James Anunda. He asserted that what M stated was the truth.

81. In cross examination by Mr L.M Ombete, DW4 stated that he lived in Butere town, just 900 meters from Butere Girls High School. He also stated that Eshetieta village was located in the township location, just one (1) kilometer from where he lives. He stated that he was a trained electrician trained in Uganda but was now doing his own private practice after leaving employment. He admitted that he was involved in public issues but he had not complained against public servants posted to Butere Township, including courts.

82. He also denied featuring in the print media. He stated that he was now 60 years old and that when he went to see Ruth in 2008 he also met Raphael in James Anunda's homestead and that he implored Ruth to allow her children to go to school and for them to return to their home. That he knew Ruth had 7 children with the late James Anunda—two of whom W and M had dropped out of school. That he also knew that the deceased Anunda had a posho mill which was sold after his death although he did not know to whom, when and how much it fetched.

83. DW4 also testified that the late Anunda's children had gone to the District Commissioner's Office to complain that their father's benefits had been taken by Raphael and Ruth. Further that the Assistant Chief said that the benefits had been credited to the account of Raphael Lukale. According to DW4, he knew for a fact that the plaintiff inherited the deceased Anunda's wife and all the property but left his children to suffer especially those who were not married. Further, that he only intervened to assist the children. He also admitted taking them to JJ Masiga Advocate on 26th July 2011 in Mumias town and also to the Human Rights Offices and the Children's offices in Butere and that his interest was to see those desperate children assisted.

84. DW4 also confirmed that he was in the Assistant Chief's offices in 2008 when the said Assistant Chief ordered for the release of the deceased's documents to Ruth. He confirmed that Roselyne Anyanga was not the real grandmother to the children as their real grandmother died. He stated that M dropped out of Butere Girls High School due to fees issues but denied any knowledge that she stole from a fellow student. He also stated that he knew that M Joined Milimani Secondary, left and later joined Bukolwe Secondary School before dropping out. He maintained that his concern was the welfare of Anunda's children and not the relationship between Ruth and Lukale. He denied knowing Lukale's other wife but maintained that Lukale lives with Ruth in Anunda's home. He also maintained that he heard M speaking during the broadcast and that Elizabeth Mayabi who was hosting the programme in Kiluhya language asked the community to contribute to the issues she had raised. He also admitted taking M to the Butere Offices of the 2<sup>nd</sup> defendant where she explained her problems. He confirmed that Raphael had sired 2 children with Ruth.

85. In re-examination by Mr Gacheru, DW4 stated that he was the person who recorded the statement as a witness in this case although the name Wandati was written O'wandati, which was the same name. He also stated that he attended the late James Anunda's funeral and that he used to visit him when he was ailing and living with his children while the posho mill was all along in the homestead but that after his demise, the posho mill was sold and his children chased from the home and that is why they complained. That he was in the Assistant Chief's office when the latter wrote a letter asking the FOSSA to transfer funds to Lukale's account to give to Ruth to assist the deceased's children to go to school. That he knew the deceased, his wife Ruth and the children when they were all still young. He maintained that he only intervened to assist the children and that he heard the first part of the broadcast.

86. At the end of the hearing, and the court after listening to the witnesses who testified that one Ruth Anunda had abandoned her children and that it was that abandonment that gave rise to the complaint subject matter of this defamation suit when the matter was highlighted by the media, I ordered the Kakamega County Children's Officer to visit the home of Ruth Anunda to establish the status of the allegations and to file a status report for the court's consideration. The Children's Officer did visit the home of Ruth Anunda, and prepared a report which was filed in court.

### **SUBMISSIONS ON THE COUNTY CHILDREN'S REPORT**

87. Both parties' advocates also filed written submissions touching on the trial record and the other submissions in respect of the Children's Officer's report.

88. The plaintiff's submission on the Children's Officer's report was that it was not evidence to confirm or reinforce evidence already tendered before the court since Ruth Anunda, the parent to the three sisters who testified in this case – M A A, DW2 S A DW3 and W A, among other children of the late Anunda, who were alleged to have been neglected and chased from their home, was not a witness before this court. He urged the court to ignore the Children's officer's report.

89. On the other hand, the defendant's counsel submitted that the social inquiry report on the welfare of children as filed by the children's officer was relevant to this case as it reveals the desperate state that the children of the late James Anunda were in, and which state prompted them to air their problems through the media to the effect that the children were displaced from their home; that they were neglected and denied their right to a home contrary to Sections 25,27, and 28 of the Children's Act; and that the plaintiff herein Mr Raphael Lukale was brought into the home by the mother to the children thereby disrupting their way of life.

### **THE PLAINTIFF'S SUBSTANTIVE SUBMISSIONS**

90. The plaintiff filed written submissions relying on the plaint as filed and amended with leave of court, the defence filed by the two defendants, the parties' respective witnesses' testimonies in court and decided cases. According to the plaintiff, the evidence on record established certain basic facts that were not in dispute briefly stated: That the plaintiff is a teacher and has been a teacher since 1983. That in the year 2000 he was promoted to the position of head teacher which he holds to date; that at the material time of this suit he was the head teacher of Ekendero Primary School and currently he is the head teacher of Bulanda A.C. Primary School.

91. It was also submitted that the second defendant Royal Media Services Limited (Royal Media) is one of the leading media houses in the country and owns "Citizen" T.V. Station, a national television station, "Citizen Radio" a national radio station and thirteen (13) vernacular F.M. radio stations. It was also submitted that it is common ground that vernacular F.M. radio stations are intended to focus their reach to listeners who speak their relevant languages; that one of those thirteen (13) vernacular F.M. radio station is known as "**Mulembe**" **F.M. Radio Station** which broadcasts in the *Luhya* language and its intended reach is the *Luhya* speaking people who inhabit the former Western Province and the Diaspora.

92. The plaintiff's counsel submitted that the first defendant, Elizabeth Mayabi (DWI), had admitted, although paragraph 4 of the amended statement of defence had denied it, that she is an employee of Royal Media and is the presenter of a highly popular programme called "**Akomwitala**" which literally means "**Family matters**"; That the said programme is aired on "**Mulembe**" **F.M. Radio Station** on all Mondays, Tuesdays, Wednesdays and Thursdays every week shortly after the nine O'clock news in the evening. That Mayabi testified that she has been a host of this programme for the last eleven (11) years and the programme is highly popular with her listeners and that she admitted that she is a highly regarded radio personality especially among her listeners.

93. It was further submitted by the plaintiff's counsel that the saga which gave rise to this action revolves around the family of the late James Anunda (James), his wife Ruth Anunda (Ruth) and Ruth's three daughters; That it is apparent that James was a primary school teacher and that he and Ruth had

established a home at Eshiateta Village. Further, that evidence before court showed that clearly, M A A (DW2) and S A (DW3) have had a most stormy and somewhat troubled relationship with Ruth, their mother; and that what may have led to the bad blood between mother and these two of her daughters is somewhat controversial, highly disputed but that all those were largely irrelevant to the issues before this court. However, it was conceded that it was due to the troubled relationship between Ruth and her children that on 8<sup>th</sup> August, 2011 Peter Namayi Wandati (DW4) took M A to the offices of Royal Media Services in Butere town where she narrated to Elizabeth Mayabi online a long story about the alleged squandering of property belonging to James, her late father. That Mayabi recorded the narration although the recorded tape was not produced in court as evidence.

94. It was also submitted that it was not denied that the plaintiff's four witnesses his son Readon Wetende (PW2), his younger brother Emmanuel Lipuku (PW3), his father in-law, Johnfray Omachi Ojuang' (PW4) and his maternal cousin Jairus Mukoyi Atitwa (PW5), who maintained in their testimonies in court as per their written witness statements that on 9<sup>th</sup> August, 2011 between 10.00p.m. and 11.00p.m. Mayabi in her "**Akomwitala**" programme did broadcast/uttered from her mouth all the Luhya words reproduced at length in paragraph 7 of the plaint. That the uncontroverted evidence is that the plaintiff's attention was drawn to the radio broadcast by Mayabi by Readon Wetende (PW2) and Emmanuel Lipuku (PW3).

95. It was further submitted that the defendants and the three witnesses for the defendants, namely-, M, S and P did not deny that the offending words were aired on the day in question. That Mayabi and the other three witnesses only said that those words are true and were the recorded words of M, with Mayabi then adding that she also aired contributions from the callers-in from among her listeners.

96. The plaintiff's counsel submitted that this court was denied an opportunity to listen to the recording of the broadcast made by Mayabi when she aired her hugely popular programme called "**Akomwitala**" on 9<sup>th</sup> August, 2011. That the tape or any recording of that programme is exclusively in the defendants' possession and that their failure to produce the tape must inevitably lead to the inference that if it was produced it would show that it was Elizabeth Mayabi who was uttering all of the offending words.

97. It was submitted by the plaintiff's counsel that from the way the offending words were stated, obviously, that they could not be the record of M's words; that M complained to Mayabi but it was Mayabi who created all the offending words so as to make them juicy and good broadcast material thus enhancing the value and relevance of her programme; that Peter admitted that he heard only part (a) of paragraph 7 of the plaint of the offending words. It was therefore submitted that this witness was not telling the truth when he said he heard only part (a) of paragraph 7 of the plaint while he admitted to listening to the entire programme.

