



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO 64 OF 2011

HEZIEKIEL OIRA.....PLAINTIFF

VERSUS

THE STANDARD LIMITED.....1ST DEFENDANT

JAMES RATEMO.....2ND DEFENDANT

JUDGMENT

1. Vide a plaint dated 21st February, 2011 the plaintiff in this case Mr **HEZEKIEL OIRA**, a former Corporation Secretary of the Kenya Broadcasting Corporation (KBC) former legal advisor to the African Union of Broadcasters, Director Multichoice (K) Ltd and the Kenya Copyright Board instituted suit against the defendants herein, **THE STANDARD LIMITED** and **JAMES RATEMO** jointly and severally seeking for general damages for alleged defamation (libel).

2. The plaintiff pleaded that on or about the 23rd day of June, 2010 the defendants maliciously, falsely and without justification caused and published an article in The Standard on the page leader an article titled **“How KBC Lost Shs 110m World Cup Deal to Competitor and proceeded to write as follows:**

“How KBC lost Kshs. 110 Million World Cup deal to Competitor”

By JAMES RATEMO

The government has lost an opportunity to recover 75 million it spent to buy broadcasting rights of the ongoing FIFA world cup tournament. This is due to the alleged impropriety by the KBC officials. As a result, KBC Managing Director and the Corporation Secretary Hezekiel Oira have been suspended with the Inspectorate of State Corporations called in to investigate. Editor in chief Waithaka Waihenya has taken over as acting MD. Information and Communication PS Bitange Ndemo said KBC had been given Kshs. 75 millions to buy the world rights and was expected to recover the money through advertising. “The Government has lost money and already the inspectorate of corporations is investigating the matter...the two are suspended to pave way for investigation which will take about a month, Ndemo told the Standard on telephone.

Board Chairman said the two had been suspended to allow independent investigations. Sources said that KBC had signed a kshs. 110 million agreements with Patrick Quarco of Radio Africa Group to co-screen world cup matches. Radio Africa Group reached an agreement with the Committee of Experts and was expected to receive kshs. 110 million to educate the public on the proposed constitution during the world cup season. But KBC also signed a kshs. 500,000 deal

with Royal Media Services which went ahead to negotiate with Committee of Experts and clinched the kshs. 110million deal from Quarco arguing it had countrywide coverage hence better placed to conduct the campaign. This denied Radio Group Africa the funds to seal the deal with KBC.’’

3. According to the plaintiff, the above words were intended to be and were actually read by the public in which the said Newspaper is one of the leading dailies with an extensive audience in the entire East African Region.

4. The plaintiff averred that the said article was false and malicious as the plaintiff's then employer did not request or receive any financial support from the Government or elsewhere for the purposes of acquiring 2010 World Cup rights and that neither did the said employer lose Sh 75 million or any part thereof.

5. It was further claimed by the plaintiff that by the said words, in their natural and ordinary meaning the defendants meant and were understood by right thinking members of society and the world at large to mean *inter alia* that:

i. By stating that the plaintiff was suspended pending investigations, the defendants were understood to mean that the plaintiff was a suspect in the loss of Kshs 75 million which was a falsity;

ii. That the plaintiff collaborated with the Managing Director of KBC to defraud the Corporation;

iii. That the plaintiff committed offences in his private capacity as a Corporation Secretary.

iv. The plaintiff is corrupt.

6. The plaintiff further claimed that by the said publications, his character, credit and reputation had been seriously injured and that the said words as published meant and were meant to be understood by way of innuendo that:

i. That the plaintiff is dishonest;

ii. That the plaintiff has no regard nor respect for the principles of rule of the laws governing the KBC;

iii. That the plaintiff is not a fit and proper person to be a Corporation Secretary;

iv. That the plaintiff is a person of doubtful moral standards and probity.

7. The plaintiff further asserted that the publication and authorship of the article by the defendants was driven by malice, malevolence and spite.

8. The plaintiff pleaded further that prior to the impugned publication, he enjoyed an excellent and priceless reputation as a Corporation Secretary and an advocate of the High Court of Kenya. However, that by the said publication of and concerning him, which publication was untrue, misleading, malicious and unfounded, the plaintiff had been exposed to ridicule, odium and contempt by right thinking members of the society and as a consequence thereof, he had suffered and continue to suffer, massive injury to his credit and reputation and had suffered damage.