98. It was also submitted that M could not have recorded as the English rendition stating that:- "***It is shocking that there is a woman in Eshatieta village of Butere who deserted her husband called Mr. James Anunda, leaving him shocked and miserable which led to his death.....***"

99. Further, that the above words could only have been stated by a person stating what he has been told by another person and that it must have been Mayabi who was telling her listeners what M had recorded with her on line on 8<sup>th</sup> August, 2011. It was therefore submitted that the plaintiff and his four witnesses whose evidence was never shaken in cross-examination told the court the truth when they stated in their statements and in oral evidence in court that the offending words were being uttered by Mayabi throughout the airing of that programme.

100. On whether the offending words were uttered by Mayabi or not it was submitted that, that is not the most important aspect of this case. That the fact remains that those words were broadcast in Luhya language by Mayabi who is an employee of Royal Media Services. Thus that if those words complained of are defamatory of the plaintiff then both defendants would be jointly and severally liable in defamation unless they can prove that either those statements are true or that they have some other defence to the action.

101. On liability, it was submitted that it is obvious that if the words which were asserted were broadcast

by Mayabi on “**Mulembe**” **F.M. radio station** on 9<sup>th</sup> August, 2011 are false then they are highly defamatory of the Plaintiff. The plaintiff relied on three statements pleaded in paragraph 7 of the plaint as being defamatory of him. According to the plaintiff, the first defamatory statement is contained in part (b) of paragraph (7) of the plaint which states:

**Luhya Version:** “*Ne liokhuchenyia liri mbu Mwalimu yakhoonya mama mukha-marehemu okhurusia amapesa ka marehemu. Kho barusinjia amapesa tsana nibanywera amalwa, balira tsinyama ne akandi mwalimu oyo asomeliamwo abaanabe*”

**English Version:** “*But what is surprising is that Mwalimu Raphael Lukale abetted the widow to withdraw the deceased’s funds. Mwalimu Raphael Lukale and the widow drew the deceased’s funds and they squandered on drinking and buying of beef meat and some of those funds were used by mwalimu Raphael Lukale to educate his children*”.

102. Further, that the second defamatory statement is contained in part (c) of paragraph 7 of the plaint which states:

**Luhya Version:** “*Elindi liokhuchenyia liri mbu Mwalimu uno yakatia omukhasi wa marehemu ni bakusia oluchina lwa marehemu nibalia amapesa ne omwana mbu Mourine (sic) Anunda ali hango shasomanga tawe khulwa okhubula ifisi.*”

**English Version:** “*Another surprise is that Mwalimu Raphael Lukale tricked the deceased’s wife and colluded with her to sell the deceased’s posho mill and they squandered the proceeds of such sale while the deceased’s daughter one Mourine (sic) Anunda dropped out of school due to lack of school fees.*”

103. That the third and final defamatory statement is to be found in part (e) of paragraph (7) of the plaint which states:

**Luhya Version:** “*Khandi Mwalimu yabukula omukunda kwa marehemu alimanga narusiamwo ebindu nayira ewuwe abanabe okhulia ne abaana ba marehemu ni banyakhana*”

**English Version:** “*Again Mwalimu Raphael Lukale has taken over the deceased’s parcel of land which he tills and takes to his family the harvested produce while the deceased’s children live in poverty*”

104. It was submitted that the law as to what amounts to defamation is settled. Those Defamatory words are those words which have a tendency to injure the reputation of the person to whom they refer. Further, that the law is that those words must lower the plaintiff in the estimation of right thinking members of the society generally and in particular the words must cause the plaintiff to be regarded with feelings of hatred, contempt, ridicule, fear, dislike or desteeem, as was stated by **Salmond on the Law of Torts, 14<sup>th</sup> Edition page 175 and as** was cited with approval by Lenaola Ag J (as he then was) in the case of **Ochieng’ & 8 others v Standard Limited. [2004] IKLR 225**, that the words which impute fraud, immorality or incompetence on the part of a person are clearly defamatory. That the words quoted in the three averments set out above clearly showed that Mayabi was imputing fraudulent acts on the part of the plaintiff. That it is also clear that Mayabi was imputing that the plaintiff had found a naïve and simple woman and used her to squander the wealth left behind by her late husband. That the tone and shock of Elizabeth Mayabi’s statement is captured in her repeated use of words like “shock” and “surprise” in her narrative.

105. It was therefore submitted that the words that Mayabi did broadcast on 9<sup>th</sup> August, 2011 were highly defamatory of the plaintiff and that the defendants did not strongly deny the defamatory nature of the offending words as pleaded in paragraph (7) of the plaint. Moreover, that once a defendant puts a plea of justification or qualified privilege or fair comment on a matter of public interest as his defence he thereby admits the defamatory nature of his statements. That even if the defendants had denied that the offending words were not capable of being defamatory of the plaintiff; the plaintiff had shown that those words are

defamatory of the plaintiff.

106. That the main thrust of the case for the defendants is first that the offending words are true and therefore they are entitled to the defence of justification. That this was an agreed issue number (4) of the agreed issues. That they also pleaded in paragraph (6) of their amended defence the defence of qualified privilege and that that forms part of agreed issue number (3) of the agreed issues. That the defendants had also pleaded in paragraph (7) of their defence articles 33 and 34 of the Constitution as giving them the right to defame the plaintiff without any let or hindrance but since this was not made an issue before this court the plaintiff would not say much about those constitutional provisions save that the Constitution did not abrogate the law of defamation which is saved by article 24 of the same constitution. It is therefore to the twin defence of justification and qualified privilege that the court must turn its attention.

107. On the defence of Justification, it was submitted by the plaintiff's counsel that the law is that when a defendant pleads that the statements he published concerning the plaintiff are true, the burden is on him to prove that those words are indeed substantially true. Reliance was placed on the editors of **Gatley on Libel and Slander, 11<sup>th</sup> edition paragraph 11.3 at page 311** wherein they state that:-

***“The burden of proof. Although the practice is that the claimant alleges that the defendant published the matter “falsely”, it is clear in England and in other jurisdictions which follow the common law on this point that a defamatory imputation is presumed to be false and that the burden is upon the defendant to show that it is substantially true”.***

108. In this case it was submitted that the defendants in paragraph (7A) of their amended defence gave nine particulars of the alleged truth. That the ones taken by the plaintiff as defamatory of the plaintiff are contained in parts (c), (d), (f) and (h) of that paragraph. Paragraph (7A) part (C) of the defence reads:

***“The said Mrs. Anunda withdrew all funds belonging to late Anunda.”***

109. It was submitted that if that be a particular of truth of the plaintiff's complaint pleaded in paragraph 7 part of paragraph (b) of the plaint then the plaintiff is not concerned with it since Ruth is the widow of Anunda and if she withdrew his funds there would be no problem with that and it would not be defamatory of the plaintiff. But that, that is not what Mayabi aired on Royal Media's Radio **“Mulembe” F.M. radio station**. That what she stated is clearly that the plaintiff aided Ruth and the two withdrew Anunda's funds which they squandered, which statement, if false, is clearly defamatory of the plaintiff.

110. It was submitted that Mayabi admitted that she had no personal knowledge of the fact that the plaintiff had colluded with Ruth to withdraw any funds belonging to Anunda and that she also admitted that she had relied on what M had told her. That she admitted that she never counterchecked with the plaintiff but that she had checked with a neighbour, presumably of M, whom she did not name and who was not called as a witness. It was contended that her evidence on this issue and on all other issues in respect of the defamatory statements is and was pure hearsay and had no evidential value.

111. It was submitted that it thus remains to analyze the evidence of M, her sister S and P to see whether the defendants have substantially proved the allegations of embezzlement and squandering of Anunda's property as pleaded in the defence. That these defence witnesses did not tell this court that they knew the amount of death benefits that Anunda was entitled to. That they did not know the name of the bank in which any money belonging to Anunda had been allegedly banked; That M talked of something like Family Bank while Peter talked of Co-operative Bank; That they never knew when the money was allegedly withdrawn; And that they had absolutely no evidence that Ruth and the Plaintiff had withdrawn any money from an account held by Anunda.

112. Further, it was submitted that M and S claimed that their cousin whose name was simply given as N was given all documents of their late father and that either their local Assistant Chief ordered those documents to be released to Ruth or Ruth somehow got them. That Peter claimed he saw a District Commissioner or a District Officer ordering that the money be released but that he does not know how much it was and who was to withdraw it and when it was withdrawn. In short it was submitted that these

witnesses had no evidence to substantially prove that the plaintiff ever aided Ruth to withdraw any money that might have been in Anunda's bank account upon his death. In addition, that they did not know any account number that belonged to Anunda, the money (if any) that was in credit of that account, how much was withdrawn, when it was withdrawn and by whom.

113. The plaintiff's counsel urged the court to take judicial notice of the fact that any death benefits of a deceased person cannot be released to any other person other than the intended beneficiary; that no evidence was forthcoming that death benefits of Anunda was given to the plaintiff and that equally any money in a bank account of a deceased person cannot be withdrawn by anybody including a widow of the deceased unless and until the surviving spouse or child or any other relative obtains a grant of representation enabling that person to administer the estate of that deceased; that no evidence that Ruth and the plaintiff had obtained such grant of representation was ever adduced before this court hence that there was no way the plaintiff would have abetted or colluded with Ruth to withdraw what was not there in the first place; and that thus this claim that the plaintiff colluded with Ruth to squander Anunda's money is completely false.

114. It was therefore submitted that the defendants have miserably failed to prove this allegation as being substantially true since even if there was money in Anunda's account the plaintiff would have had no access to it.

115. As regards the alleged sale of the posho mill which forms the second defamatory statement set out above, it was submitted that neither the two sisters, M and S, nor P had any evidence to prove whether in the first place the posho mill was sold; secondly, that if it was sold when it was sold; and thirdly, that if it was sold, to whom it was sold and for how much. The plaintiff's counsel posed a question as to how one could allege that a particular individual sold a particular item when there is no proof of such a transaction, and concluded that they were merely acting on rumours both on the alleged withdrawal of money from a bank and the sale of the posho mill. Further that the law cannot allow rumours to form the basis of truth and therefore again the defendants have miserably failed to prove the allegation that the plaintiff and Ruth sold Anunda's posho mill as being substantially true.

116. Finally as regards the alleged tilling of the parcel of land belonging to Anunda, it was contended that M, S and P testified that the plaintiff had been tilling that parcel of land since 2011 when allegedly Ruth returned to Anunda's homestead where she is cohabiting with him. That the two sisters agreed that the plaintiff's home is some 27 Kilometres away from their late father's home in the village of Eshatieta. That the plaintiff and his four witnesses testified that the plaintiff is a married man with a family. That on 9<sup>th</sup> August, 2011 when the programme was on air the plaintiff was in his home and that it was his son Readon Wetende (PW2) who lived with him in the same compound who alerted him to the programme which was being aired. That the question put to M as why not a single male relative of her father had raised the issue of a stranger tilling Anunda's land was met with the simple answer that their father had bought that land and since they do not live in their ancestral land no one would come to their assistance. That the one person who came to their assistance, Peter, never complained to anybody, except Royal Media Services, about the alleged fraudulent withdrawal of funds, the sale of a posho mill and the tilling of the shamba. That he took the plight of M and another girl called WA to a firm of lawyers called J.J. Masiga & Company Advocates based in Mumias and Busia who wrote to the Human Rights Commission and the Children's Office, Butere. That if indeed Peter was aware that money had been fraudulently withdrawn, a posho mill sold and that the shamba (farm) was being tilled by the plaintiff for his benefit, that would have been the first thing to complain about to all who would have cared to listen to him, and that he would probably have had the matter reported to police.

117. It was submitted that M and S wanted to portray a picture that everybody including the local Assistant Chief, the Chief, the District Commissioner and the District Officer were all against them and that even Nelson who is their cousin was against them, but that they never satisfactorily explained to this court why their elder siblings who are alive did not testify to buttress their allegations. That M and S confirmed that a meeting was held on 10<sup>th</sup> May, 2011 to try to reconcile them with their mother under the leadership of one Roselyne Anyande, but on 8<sup>th</sup> August, 2011 just three months later M was pouring vitriol against her own mother and bringing in the plaintiff so as to paint her mother as a monster.

118. It was contended that M, particularly, as her evidence demonstrated, must have been a difficult child to her mother. That she did not drop out of schools she attended because of lack of school fees as she claimed. That no evidence was adduced that any Principal or Head teacher of those schools expelled her due to lack of school fees. That she admitted that she gave birth to a baby boy who is still alive, thanks to good Samaritans who saved him as she had abandoned the baby in the bush soon after delivery.

119. It was submitted that the story that M gave to Mayabi and which was supported by Susan and Peter was merely concocted to get at Ruth who M obviously hates with a passion and that if indeed her story was correct she would have called one of the many women who attended the reconciliation meeting of 10<sup>th</sup> May, 2011 to support her evidence.

120. It was the submission of the plaintiff's counsel that there was absolutely no evidence that a teacher of the plaintiff's standing in society would trek 27 kilometers to till a piece of land described variously as a half an acre or an acre and carry what it may produce to his home. It was further submitted that the witness did not even know the proper description of the parcel of land they claimed the plaintiff was tilling and or was still farming; that no evidence was forthcoming that indeed any parcel of land belonging to Anunda was being tilled by the plaintiff except the word of mouth of the two sisters and Peter which evidence was totally unreliable and based on the hatred the two girls had against their mother and all the three allegations of fraud on the part of the plaintiff are therefore utterly false.

121. It was also submitted that part (a) (b) (e) (g) (i) of paragraph 7A of the amended defence are irrelevant. That the question whether Ruth deserted Anunda in his lifetime and eloped with the plaintiff and continues to cohabit with her cannot answer the question whether it is then true that the plaintiff and Ruth fraudulently withdrew Anunda's funds. That it cannot also answer the question whether the plaintiff and Ruth fraudulently sold Anunda's posho mill or whether the plaintiff is tilling Anunda's land. That these issues which are crucial to the determination of this case can only be proved by evidence but that no satisfactory evidence was adduced before this court to prove them.

122. Mr Ombete submitted that the whole evidence by M, S and P and even the whole idea of going to the media was caused by the intense hatred of Ruth by her own daughters M and S. That that is why their elder siblings have had nothing to do with this matter and therefore the defendants have not proved that the three allegations set out above are substantially true.

123. On the defence of Qualified Privilege and fair comment it was submitted that these two defences which form part of issue number (3) of the agreed issues, the defendants never adduced any evidence to support the defence of qualified privilege or fair comment. That the law is clear that if a defendant admits that the words published are defamatory but that they are either true or therefore the publication was justified or they were published on occasion of qualified privilege, he must adduce evidence to prove it. That in this case, the defence of qualified privilege was not available to the defendants since the plaintiff had shown that the statements published by the defendants were not true. Reliance was placed on **Salmond on The Law of Torts 14<sup>th</sup> Edition at page 229** where four "**chief instances of qualified privilege**" are listed as follows:-

- a) "**Statements made in the performance of a duty;**
- b) "**Statements made in the protection of an interest;**
- c) "**Reports of parliamentary, judicial and certain other public proceedings;**
- d) "**Professional communications between solicitor and client.**"

124. It was submitted by the plaintiff's counsel that obviously number (c) and (d) above do not apply to the circumstances of this case but that as regards numbers (a) and (b) of the above instances, the defendants never adduced any evidence that they had legal or moral duty through **Mulembe F.M. radio station** to air those words to their listeners and that those listeners had a corresponding interest or duty to receive it. That the defence of qualified privilege is only available to a defendant if the statements

published are true and there is reciprocity between the publisher and the recipient. That there was no such reciprocity between the defendants and the *Luhya* speaking listeners at large. Reliance was placed on the case of **Bildad Abiud Mbutia v University of Nairobi (1976- 1980)IKLR 733 at page 736** where **Harris J** after citing a number of English authorities on the question of qualified privilege as a defence stated:

***“Considering the respective positions, functions and status of the finance officer, the assistant registrar (housing) and the senior assistant registrar (recruitment), I am unable to see either the interest or duty, legal, social, or moral which the defendant is said to have had in communicating the first paragraph of the offending letter to any of these three gentlemen or the corresponding interest or duty which any one of them had to receive it. I must therefore hold that the defence of qualified privilege put forward in regard to each of them fails.”***

125. It was also submitted that the above case concerned Mr. M.K. Ndoria, the then the Deputy Registrar of the University of Nairobi, who wrote a letter to the Plaintiff, who was then an Administrative Assistant, alleging theft in the plaintiff’s department and copied that letter to the Medical Officer who was the plaintiff’s boss and to the Finance Officer, the Assistant Registrar (Housing) and the Senior Assistant Registrar (Recruitment) who had no interest in the matter. That the court held that while publication to the Medical Officer was within the purview of qualified privilege the publication to the others was not. That the above case went to the Court of Appeal as **University of Nairobi v Mbutia (1985) KLR 821** and the Court of Appeal affirmed the decision of **Harris J.**)

126. It was further submitted that if the defendants had addressed their complaint to the plaintiff’s employer, Teachers Service Commission, and had accused him, in confidence of all they were alleging on the programme then if the allegations were true and published without malice they might have had a defence of qualified privilege. That the defendants in this case had no interest to protect and that all they were interested in was to air what they regarded to be a big scandal so that they can hook more listeners to their programme and that therefore in those circumstances they are not protected by the defence of qualified privilege or even fair comment.

127. On whether the publication was libel or slander, the plaintiff's counsel submitted that although the pleadings do not raise the issue whether the airing of the offending words amounts to libel or slander, there is a thin line separating publication that amounts to libel or slander and that it is generally agreed that what is broadcast is usually libel. Reliance was placed on **GATLEY ON LIBEL AND SLANDER 11<sup>th</sup> Edition at page 11** where it states:-

***“Broadly speaking; if the publication is made in a permanent form or is broadcast or is part of a theatrical performance, it is libel. If the publication assumes transient forum, it is slander.”***

***“Libel is committed when defamatory matter is published in a permanent form or in a form which is deemed to be permanent. Defamation published by spoken words or in some other transitory form is slander.”***

128. The plaintiff's counsel also cited **Salmond on the Law of Torts 14<sup>th</sup> Edition at page 196** where it is stated that:

***“The wrong of defamation is of two kinds – namely, libel and slander. In libel the defamatory statement is made in some permanent and visible form, such as writing, printing, pictures, or effigies. In slander it is made in spoken words or in some other transitory form, whether visible or audible, such as gestures or inarticulate but significant sounds. It is not always easy to determine whether in a particular case the proper cause of action is libel or slander.”***

129. It was therefore submitted that the defendants agreed that they recorded M’s words and it is clear those words formed the basis of the broadcast aired by Mayabi and that on the authority of the above statements what was broadcast by Mayabi amounts to a libel.