9. The particulars of malice as set out in paragraph 14 of the plaint are:

i. Publishing of words complained of without any justification;

ii. Publishing of words without verification;

iii. Publishing the said words with a malicious intent in order to injure the plaintiff's character, credit and reputation;

iv. Misinforming fellow members of the KBC, customers, members of the public and his friends in the Diaspora;

v. Interfering with the plaintiff's calling as a leader due to the publication;

vi. Publishing the said words without ascertaining the facts wither from the plaintiff or the source of the information if any;

vii. They had bid for the World Cup 2010 Rights to broadcast live but were rejected by the employer of the plaintiff;

viii. No money was given to the plaintiff's employer at all which was allegedly misappropriated in the tune of Kshs 110million;

ix. No money was lost or misapplied by the plaintiff's employer for which the plaintiff was held accountable;

x. Seeking to have the plaintiff sacked by his employer.

10. The plaintiff also pleaded that despite demand being made and notice of intention to sue given the defendants had refused and or neglected to make good the claim. The plaintiff therefore prayed for general damages, aggravated damages, exemplary damages and punitive damages for libel, costs and interest.

11. The defendants entered a joint appearance on 11th March, 2011 and filed defence dated 22nd March, 2011 through the firm of Ochieng, Onyango, Kibet & Ohaga Advocates denying liability and contending that the published article was contained in the report contained in the report issued by the Inspectorate of State Corporations. The defendants also denied that any of the words as published bore any defamatory meanings or connotations attributed to them by the plaintiff.

EVIDENCE

12. The Plaintiff testified on oath as PW1 that in the year 2009 Kenya Broadcasting Corporation (KBC) which is the country's State Broadcasting Corporation acquired non-exclusive broadcasting rights over 2010 FIFA World Cup that took place in South Africa. Because of the huge costs involved, Kenya Broadcasting Corporation invited proposals from other Media Houses to co-host the event. That the first Defendant, Nation Media Group and Radio Africa Group were invited to bid after which Kenya Broadcasting Corporation awarded the contract to Radio Africa Group to the protest of the 1st Defendant.

13. That on the eve of the kick-off of the World Cup, there was a misunderstanding between Radio Africa Group and the Kenya Broadcasting Corporation management over the scope of exploitation and marketing of the World Cup. That the former enlisted the support of the Board of Directors who sent the Plaintiff and the then Managing Director on 23rd June 2010 on compulsory leave. That the Board of Directors then wrote to the Inspectorate of State Corporations (who himself sat on the Board of Directors) to investigate the matter.

14. That on the same day of 23rd June 2010, the 2nd Defendant then working for the 1st Defendant as an investigative journalist posted online and on the front page of the Standard Newspaper the impugned article as reproduced in this judgment. That the article was published even before the Inspectorate of State Corporations had started its investigations into the dispute. That the article was published

maliciously in order to firstly settle scores against the Plaintiff and the then Managing Director who purportedly declined the 1st Defendant's co-hosting bid. Secondly that the publication was calculated to incite the public against the Plaintiff to whom it falsely attributed the loss of Kshs.110 million. Thirdly that the publication was calculated to influence the investigations by the Inspectorate of State Corporations and fifthly that because the article imputed the commission of a crime, it was orchestrated to having the Plaintiff prosecuted as well as lynch him professionally.

15. The Plaintiff further testified that he and his family were affected by the article. That he and his legal practice were fundamentally ruined for potential clients could not trust him with money. That his daughter who was then in Form II at Naivasha Girls School could not stand the ridicules from other girls on how they wished "her father could share part of the looted money" with them for school fees. That the girl had to be transferred to Kabare Girls' High School, in Kirinyaga County. That his international colleagues and friends shunned and avoided him after reading the impugned article which was an online edition.

16. The Plaintiff further testified that the article was the ammunition that was used against him in 2013 when he campaigned for a national Parliamentary seat for the Nyaribari Constituency. The Plaintiff also testified that although his services were terminated in September 2010 by KBC, it was because of the activities of cartels who wanted to loot from the Kenya Broadcasting Corporation, using the 1st Defendant as the media propaganda tool. That he subsequently sued Kenya Broadcasting Corporation vide **NAIROBI INDUSTRIAL CASE NO. 299 OF 2011. HEZEKIEL OIRA -vs- KENYA BROADCASTING CORPORATION AND ANOTHER** and was awarded Kshs 4.8 Million for wrongful termination of services.