130. It was submitted that whether the publication by the defendants of the offending words amounts to libel or slander is irrelevant since it is a fact that what they imputed against the plaintiff was criminal and Mayabi even recommended that the plaintiff be prosecuted and be dismissed and that that is one of the cases where slander is actionable *per-se*.

131. On Quantum of damages it was submitted that the plaintiff had proved, on a balance of probabilities, that the words the defendants aired on 9<sup>th</sup> August, 2011 on **Mulembe F.M. radio station** were and are defamatory of the plaintiff. It was also submitted that whether they are held to amount to libel or slander is not relevant since they imputed fraud on the part of the plaintiff which is actionable *per-se*. That the law is that a successful plaintiff in a defamation action is entitled to recover as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That that sum must compensate him for the damage to his reputation, vindicate his good name, and take account of the distress, hurt and humiliation which the defamatory publication has caused him.

132. That in arriving at the figure to award to a plaintiff the court has to take into account certain important factors. These include the status of the plaintiff in society, the manner of publication of the defamatory statement, and the reach of the publication of defamatory statements. Other factors to be considered by the court include whether the defendant was actuated by malice in the publication or not, failure by the defendant to apologize for the publication and the defendant's conduct before, during and after publication.

133. The plaintiff's counsel relied on the case of **Mikidadi v Khalfan & another (2004) 2KLR 496** where the plaintiff who was a University Lecturer and member of Jamia Mosque, Nairobi, successfully sued the defendants, a reporter and the publisher of the newspaper. **Ochieng Ag J**, (as he then was) set out the factors that a court should take into account in assessing the quantum of compensatory damages that ought to be awarded to a plaintiff who has proved that the words published about him were defamatory. At page 503:-

***“In this case, the publication was in a national daily newspaper. The impact of the publication would thus reverberate throughout our country, Kenya. And although the plaintiff did not lead evidence to prove actual malice, on the part of the 2<sup>nd</sup> defendant, the refusal by the said defendant to apologize is definitely a factor that would aggravate the damages. Indeed, the 2<sup>nd</sup> defendant not only wrote, saying that they would not apologize, he thereafter put forward a defence of justification. But when the case came up for trial, the 2<sup>nd</sup> defendant did not adduce any evidence to justify its actions.”***

134. Further reliance was placed to similar conclusion reached by **Mulwa J** (as he then was) in the case of **Machira v Mwangi & another (2001) KLR 532**. It was submitted that in the **Mikidadi** case Justice Ochieng awarded the plaintiff a total sum of Kshs 4,000,000 (4 Million Shillings) in 2004 and that in the **Machira** case Justice Mulwa awarded the plaintiff the sum of 8 Million in 2001, and stated at page 536:- ***“There is no set formula for the assessment of damages in libel cases,*** ”and after quoting the words of Lord Hailsham in the case of **Cassel & Company Limited –versus- Broome and another (1972) A11 E & 801 at 825** to the effect that:-

***“The whole process of assessing damages where they are ‘at large’ is essentially a matter of impression and not addition stated.”*** ’The learned judge continued at page 543...

***...“the court is free to form its own opinion about the nature of the dent punched into the plaintiff’s reputation and accordingly grant an appropriate redress”.***

135. In this case it was submitted that the plaintiff has been a teacher for the last 32 years and a head teacher for the last 15 years which is a no mean achievement in the teaching profession. That there was no evidence adduced by the defendants that the plaintiff had any disciplinary issues as a teacher and it must be taken that he had had an unblemished reputation as a teacher. Thus the allegation that the plaintiff had colluded with Ruth to fraudulently squander the wealth left behind by James Anunda must have terribly hurt the reputation and feelings of the plaintiff. In addition it was submitted that the defendants never

attempted to countercheck the story Mayabi received from M whether it was true or not. That the whole purpose of Mayabi broadcasting the offending words was to enhance her reputation as an investigative journalist who gets to the bottom of scandals so as to get even more listeners in the competition by the electronic media for listeners, and which conduct cannot be allowed to happen at the expense of other people's reputation.

136. It was submitted further that it was admitted that the programme "**Akomwitala**" is a very popular programme with Luhya speakers who form just about the second most populous community in the country. That the plaintiff as a member of that community must have been terribly hurt by the broadcast. That his relatives and friends who listened to that programme must have been shocked at what was being said against him. That Mayabi herself was inciting her listeners to have complete revulsion against the plaintiff for the alleged shocking behavior and even recommended the dismissal or and prosecution of the plaintiff which in the plaintiff's view is defamation which is probably one of the worst that a head teacher can be subjected to. In those circumstances and on the very special circumstances of this case the court was urged to award the plaintiff the sum of **Kshs.10,000,000 (ten million) shillings** as general damages together with costs and interest at court rates.

### **THE DEFENDANTS' SUBSTANTIVE SUBMISSIONS**

137. The defendant's counsel submitted on the list of agreed set of issues filed on 30<sup>th</sup> April, 2013 which are:

- i. Was the 1<sup>st</sup> Defendant at the material time an employee of the 2<sup>nd</sup> Defendant?
- ii. Did the 1<sup>st</sup> Defendant in hosting a program entitled Akomwitala (literally meaning – matters of family life) on Mulembe FM on 9<sup>th</sup> August, 2011 at 9.00pm, publish in the Luhya language the words produced in their English translation in paragraph 7 of the Plaintiff?
- iii. Were the said words defamatory of the Plaintiff and if so are the Defendants entitled to the Defence of qualified privilege?
- iv. Is the Defence of justification available to the Defendants?
- v. Is the Plaintiff entitled to general damages in defamation and all other reliefs prayed for in the plaintiff?

138. In the defendants' view, issues (i) and (iii) could easily be disposed of and that on issue no (i), it was conceded that there was no dispute that the 1<sup>st</sup> Defendant was an employee of the 2<sup>nd</sup> Defendant and that she admitted as much in her testimony.

139. With regard to issue (iii), it was submitted that it had also been conceded that on the face of it, the words pleaded in the plaintiff are defamatory, thereby leaving the following three main issues for determination.

- i. Did the 1<sup>st</sup> Defendant in hosting a program entitled Akomwitala (literally meaning – matters of family life) on Mulembe FM on 9<sup>th</sup> August, 2011 at 9.00 pm, published in the Luhya language the words produced in their English translation in paragraph 7 of the Plaintiff.*
- ii. Is the defence of justification available to the Defendants?*
- iii. Is the Plaintiff entitled to general damages in defamation and all other reliefs prayed for in the plaintiff?*
- iv. Did the 1<sup>st</sup> Defendant in hosting a program entitled Akomwitala (literally meaning – matters of family life) on Mulembe FM on 9<sup>th</sup> August, 2011 at 9.00pm publish in the Luhya language the*

*words produced in their English translation in paragraph 7 of the plaint.*

140. On the first issue, it was submitted that the words are alleged to have been made by the 1<sup>st</sup> Defendant through a radio station called Mulembe FM and a program called Akomwitata. That whereas the defendants do not dispute that Mulembe FM is owned by the 2<sup>nd</sup> Defendant, they nonetheless dispute that the plaintiff proved that the Defendants broadcasted the alleged words as set out at paragraph 7 of the plaint, both in the Luhya language and in English.

141. The defendants contended that the legal burden of proving that as a result of the alleged broadcast, the plaintiff was defamed lay on the plaintiff, citing Section 107 of the Evidence Act which provides that:

*107. (1). Whoever desires any court to give judgment as to any legal right or liability dependant on existence of facts which he asserts must prove that those facts exists.*

*(2). When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

142. The defendants submitted that indeed the broadcast complained of constitutes libel in permanent form (wireless), by dint of Section 8 of the Defamation Act, Cap. 36, which provides that:

***8. (1) For the purpose of the law of libel and slander, publication of words by wireless broadcasting shall be treated as publication in a permanent form.***

143. However, that the purpose of the above provision of the law is to remove the radio broadcasts from the realm of slander under common law but that nonetheless, the right question to ask is how do you prove libel. The defendants relied on **Gatley on Libel and Slander, 10<sup>th</sup> Edition**, wherein it is stated that the proof of libel is the production of the document itself. See Para. 32.5 which states as follows:

***“Production of document. What is required is the evidence that the defamatory statement was communicated by or on behalf of the defendants to persons other than the Claimant. In cases of libel this usually presents little difficulty. Production of the document containing the statement will in many cases be sufficient...”***

144. The defendants submitted that Sections 3 and 106B of the Evidence Act recognize information contained in electronic records as a document. According to the defendants, the plaintiff claims that the defamatory words were aired by Mulembe FM Radio and therefore it falls under electronic records. Further, that Section 106A and 106B provides for how such evidence should be produced. Such requirements include a certificate as to how that electronic evidence was developed. Reliance was placed on **William Odhiambo Oduol –v- IEBC & 2 Others, [2013] eKLR**, where the court at its page 3 of the decision highlighted the relevance of this provision since electronic evidence presents unique characteristics which necessitate careful treatment.

145. The defendants maintained that for the Plaintiff to succeed in this case, he ought to have produced the radio clip that he complains about and that he ought to play it in court to prove that the words allegedly set out in the plaint were made by Mulembe FM. That in this case, the plaintiff had failed to do so and therefore there is no evidence before this court of the broadcast. Further, that the Plaintiff himself admitted that he never heard the broadcast and was only told of it by the other witnesses.

146. The defendants also relied on the case of **Clement Muturi Kigano –v- Hon. Joseph Nyagah HCCC No. 509 of 2008** where the Plaintiff had testified of how he had been defamed by the Defendant through various media houses by television and radio, including Citizen Radio owned by Royal Media Services Limited. The suit was not defended and so it proceeded by way of formal proof. However, the plaintiff did not produce any clip as evidence to prove publication. At page 7 of the judgment the court said:

***“As already referred to, the Plaintiff claimed that he was libelled and so he sought general***

***damages. Fair enough. But did he prove the tort? In short, did the Plaintiff lay before the court.....defamatory statement....made in writing or some other permanent form....”***

***To prove his claim even in the absence of defence it does not appear so. He pleaded to do so but did not produce in court, clips of the broadcast....”***

147. It was further submitted by the defendants that the above position was recently confirmed by the High Court in **Kisumu HCCC No. 145 of 2006; Odera O. Alfred –v- Royal Media Group Ltd.** In that case, the Plaintiff had claimed to have been defamed by Ramogi FM, a sister radio station to Mulembe FM. However, though the plaintiff brought witnesses who claimed to have heard the broadcast (like in the present case), he did not produce the clip as evidence of that broadcast. The court said the following concerning this issue at paragraph 25-27:

***“25. For an action in tort of defamation to succeed, there is also the requirement of publication. It must be proved that the Defendant was responsible for the publication. In libel case, the Plaintiff must present evidence of publication by the Defendant. Failure to do so provide, the allegation of publication is deemed to be no more than bare assertion. See Gatley on Libel and Slander (supra) at paragraph 34.7***

26. ...

***27. It follows therefore that a duty lies on the Plaintiff to produce evidence of such a broadcast. In our present case, the Plaintiff did not produce such evidence. I do acknowledge that fact that it might have been difficult to obtain such evidence considering that it was in the hands of the Defendant. Even so nothing would have stopped the Plaintiff asking for the court’s assistance to obtain the news clip.....”***

148. The defendants' counsel urged the court to take judicial notice of the fact that such clips are readily available from research groups such as Ipso Synovate and Info track and that it is a common occurrence in courts for such clips to be produced in these kinds of cases.

149. It was therefore submitted that the Plaintiff had not proved the libel pleaded **first**, on account that he did not produce the clip of the alleged broadcast as by law required and second, that the Plaintiff had failed to prove the publication of the specifically pleaded words for the following other reasons. **Firstly, that** according to the Plaintiff’s witnesses, the words they alleged to be defamatory were uttered by the 1<sup>st</sup> Defendant. Yet, when giving evidence, the 1<sup>st</sup> Defendant, supported by the other defence witnesses, stated that the material words were recorded words that other listeners including the 1<sup>st</sup> Defendant commented upon the broadcast. That it therefore appears that each party presented a different version of what was allegedly broadcast. The Defendants submitted that their version is obviously the correct one.

150. According to the defendants, the Plaintiff did not only fail to prove the words, but he also did not set out the exact words made in the broadcast that he claims were defamatory of him. On this account it was contended that the pleadings are fatal since in libel, the alleged defamatory words are material and must be set out **verbatim** and it is not enough to set out their effect as the plaintiff had done. Reliance was placed on **Gatley on Libel and Slander, 10<sup>th</sup> Edition**, where it is stated at paragraph 26.11 that:

***“Setting out words complained of: Libel. In a libel claim, the words used are material facts and they must therefore be set out verbatim in the particulars of claim, preferable in the form of a quotation: it is not enough to describe their substance, purport or effect.”***

151. It was contended that the above passage was adopted by Emukule J in the case of **Kariunga Kirubua & Co. Advocates –v- the Law Society of Kenya & Others, Meru HCCC No. 117 of 2005** where the judge struck out a plaint that had inadequate pleading of libel.

152. It was further submitted that there is no connection between the story alleged by the Plaintiff and the

one alleged by the Defendants and that the clip was not only not produced but that, there was no evidence that the broadcast was made by the defendants. Reliance was placed on **Phinehas Nyagah –v-Gitobu Imanyara, Nairobi HCCC No. 697 of 2009** where the court held that it is not sufficient even to prove that the broadcast was made but the Plaintiff must prove that the same was made by the Defendant, which the plaintiff had failed to prove in the instant case. **Secondly** and related to the above, it was submitted that though some allegations appear to be the same, the two alleged broadcast are materially different in wording and that the defence witnesses on examination confirmed having not heard or made some of the allegations pleaded by the Plaintiff. The defendants gave an example of the following allegations existing in the Plaintiff's version that do not appear in the Defendants' version:

- a. *The allegation that the late Anunda's wife deserting him shocked and led to his death (para 7a).*
- b. *The allegation that the Plaintiff abetted the widow to withdraw the deceased's funds (para 7b).*
- c. *The allegation that the Plaintiff and the widow squandered the funds on "drinks and buying beef meat" (para 7b).*
- d. *The allegation that the Plaintiff used the deceased's funds to educate his children up to college level (para 7b).*
- e. *The allegation that the Plaintiff had caused the widow to be so hostile to her own children that any time they try to come home their mother armed with a machete chase them way (para 7c).*

153. It was submitted that the averments appearing in the Plaintiff's version, which are not present in the Defendants' version raise doubts as to whether the Defendants actually published the alleged words, more so in view of the absence of the evidence of the clip. **Thirdly**, it was submitted that there are serious doubts as to whether the Plaintiff and his witnesses ever heard the broadcast. That the Plaintiff, PW1 did not hear the whole broadcast as his attention was called by his son PW2, after the same had started and that some witnesses like PW4 alleged to have heard the broadcast at 10.00pm whilst other witnesses stated to have heard it earlier. It was therefore submitted that the Plaintiff has not only failed to prove the existence of the alleged defamatory broadcast but has also failed to prove that the broadcast, which he has pleaded at paragraph 7 of the plaint was made by the Defendants and that the Plaintiff has failed to address this crucial issue in his submissions filed on 30<sup>th</sup> November 2015 hence he had not discharged the burden of proof under Section 107 of the Evidence Act.

154. On whether the defence of justification is available to the defendants, the defendants submitted that the answer is in the affirmative in the sense that it is a defence to libel for the Defendant to show that the publication is substantially true, referring to **Gatley on Libel and Slander, 10<sup>th</sup> Edition (para 11)** that it is the imputation contained in the words which has to be justified and not the literal truth of the words nor some other similar charge not contained in the words (see para. 11.8).

155. On the standard of substantial justification required it was submitted that the writers **Gatley on Libel and Slander, 10<sup>th</sup> Edition** state the following at paragraph 11.9:

*"Substantial justification sufficient. Some leeway for exaggeration and error is given by the defences of fair comment and qualified privilege. However, for the purposes of justification, if the Defendant proves that "the main charge or gist", of the libel is true, he need not justify statements or comments which do not add to the sting of the charge or introduce any matter by itself actionable..."*

156. That again at paragraph 11.10, the writers say:

*"Inaccuracy of detail. Again, if the Defendant can prove that the main charge or gist of the libel is true, a slight inaccuracy in one or more of its details will not prevent him from succeeding in a defence of justification."*

157. It was submitted that even assuming, which is denied, that the Plaintiff has proved that the broadcast pleaded at paragraph 7 of the plaint is defamatory, then the same is true and hence the defence of justification/truth pleaded by the Defendants is available to them. It was contended that the defendants pleaded the following material allegations by the Plaintiff to have been proved to be true by the defence witnesses:

- i. That a woman (Ruth Anunda) of Eshatieta village of Butere deserted her husband, James Anunda. It is after this desertion that the late James Anunda died.*
- ii. That Ruth Anunda upon deserting her late husband eloped with the Plaintiff, with whom they had two children.*
- iii. that later after the death of the late Anunda, her widow, Ruth returned to the home of the late Anunda, where she continued and continues to live with the Plaintiff.*
- iv. that Ruth has all exclusive possession and use of assets of the estate. This includes the bank account. Only she has access at the exclusion of the children. She uses the assets with the Plaintiff with whom she cohabits in the home of the deceased.*
- v. Children of the late Anunda dropped out of school due to lack of school fees.*
- vi. The widow of the late Anunda (whose current husband is Lukale) sold the posho mill that was in the homestead and used the proceeds for her own purposes.*
- vii. Ruth Anunda is so hostile to the children, whom she has chased out of the homestead where she lives with the Plaintiff.*
- viii. The Plaintiff has taken over the deceased's land which he tills for his own use.*
- ix. There is a need for area leaders and neighbours to step in to assist the children of the late Anunda.*

158. In concluding on this issue, it was the defendants' submission that even assuming that the Plaintiff has proved the libel, the defence of truth or justification is available to the Defendants, placing reliance on **Clerk & Lindsell on Torts, 20<sup>th</sup> Edition where it is stated that** justification is a complete defence to an action for defamation and hence the Defendants are not liable.

159. In response to the plaintiff's submissions filed on 30<sup>th</sup> November, the defendants contended that the Plaintiff completely misunderstood the nature and extent of the defendants' defence and that he concentrated on two minor details of whether the Plaintiff withdrew the deceased's funds and whether he is tilling the deceased's land, while ignoring the fact that the Defendants have proved the substance or the 'sting' of the alleged defamation.