17. The plaintiff also testified that his subsequent trumped arraignment in Court *instigated by the 1st Defendant* ended up in an acquittal in Nairobi Acc No. 18 of 2011 wherein the Court found that the Kenya Broadcasting Corporation did not lose any money but generated revenue of over Kenya Shillings One Hundred Million (KES 100 000, 000).

18. The Plaintiff further testified that the said article was published maliciously and falsely since the same was circulated not only within Kenya but beyond the borders and that the Plaintiff and the then employer did not request or receive any financial support from the Government or elsewhere for the purposes of acquiring 2010 World Cup rights and that Kshs. 75 million was not lost.

19. The Plaintiff further testified that the said article in its natural and ordinary meaning of the words used portrayed him as a suspect in the loss of Kshs. 75 million which was a falsity; corrupt; not principled; untruthful and unreliable; unfit to hold a public office, and that the said article contained an innuendo.

20. The Plaintiff stated that as a result of the said publication, his reputation, credit and character has suffered and that he had been exposed to hatred, ridicule, scandal and contempt in the eyes of the right thinking members of the society.

21. The Plaintiff therefore urged that because he was defamed by the defendants, they should be compelled to pay him general damages for libel inclusive of exemplary and punitive damages in lieu of an apology.

22. In cross examination by Mr Echesa counsel for the defendants, the plaintiff stated that he was send on compulsory leave and not on suspension and that the reason was media rivalry on World Cup Rights with the Standard Group. Further, that he was accused of single sourcing rights with FIFA. PW1 stated that there were KBC cartels who wanted to inflate prices and that his services were terminated after he refused to succumb to those cartels over World Cup Rights. Further that because of the publication, the public were outraged at the plaintiff for allegedly losing money hence the Anti Corruption Commission went for him. He stated that the outrage came from social media and FM Stations talk shows although he had not tendered that evidence in court.

23. PW1 further stated that the DPP was responsible for public prosecutions and receive s files from the

Anti Corruption Commission. He stated that he did not have communication between the DPP and the ACC on the decision to prosecute him. He also stated that when he called Kenya copyright Board on why they did not invite him for Board meetings, he was informed by Marsela Ouma that his reputation had tainted.

24. The plaintiff further stated that he lost his Parliamentary bid because during his campaigns he was asked questions regarding the loss of shs 110 million at KBC and that he could not bring all documents but that what he had told the court was the truth.

25. The plaintiff stated that the publication did not state that he took shs 110million or any money directly but that the article meant that he was a suspect although it did not use the word suspect. He also stated that he understood the article to say that he had collaborated to defraud KBC. Further, that although the article does not use the term corruption, it was understood to mean that he was corrupt. The plaintiff denied that he was suspended. He maintained that Standard Group was unhappy after losing the bid to jointly exploit the World Cup Rights with KBC.

26. The plaintiff conceded that the publication used the word “alleged” in the article. Further, they held a meeting between KBC and the Nation Media Group and the Standard over the issue of exploitation of the World Cup Rights and that when KBC refused to collaborate with the Standard Group the Standard wrote to KBC complaining. He stated that that letter of complaint was with KBC. The plaintiff conceded that the top management would be to blame. He further stated that the Anti corruption case related to World Cup Rights and that his employment was terminated in September, 2010 after the criminal case was instituted against him.

27. The plaintiff maintained in cross-examination that the Anti-Corruption Commission picked up the matter because of what was reported in the media by the defendants. He also maintained that although the Anti-Corruption Commission acted independently, the 1st defendant acted maliciously and wanted to settle scores with the KBC management after the latter’s refusal to accept joint exploitation of World Cup Rights.

28. In reexamination by Mr Nyakiangana, the plaintiff stated that although the term used in the publication was “*alleged*,” there were no specific allegations by KBC against him. He stated that nobody complained against him and that even the KBC staff who testified against him in the criminal case stated that they never complained against the plaintiff. He stated that the article referred to him and David Waweru specifically. He maintained that his alleged suspension was a concoction of the Standard Group since he was not suspended.

29. The defendants filed a defence on 24th March, 2011 and admitted publishing the said article but denied that it was published falsely or maliciously. They further denied that the said article had the meaning or innuendo that the Plaintiff had ascribed to it. The defendants contended that the article contained facts which were in the report issued by the Inspectorate of State Corporations and that the article consisted of true reporting of facts relating to KBC a public broadcaster and State Corporation in which the general public has a considerable public interest and that the defendants had a social responsibility to report on concerns affecting the state of the nation. The defendants relied on section 14 of the Defamation Act Cap 36 Laws of Kenya and pleaded truth and gave particulars thereof.