160. On whether the Plaintiff is entitled to general damages in defamation and all other reliefs prayed for in the plaint, it was submitted that the answer to this question is in the negative since as stated earlier, the defence of truth, which is available to the Defendants is an absolute defence and hence the Defendants are not liable in damages.

161. The defendants also submitted on other issues that they considered important for consideration by the court, which issues are said to give a holistic and complete resolution of the matters in issue in this suit, considering that one of the reliefs sought in the plaint is "*Any other remedy deemed appropriate by this Honourable Court.*"

162. The following was suggested for consideration by the court: that had the Plaintiff been successful, what is the quantum of damages, it was submitted by the defendants that notwithstanding the fact that the plaintiff had not proved his case against them on a balance of probabilities, nonetheless, had the Plaintiff

proved his case, he, being a teacher, would have been entitled to damages of Kshs. 500,000 as general damages for libel, considering the case of **Clement Muturi Kigano, (supra)** in which the court found that had he proved the libel, the Plaintiff would have been entitled to damages of Kshs. 1.1 Million. In Kigano's case, the Plaintiff was a Senior Advocate of the High Court of Kenya whilst in this case, the Plaintiff is a teacher. Further, that in a recent case of **Muthui Mwai & Anor v Standard Newspaper & Others [2012] eKLR**, the court awarded **journalists** Kshs. 400,000/- each as general damages for libel.

163. It was submitted that the cases cited by the Plaintiff on quantum can easily be distinguished. That they are all High Court decisions, which though persuasive are not binding. That they all concerned newspaper publications yet this case involves a sectarian radio broadcast with very limited reach and audience in the tiny Western part of the country. That the **Machira case (supra)** concerned a very Senior Advocate of the High Court, which is not the case here. They therefore submitted that the **Muthui Mwai (supra)** case is the closest case to this case and that had the plaintiff been successful, he would be entitled to damages of Kshs. 500,000/-

164. On a case for Alternative Dispute Resolution. Article 159 (2)(c) of the Constitution of Kenya, 2010, where the court is obliged to promote all forms of dispute resolution, including reconciliation and traditional forms of dispute resolution. The defendants submitted that from the onset, it clear that this was not strictly a case for defamation *per se*, but a serious family dispute pitting a mother and her lover on one side and her children with the deceased's husband on the other, which raises social and cultural issues with legal bearing for instance concerning inheritance of property; wife inheritance; children rights among other issues. It was submitted on behalf of the defendants that whereas the wife of the deceased may have the right to remarry, the children too have the right to parental love and guidance, including all the children's rights under Article 53 of the Constitution and to remain on their father's land and partake of their father's estate; and that these are matters that should first be dealt with at the clan and family levels through reconciliation and traditional dispute resolution mechanisms.

165. It was submitted that although they are no authorities on how Luhya traditional dispute resolution mechanism operates but are sure that it exists and that the family should be given the chance to explore these including Christian dispute resolution mechanisms, noting that the parties herein answer to Christian names. Further, that the main character bears the biblical names "Ruth" and therefore should these mechanisms fail, parties can move to court to resolve the real issues in dispute.

166. The defendants therefore prayed that the court makes orders/gives directions that the family of the late Anunda sit down together with the elders and the community to resolve the outstanding issues between them and ensure that the children of the late Anunda gets their fair share of the estate. This is so, considering that all except perhaps one, are now over 18 years of age.

167. In conclusion, it was submitted by the defendants that:

- a. The Plaintiff has failed to prove that the Defendants published the defamatory statement against him. On this count, the suit needs to be dismissed with costs.
- b. that even if it be taken, that the Plaintiffs have proved the libel or that the Defendants have admitted to have published the story they testified on about the Plaintiff, the same was true in substance and hence they are not liable for libel.
- c. that had the Plaintiff succeeded in proving his case against Royal media Services, damages of Kshs. 500,000/- would have been sufficient.
- d. That this is a proper case for the court to invoke Article 159(2)(c) of the Constitution to order for alternative dispute resolution mechanisms.

## **DETERMINATION**

168. I have carefully considered the pleadings, lengthy evidence adduced by both parties and their

respective witnesses, the useful submissions by both parties' advocates and the authorities relied on both statutory and case law. In my humble view, the issues that flow for determination are:

**1. Whether the reproduced words were the ones spoken by the 1st defendant and disseminated by the second defendants' radio programme on Mulembe FM "AKOMWITALA."**

**2. Whether the plaintiff has established to the required standards that he was defamed by the defendants**

**4 Whether the defenses of truth/justification/qualified privilege or fair comment on a matter of public interest are available to the defendants**

**5. Is the plaintiff entitled to damages and if so how much**

**6. What orders should this court make?**

**7. Who should bear the costs of this suit?**

169. Before delving into each and every issue as framed above, first and foremost, there is no denial from the evidence of the 1st defendant that she is and was at all material times to this suit an employee of the second defendant Royal Media Services and or that the *Mulembe* FM Radio Station was owned by the 2nd defendant. Further, there is no dispute that on the material day and night named as pleaded; the 1st defendant was to be found broadcasting and or hosting the vernacular programme "*Akomwitala*" on the said *Mulembe* FM Radio Station.

170. What is in dispute is whether the 1st defendant while hosting the said programme "*Akomwitala*" in *Luhya* language said or caused to be said or published or caused to be published the *Luhya* words as pleaded by the plaintiff in his paragraph 7 of the plaint and as translated in the English language in the same paragraph, which words as translated are said to be highly defamatory of the plaintiff and that they were broadcast with malice and desire to attract widest listeners of the defendants' radio programme on *Mulembe* FM.

171. The defendants deny publishing the words as pleaded in the *Luhya* language and as translated in English and they contend that the words if any, were spoken by M A, a victim of child neglect and who complained that the plaintiff had contributed to her woes and those of her other siblings by invading her home after her father's death and inheriting her mother and all other assets and chasing her and her siblings from home, some of whom like herself were forced to drop out of school and were now homeless.

172. The first defendant testified adopting her witness statement and stated that the actual words used in the broadcast were as per her paragraph 6 of her witness statement and that those were the words of M A. M A too testified and confirmed that she was the complainant in the family issues programme and that her complaint was recorded and aired as per her testimony and in the words contained in the witness statement of Elizabeth Mayabi.

173. The plaintiff in his paragraph 7 of the plaint pleaded words which he alleged were uttered by the 1st defendant during the said broadcast. On the first issue of whether the reproduced words in paragraph 7 of the plaint were the ones spoken by the 1st defendant and disseminated by the second defendants' radio programme on *Mulembe* FM "*AKOMWITALA*," the plaintiff and his witnesses testified that they heard the 1st defendant broadcast the said words through *Mulembe* FM Radio Station which is owned by the second defendant and that the said broadcast was in the *Luhya* language and the plaintiff has also reproduced the English translation of the said alleged broadcast words.

174. In my humble view, what is obviously missing from the plaintiff's claim and evidence, and which would from the word go render this suit based on defamation a non starter is that there is no English literal translation certificate for the words that were allegedly uttered and or broadcast or published in

*Luhya* language by the defendants.

175. From the evidence on record as adduced by the plaintiff and his witnesses who are all relatives, it is not clear on who extracted the words allegedly spoken by the 1st defendant as reproduced and translated in English and or who transcribed them.

176. The plaintiff and each of his witnesses wanted the court to believe that they listened to the Mulembe FM Radio Station, heard the words as reproduced in *Luhya* language and as translated in English, verbatim, being broadcast by the 1<sup>st</sup> defendant on behalf of the 2<sup>nd</sup> defendant. But the plaintiff and his witnesses neither taped nor recorded in any Electronic format the words as spoken in *Luhya* during the live broadcast. They nonetheless wanted the court to believe that they memorized all the words which were spoken by the 1st defendant in *Luhya* language and as translated in English and narrated those words to the plaintiff's advocate for reproduction in the plaint and in their witness statements which were adopted as evidence in chief.

177. This court refuses to believe that the plaintiff and his witnesses heard and memorized all the words broadcast by the defendants of and concerning the plaintiff as reproduced in paragraph 7 of the plaint both in the *Luhya* and English literal translation versions. In the absence of any audio recording before court, with an English translation and a certificate signed by the translator, this court would not know whether the alleged defamatory words that were broadcast were edited, especially with the defendants contending that the words in her paragraph six of her written witness statement were the ones spoken by M A and that the programme was interactive. In addition, if there were call ins as stated by the plaintiff in his testimony and the testimonies of his witnesses, then those call ins must also feature in the pleadings and evidence to make the alleged broadcast words credible.

178. The plaintiff in this case did not even testify as to how he extracted or who extracted for him the alleged publication since he admittedly did not record the broadcast and the court is therefore left wondering how he got the words allegedly as uttered and broadcast by the 1st defendant and as reproduced in paragraph 7 of the plaint and as extracted in the plaintiff's advocate's submissions.

179. Defamation is the publication of a statement about someone that lowers him or her in the estimation of right-thinking members of the society generally, where no defense (usually truth, opinion, or qualified privilege) is available. The rule is: whoever reports it is liable for it. Even if it is from an apparently reputable and knowledgeable source, such as the police. The publisher has to prove the truth of the sting of the article, for that is what the readers or viewers will take it to mean. It is not enough for the publisher to prove that it has reported the accusation accurately. It must be able to prove that the accusation itself is true.

180. In this case, although the defendants admit broadcasting words uttered by M A expressing her displeasure with the plaintiff who had allegedly inherited her mother and that both the plaintiff and M's mother had abandoned her and her siblings, the plaintiff did not prove that the words in fact, as uttered by Mayabi the first defendant are the ones which were reproduced in the plaint at paragraph 7 as per his literal English translation, and not those ones which Mayabi stated that were broadcast.

181. The plaintiff then tried to shift the burden of proof to the defendants by stating that in any case, the defendants were the ones in possession of the broadcast and that they should have produced it to prove what they allege to have been broadcast in the paragraph 6 of the defence by Elizabeth Mayabi. However, the law is clear that he who alleges must prove. In this case, it is the plaintiff who alleged that he was defamed and therefore it was his primary duty to prove the actual publications and that they were defamatory of him. It was not sufficient to shift the burden on the defendants as the defendants had no counterclaim against the plaintiff. Further, the only burden that was cast on the defendants is that of proving their defences of truth, justification and or fair comment on matters of public interest, assuming that the plaintiff was able to prove that indeed the alleged utterances by the defendants through radio broadcast were defamatory of him.

182. In addition, even if the defendants were to produce the actual broadcast as demanded by the plaintiff,

it is not disputed that the broadcast was in *Luhya* language, and there was no duty placed on the defendants to provide an English literal translation of that broadcast since their audience is clearly, the *Abaluhya* speaking people, and not for the whole world, and even if the broadcast was online, only those who speak the *Luhya* language would understand what was being broadcast. There was no evidence adduced by the plaintiff to prove that the defendants also translated the broadcast into English language for all and sundry to hear.

183. In the present case, whereas this court does agree as to what defamatory words are- those that tend to lower the plaintiff's reputation in the eyes of right thinking members of the society generally and which make them shun or avoid him, and whereas I am in agreement that words that allege that the plaintiff is a fraudster which impute criminality on his part would be defamatory in the absence of truth or justification defences, I am unable to find that the plaintiff has on a balance of probabilities proved that the defendants did utter or broadcast the words that are reproduced in paragraph 7 of the plaint. And even if the 1st defendant did utter those words, in the absence of a literal English translation certificate, this court does not take judicial notice of the *Luhya* translation in English done by unknown/undisclosed persons who are not independent witnesses to this suit. The court cannot take judicial notice of a translation from *Luhya* language to the English language as the *Luhya* language is neither a national nor an official language of the court as contemplated in Article 7 of the Constitution.

184. In addition, where the utterances were made in *Luhya* language, then a translation, accompanied by a certificate of translation by a person who must satisfy the court that he or she was conversant with the specific dialect of the *Luhya* language that was used for broadcast, and who must be called upon to testify and be cross examined on his translation was critical to the success of the plaintiff's suit.

185. That the publication was made and that it is defamatory of the plaintiff can only be deduced from the English language or Kiswahili language which this court is by law enabled to use. Consequently, in the absence of a translation certificate, and the translator thereof, this court is unable to admit as authentic the English version of the *Luhya* translation whose translator was never disclosed. As a consequence I am unable to find that there is an irrefutable presumption that the words broadcast by the defendants are the ones contained in the *Luhya* and English versions presented to court. Furthermore, there is no evidence of what dialect of the *Luhya* language was used since there are many sub tribes of the *Luhya* tribe who speak different dialects.

186. In addition, the plaintiff did not produce the audio version of the broadcast. He did not explain to the court why and neither did he issue Notice to Produce the said audio version of the broadcast to the defendants or even seek the assistance of the court to avail such evidence that was so crucial to his case. The plaintiff, in my view, simply believes that the defendants should have produced the audio version of the broadcast because they are in possession of the broadcast.

187. Section 107-109 of the Evidence Act places the burden of proof on the person who alleges. The defendants admit carrying out the broadcast but their version is different from what the plaintiff asserts and the defendants went ahead to reproduce what they claim to have aired, and what they say was a prerecorded statement of Mourine Achieng seeking for help, which is quite different from what the plaintiff pleaded. It was therefore upon the plaintiff to produce an audio version of the *Luhya* version with a certificate of translation in English to show that what the defendants were alleging to be their broadcast was in fact not true.

188. In **Gatley on Libel and Slander, 10<sup>th</sup> Edition**, it is stated that the proof of libel is the production of the document itself. See Para. 32.5 which states as follows:

***“Production of document. What is required is the evidence that the defamatory statement was communicated by or on behalf of the defendants to persons other than the Claimant. In cases of libel this usually presents little difficulty. Production of the document containing the statement will in many cases be sufficient....”***

189. Similarly in **Clement Muturi Kigano –v- Hon. Joseph Nyagah HCCC No. 509 of 2008** where the Plaintiff had testified of how he had been defamed by the Defendant through various media houses by television and radio, including Citizen Radio owned by Royal Media Services Limited. The suit proceeded by way of formal proof. However, the plaintiff did not produce any clip as evidence to prove publication. At page 7 of the judgment the court stated that:

***“As already referred to, the Plaintiff claimed that he was libelled and so he sought general damages. Fair enough. But did he prove the tort? In short, did the Plaintiff lay before the court.....defamatory statement....made in writing or some other permanent form....”***

***To prove his claim even in the absence of defence it does not appear so. He pleaded to do so but did not produce in court, clips of the broadcast....”***

190. I reiterate that in order for this court to find the words broadcast to be defamatory, those words as broadcast in the *Luhya* language and followed by English or Swahili literal translation must be set out with certificate(s) of translation and the translator must testify that he / she was responsible for the translation. This was the principal set out in **Souza v Zenith Printing Works, Kenya CC149 OF 1959 and in Nkalubo v Kibirige (1975) EA 103.**

191. In **Kisumu HCCC No. 145 of 2006; Odero O. Alfred –v- Royal Media Group Ltd**, the Plaintiff had claimed to have been defamed by Ramogi FM, a sister radio station to Mulembe FM. Albeit the plaintiff called witnesses who testified to have heard the broadcast (like in the present case), he did not produce the audio clip as evidence of that broadcast. The court had this to say concerning this issue at paragraph 25-27:

***“25. For an action in tort of defamation to succeed, there is also the requirement of publication. It must be proved that the Defendant was responsible for the publication. In libel case, the Plaintiff must present evidence of publication by the Defendant. Failure to do so provide, the allegation of publication is deemed to be no more than bare assertion. See Gatley on Libel and Slander (supra) at paragraph 34.7***

26. ...

***27. It follows therefore that a duty lies on the Plaintiff to produce evidence of such a broadcast. In our present case, the Plaintiff did not produce such evidence. I do acknowledge that fact that it might have been difficult to obtain such evidence considering that it was in the hands of the Defendant. Even so nothing would have stopped the Plaintiff asking for the court’s assistance to obtain the news clip.....”***

192. In the instant case, the English translation was given but there is no evidence adduced by the translator as to the correctness of the translation. In the premise, further, there was no audio recorded evidence of what was allegedly broadcast by the defendants. I am in agreement with the defendants’ counsel’s submissions while placing reliance on Sections 106A and 106B of the Evidence Act, Cap 80 Laws of Kenya which provides for how such electronic evidence should be produced. Such requirements include a certificate as to how that electronic evidence was developed as was stated in the case of **William Odhiambo Oduol –v- IEBC & 2 Others, [2013] eKLR**. Accordingly, I find that there was no evidence adduced by the plaintiff to prove that the defendants published or broadcast any defamatory words of and concerning him. He did not even issue Notice to Produce any evidence which he believed was held by or was in the sole possession of the defendants. I would therefore not delve into the merits of issue No 4 as framed above on whether or not the defences raised by the defendants are available to them.

193. In the Singapore High Court case of **Qingdao Bohai Construction Group Co. Ltd and others v Goh Tack Beng and another [2016]SGHC 142**, the plaintiff's suit for damages for defamation was dismissed because they could not establish that the defendants had published allegedly defamatory online articles. The relevant publications involved 12 online articles on various websites based in China, Hongkong and the United States, and two newspaper articles that the plaintiffs claimed contained untrue

and defamatory statements about them and that this resulted in damage to the plaintiffs' reputation. The decision regarding the newspaper publications was uncontroverted. The plaintiff claimed that the defendants published those articles, and tendered the following as proof of such publications:

- i. video and audio recordings as evidence of the second defendant's alleged admission to the publication;*
- ii. circumstantial evidence including the signoff containing the second defendant's name on the online articles; and*
- iii. the defendants' filing of a Central Commission for Discipline Inspection of the Communist Party of the People's Republic of China (CCDI).*

194. However, the plaintiffs in that **Qingdao Bohai Construction Group Co. Ltd and others** case did not adduce any electronic evidence to prove that the defendants had published the online articles. In contrast, the defendants denied that they had published the online articles; that the publication had occurred in Singapore and alternatively that the meanings of the online articles pleaded by the plaintiffs were true in substance and in fact. The Court held that publication requires proof of identity and the third party's direct downloading of the online article. In that case, the court found inter alia that there was no actual proof that the defendants had published the articles, but that there was mere suspicion that the defendants were responsible for the online articles publication. And that there was no direct proof that the third party downloaded and read the defamatory publication.

195. Although the above decision concerned publication on the internet, the principle espoused therein that there is need for the plaintiff who alleges that he was defamed by a publication through the radio broadcast to prove that the third parties directly heard the impugned broadcast the way it is pleaded, that evidence must be clear and convincing.