30. The defendants denied all allegations that the article tended to injure the plaintiff’s reputation or at all and maintained in their defence that the reporting was done in due exercise of its freedom of the media as well as the observance of the general public’s right to access information concerning public matter. The defendants prayed for dismissal of the plaintiff’s suit with costs.

31. In their evidence in court, only the 2nd defendant James Ratemo Osoi testified on oath as DW1 and stated that as per the letter dated 15/3/2010 he ran the story which was a matter of public interest. DW1 testified that he was a professional journalist and a communications specialist; that he worked for the Standard Ltd between 2006 and 2011 and was aware of the impugned article which he authored on 23rd June, 2011. That his source of information was from the KBC website which stated that the plaintiff

herein and the Managing Director of KBC Mr David Waweru had been relieved of their duties due to World Cup Rights issue. That he also got the information from Mr Bitange Ndemo who was the then Permanent Secretary Ministry of Information and Communication and that he also saw a report by the Inspectorate of State Corporations. According to DW1, he did not express any personal opinions in that article.

32. The defendants sought to produce the report dated June 2010 whose production was objected to by the plaintiff's counsel hence it was only marked for identification. The court then directed that the defendant do appear before the Deputy Registrar of the Court on 2^{9th} April 2016 to give names of the officer who would produce the report and in default it would be deemed that they had closed their case. When the defendants did not appear it was deemed that the case was closed. Therefore, when the matter came up for hearing on 3^{1st} May 2016, the defendants closed their case without calling their witness to produce the said audit report.

33. The 2nd defendant denied that he knew the plaintiff personally. He also denied that he had any scores to settle with the defendants. He also denied being aware that the 1st defendant had any scores to settle with the plaintiff and his other Managers at KBC.

34. In cross examination by the plaintiff's counsel, the 2nd defendant responded that the document date 6th September, 2010 was authored by Clare Wanja and that it was from the KBC website. Further, that the document did not talk about Oira the plaintiff herein but that it is about the sacking of the KBC Managing Director and not the plaintiff herein and that neither did it talk about loss of money

35. The 2nd defendant also stated that he did not get Mr Oira to give his comments on the article. He maintained that the impugned article spoke of facts and not speculation. He stated that the audit report by Inspectorate of State Corporations was availed to him in June, 2010 in hard copy photocopy format although he could not tell the date. He conceded that the said audit report had no signature and maintained that it was one of his sources of information for the published article. He stated that the report did not mention any finding or loss of shs 110million or any other money.

36. He also stated that he could not disclose that person who gave him that report but that he investigated the matter. He stated that his other source of information which he published was Dr Bitange Ndemo whom he interviewed and recorded his interview. He stated that he got the figures of loss of 110m from his sources after investigations and also from Dr Bitange Ndemo. DW1 stated that as at 23rd June, 2010 investigations had not been completed although he did not know when the investigations were commenced.

37. Both parties agreed by consent to file and exchange written submissions.

PLAINTIFF'S SUBMISSIONS.

38. In his submissions, the plaintiff's counsel reproduced the words that were published by the defendants of and concerning the plaintiff on 23rd June 2010 on the front page of the Standard Newspaper.

39. It was submitted that at the time of the publication of the article the Plaintiff was the Corporation Secretary of Kenya Broadcasting Corporation having been appointed as such in 1998 after serving as Senior Legal Officer since his employment in 1993.

40. The plaintiff's counsel submitted under the following headings:

A. LAW

41. It was submitted that it is trite law that in defamation the Plaintiff must prove to the required standard that;

i. *There was a publication.*

ii. *Article in question refers to him.*

iii. *Article published is defamatory.*

iv. *As a result of the publication, his reputation in the eyes of the right thinking members of the society was injured and subjected to contempt.*

42. That in this instant case, it is not in dispute that the article was published by the Defendants as the publication was produced in court by the Plaintiff as exhibit no. 2. The plaintiff's counsel urged the court to find that the defendants did not deny publishing the article complained of by the Plaintiff.

43. It was further submitted that the article in question referred to the plaintiff by his name and his occupation by then. It was therefore urged that the issue of publication by the defendants had been established through credible evidence and also as admitted by the defendants. It was submitted that the article remains permanent as the defendants had not published an apology to the Plaintiff.

44. As to whether the published article is defamatory, the plaintiff's counsel reminded the court of what defamation is and referred to the well known work of **Winfield in J.A Jolowicz and Ellis Lewis, Winfield on tort 8th Edition p. 254** which gives the following definition of defamation;

“Defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of society generally, or which tend to make them shun or avoid that person.”

45. Further reliance was placed on **Halsbury's Laws of England Vol. 28 4th edition para 10 pg 7** which defines a defamatory statement as:

“A statement which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business”.

46. That at page **294 Jolowicz** defines the term right –“*thinking members of society*” as the ordinary person, like his cousin “reasonable person “, is a construct of the law that Courts use as standard to determine defamation.

47. Reliance was also placed on the case of **ODONGKARA –vs- ASTLES (1970) EA 374**, where the Court held:

“The Ordinary man that the Court constructs does not live in the ivory tower and is not inhibited by knowledge of the rules of construction. He can and does read between the lines in light of the general knowledge and experience of worldly affairs”.

48. The plaintiff's counsel invited the court to draw the kind of inference that ordinary persons would have made from the statement that Kenya Broadcasting Corporation had lost Kshs.110 Million and that Hezekiel Oira the plaintiff herein and that the Managing Director had been suspended.

49. It was submitted that there is no absolute evidence that the plaintiff had been involved in unethical and unprofessional conduct and or that he had caused the KBC to lose such kind of money as alleged through the fraudulent dealings.

50. That there was also no evidence that the plaintiff had been reported to the police station for such serious fraud leading to such monumental loss to the corporation, or for engaging in unethical and unprofessional conduct. That indeed if the Corporation had lost such money they would have filed a

counter-claim in the Industrial Court case filed against them by the plaintiff wherein he was awarded Kshs 4,8 million for unlawful termination of services.

51. It was therefore submitted that the defendants have not adduced any evidence showing that the allegations they published against the plaintiff were true or justified. That the defendant's failure to adduce relevant, reliable and credible evidence in their defence ought to be inferred as admission that they published the defamatory statement knowing that they were false. That none of the defendants has admitted liability and or offered genuine apologies and retractions.

52. The plaintiff's counsel further cited the decision in **Hon. Uhuru Muigai Kenyatta V Baraza Ltd [2011] eKLR by** Rawal J (as she then was) where the court observed that:

“ the information that causes defamation will be assumed to be untrue until the defendant proves otherwise... while taking defence of justification or qualified privilege in the defamation case, the defendant was required by law to establish the true facts and the plaintiff has no burden to prove the defence raised by the defendant...once not verified, the justification or qualified does not injure the defendant and in any event, the onus that the same is true, rests on the defendant to make it a fair publication.”

53. Further reliance was placed on the case of **Cassidy Vs Daily Mirror Newspapers, Limited Court of Appeal.[1929] 2 KB 331; 98 L.J.K.B 595;141 L.T 404 45 T.LR. 485,** where it was held that, if publishers of newspapers who have no more rights than private persons, publish statements which may be defamatory of other people, without inquiry, their statements are found to be untrue or capable of defamatory inferences.

54. Reliance was also placed on the **Supreme Court of Nigeria case in Joseph Mangtup Din v African Newspaper of Nigeria ltd no. 44/1986, Adolphus Godwin Karib Whyte J.S.C** where the court held that;-

“It is well settled that the onus lies on the respondent to prove the truth of the words in their ordinary and natural meaning... a plea of justification means that all the words were true and covers not only the bare statements of facts in the alleged libel but also any imputation which the words in their context may be taken to convey”.

55. Further reliance was placed on the decision in **The Daily Nation v Mukundi and another 1975 EA 311 AT 316 the Court of Appeal for Eastern Africa** where the court held that;

“When the Defendant publisher accepted an item for publication it had the right and indeed the duty to see whether such item contains defamation matters and if it fails in that duty it always publishes it at its own risk”.

56. Counsel for the plaintiff submitted that any fair minded person reading the impugned article got a straight message that the Plaintiff is a wanted criminal for having committed an offence in the course of his employment. That the publications made by the defendants of and concerning of the Plaintiff were false and malicious.

57. Again it was submitted that due to the publication of the article, feelings of humiliation embarrassment and odium had been compounded by the fact that his children and wife and friends read the publications. Furthermore it was submitted that the article was done sensationally and exposed the Plaintiff to millions of people who read the article.

58. Further, it was submitted on behalf of the plaintiff that taking into consideration the Plaintiff's profession and his career record as shown by his testimony, there is no doubt that the Plaintiff's standing in society was lowered by the published article. That from the evidence adduced by the plaintiff and the circumstances of this case, the defendants caused the publication concerning the plaintiff with the sole and clear intention of defaming him.