196. In the instant case, I find that the plaintiff failed to prove that the pleaded words are the ones which were published by the defendants and which amounts to libel. Accordingly, I find that the plaintiff has not proved his case against the plaintiff on a balance of probabilities. I proceed to dismiss it.

197. However, had the plaintiff proved his case, the law is clear that if the plaintiff succeeds in proving defamation, he is entitled to recover compensatory damage for the wrong done for personal humiliation as well as punitive damages which are awardable in addition to compensatory damages and are intended to punish the defendants who has overwritten the story with malice and where the defendant refuses to apologize or retract the falsity in the defamatory publication.

198. In **CIVIL APPEAL NO. 115 OF 2003 THE STANDARD LIMITED V G.N KAGIA T/A KAGIA & COMPANY ADVOCATES** the Court of Appeal set out the following principles to be applied in the awarding of damages:-

- i. “ in situations where the author or publisher of a libel could have with due diligence verified the libelous story, 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;”*
- ii. “the level of damages awarded should be such as to act as a deterrence and to instill a sense of responsibility on the part of the authors and publishers of libel. Personal rights, freedoms and values should never be sacrificed at the alter of profiteering by authors and publishers”.*

199.. In the instant case, the court would consider the following factors in awarding general damages:-

- i. The Gravity of the allegation or the libel complained of*
- ii. The size and influence of the particular circulation in which the libel was contained.*
- iii. The effect of the Publication on the Plaintiffs reputation and integrity.*

iv. The extent and nature of the Plaintiff's reputation.

v. The behavior of the Defendant.

vi. The behavior of the Plaintiff himself.

vii. Whether the defendants have offered any apology with respect to the libel.

viii. The conduct of the defendant in the suit and in particular the plea of defence of fair comment on a matter of Public interest.

200. On the gravity of the allegations, the court notes that fraud is a criminal offence under the Penal Code. Further, the allegations by the plaintiff against the defendant as per the alleged English literal translation centre on accusations of issues of child abuse and child neglect which is criminalized under the Children's Act. The alleged publication, had it been proved to be defamatory of the plaintiff, as claimed that the Plaintiff was not fit to be a Head teacher and is therefore not fit to hold public office and that he belongs behind bars, would be a serious libel against the Plaintiff and which would call for a high award of damages.

201. On the size and influence of the circulation, the Plaintiff's submission is that the *Mulembe* FM radio station is very popular among the *Luhya* in western Kenya and that it has the widest circulation in the country. It also has a website to enable the circulation to be read word wide.

202. On the effect of the Publication, the plaintiff gave evidence that it caused him to be shunned by members of the public.

203. It was also submitted that the extent and nature of the Plaintiff's reputation is wide in Butere sub county where he serves as a head teacher of a school.

204. On the behavior of the Defendant, the Plaintiff submitted that the Defendants were most unapologetic right from the time the article was broadcast to the date of trial. Absence of proof of malice substantially mitigates the general damages awardable and correspondingly such absence takes away an indispensable limb for the grant of exemplary damages. In this case, there is no evidence and neither are there factors on the conduct of the defendants that aggravate the defamation.

205. On account of matters tending to reduce damages the plaintiff by his testimony did not testify that he availed himself the right of reply neither did he state that he was denied the exercise of this right to enable him clarify the inaccuracy as required by section 7A of the **Defamation Act**, Cap. 36 Laws of Kenya which entitles the plaintiff to this right which if he did exercise was to be published free of charge and given similar prominence as the item complained of. This right is guaranteed by statute and it is to be affirmatively invoked by a claimant. That the failure to invoke this right is relevant in the assessment of the damages awardable, Section 7A (7) of the **Defamation Act** is emphatic:

***'In any civil proceedings for libel instituted by a person or body of persons entitled to a right of reply who or which has failed to exercise such right in accordance with this section the court shall, in the event of it having found in favour of the Plaintiff, be at liberty to reduce the amount of damages which it would have otherwise awarded by such sum as the court considers appropriate having regard to the circumstances of the case.'***

206. In determining all the above issues, the paramount question is whether the words complained of are false, defamatory of the plaintiff and whether they were published/uttered maliciously. As earlier stated, this court was not shown any audio video or certificate of translation of the allegedly published words of and concerning the plaintiff. The court is therefore unable to infer any malice on the part of the defendants. Therefore, in the instant case, doing the best I can, I would award the plaintiff a sum of Kshs 1,000,000 (one Million) general damages as appropriate for the plaintiff who is a primary school head teacher, for defamation of character had I found in his favour, based on the holding by Lord Hailsham in

**Cassel & Company Limited –versus- Broome and another (1972) A11 E & 801 at 825 that:**

*“There is no set formula for the assessment of damages in libel cases, ”*

*“The whole process of assessing damages where they are ‘at large’ is essentially a matter of impression and not addition stated.” ’The learned judge continued at page 543...*

*...“the court is free to form its own opinion about the nature of the dent punched into the plaintiff’s reputation and accordingly grant an appropriate redress..*

207. However, as there was no proof of defamation against the plaintiff by the defendants on a balance of probabilities, I dismiss the plaintiff’s case against the defendants and I award the plaintiff nothing.

208. The defence **also beseeched the court to consider A case for Alternative Dispute Resolution under** Article 159 (2) (c) of the Constitution of Kenya, 2010, where the court is obliged to promote all forms of dispute resolution, including reconciliation and traditional forms of dispute resolution. The defendants submitted that from the onset, it clear that this was not strictly a case for defamation *per se*, but a serious family dispute pitting a mother and her lover on one side and the children with the deceased’s husband on the other, which raises social and cultural issues with legal bearing for instance concerning inheritance of property, wife inheritance, children rights among other issues. it was submitted on behalf of the defendants that whereas the wife of the deceased may have the right to remarry, the children too have the right to parental love and guidance, including all the children rights under Article 53 of the Constitution and to remain on their father’s land and partake of their father’s estate; and that these are matters that should first be dealt at the clan and family level through reconciliation and traditional dispute resolution mechanisms. that although they are not authorities on how *Luhya* traditional dispute resolution mechanism operates but are sure that it exists and that the family should be given the chance to explore these including Christian dispute resolution mechanisms, noting that the parties herein answer to Christian names. Further, that the main character bears the biblical names “Ruth.” Should these mechanisms fail, parties can move to court to resolve the real issues in dispute.

209. The defendants therefore prayed that the court makes orders/gives directions that the family of the late James Anunda do sit down together with the elders and the community to resolve the outstanding issues between them and ensure that the children of the late Anunda gets their fair share of the estate. This is so, considering that all except perhaps one, are now over 18 years of age.

210. This court concurs with the proposals by the defendants that indeed, from the onset, there appears to be a historical social problem pitying the mother Mrs. Ruth Anunda and her Children, some of whom are witnesses in this case against the plaintiff, her lover. The Bible Commands Children to obey their parents, for that is well pleasing unto the Lord Ephesians 6:1-4; Proverbs 1:8; Colossians 3:20. On the other hand the Bible commands parents to discipline their children in love Proverbs 19:18; Proverbs 22:15, and to provide them with the basic needs from their first nursing care at the breast to their establishment of self sufficient maturity. Children are a heritage from the Lord, the fruit of the womb a reward- Psalm 127:3.

211. The testimony of M and her sister in my humble view is reminiscent of children who are bitter from being neglected by their own mother, who has diverted her attention from her children to the lover. There is need to reconcile the family of the late James Anunda which has disintegrated. In my humble view, the children and their mother Ruth Anunda comprise the family of the late James Anunda and the children need their mother and they also need to be comforted to heal the wounds brought about by the death of their father, who, at the time of his demise, had been abandoned by Ruth Anunda. But this healing requires the cooperation of their mother Ruth Anunda. She cannot be compelled to love her children. The law does not compel her to maintain her children especially once the children are over 18 and not in school or college.

212. In the premise, this court only implores the children who testified in this case against the plaintiff, while seeking the attention of their mother to respect their mother and approach her with humility and seek for her lost love for them. Mrs. Ruth Anunda was neither a witness nor a party to these proceedings.

But she is the mother to the children who are crying out for her love for them, which love appear to have been lost to the plaintiff hence their anger which is directed at the plaintiff. This court implores Mrs Ruth Anunda by this obiter to reach out to her children and embrace them. Children are a blessing from God. As their biological mother, she is expected to guide them until they are established. This court beseeches Mrs Ruth Anunda to raise her arms and embrace them the same way she handled them when they were babies for that is what God expects mothers to do to their children.

213. In the end, as I hereby dismiss this suit, I order that each party shall bear their own costs of the suit, in view of the revelations that the plaintiff and the witnesses to the defendants have a close yet very acrimonious relationship that gave rise to this cause of action. There was indeed no evidence that the 1<sup>st</sup> defendant went on her own frolics to solicit for information that was allegedly broadcast but that it is the Children of Ruth Anunda, led by DW2 who set in motion the complaint against the plaintiff that gave rise to the cause of action in this matter, which cause of action has, nonetheless, not been proved to the required standards, on a balance of probabilities.

Dated, signed and delivered in open court at Nairobi this 26th day of September, 2016.

**R.E.ABURILI**

**JUDGE**

**In the presence of :**

Mr L.M Ombete for the plaintiff

Mr Karanja for the defendants

CA: Adline