59. The court was therefore urged to find that the plaintiff has satisfied this court that that there was a publication which was defamatory in nature and the same referred to the plaintiff, and was published without lawful justification. The plaintiff's counsel added that furthermore the report which was heavily relied on by the defendants in their defence was not produced by the witness who was supposed to produce it.

60. On what damages the plaintiff should be awarded, the plaintiff's counsel set out the principles governing assessment of compensatory damages as follows:-

- i. That the award must compensate the plaintiff for pain and suffering caused to him by the publication.*
- ii. That the award should vindicate the plaintiff's reputation in the eyes of the public. (See Cassel and company vs. Broome [197]1 ALL ER 801)*
- iii. That the whole conduct of both plaintiff and the defendant should be considered from time of publication to the time of judgment*
- iv. That the Court should consider the manner of publication and the extent of the circulation.*

61. The plaintiff's counsel also cited other authorities dealing with principles in defamation which are:-

- a. Cassidy Vs Daily Mirror Newspapers, limited court of Appeal. [1929] 2 K.B 331; 98 L.J.K.B 595; 141L.T. 404; 45 T.L.R 485.*
- b. ODUNGA'S Digest on Civil Case Law and Procedure. Vol 2 2nd Edition, Law Africa.*

B. DAMAGES AND COSTS

62. The plaintiff's counsel prayed for damages assessed as follows:

- a. General damages Kshs. 10,000,000/=**
- b. Exemplary damages Kshs. 8,000,000/=**
- c. Punitive damages Kshs. 3,000,000/=**
- d. Costs of the suit and interest.**

63. Counsel relied on the following authorities:

- a. Gideon Mose Onchwati vs. Kenya Oil Company Limited & another [2015]eKLR _ where this court in July 2015 awarded the Plaintiff General Damages of Kshs.3 Million, exemplary damages of Kshs.12 Million and damages in lieu of an apology, Kshs.500,000/=..(there is an application pending in the matter seeking review of the judgment).*
- b. Nicholas Kiprono Biwott –vs- Clays Limited & 5 Others (2000)eKLR where in 20th December 2000, Justice Visram awarded the Plaintiff general damages ofKshs.10 Million.*

THE DEFENDANTS' SUBMISSIONS

64. The defendants' counsel conceded that the Plaintiff was formerly the Corporation Secretary of Kenya Broadcasting Corporation. On liability, the defendants' counsel submitted that the burden of proof in this case rests upon the Plaintiff to show on a balance of probabilities that the words pleaded at paragraph 7 of the Plaintiff would convey in their ordinary meaning or would be understood in light of the attributes set out at paragraphs 10 and 12 of the Plaintiff.

65. Further, that on the basis of the cause of action founded by the Plaintiff the main issues for determination before the court are:

- a. *Whether the meanings attributed to the publication are defamatory as a matter of fact.*
- b. *Whether the Plaintiff has a cause of action in Defamation against the Defendants.*

66. The defendants' counsel submitted that his clients pleaded fair comment made in good faith and without malice upon matters of public interest and relied upon **Section 14** of the **Defamation Act**, Cap 36 of the Laws of Kenya.

67. It was further submitted that the article complained of as set out wholesomely at paragraphs 7 as read together with paragraphs 10 and 12 of the Plaintiff and that from the words used in the said article, none, whatsoever in their natural and/or ordinary meaning portray the Plaintiff as set out at paragraphs 10 and 12 of the Plaintiff.

68. The defendant's counsel urged the court to consider the captioned words appearing in the article alongside the assertions made by the Plaintiff concerning the natural and ordinary meaning of the words pleaded.

69. It was further submitted that on the evidence adduced, the court should note that only the 2nd Defendant testified on behalf of the Defendants and that during examination in chief, the 2nd Defendant in his testimony indicated as follows:

a. *That in publishing the article he did not make any conclusion or any personal opinion but just stated the facts as they were;*

b. *That he got and/or sourced the information from :*

i. *Kenya Broadcasting Corporation website (www.kbc.co.ke/news) in which he produced a copy of the print-out from the website with a banner entitled, 'Kenya Public Broadcaster sacks MD' citing that the Plaintiff and one David Waweru were relieved of their duties following allegation of financial impropriety;*

ii. *An interview with the then Information and Communication Permanent Secretary Bitange Ndemo which interview entailed information released to the press;*

iii. *A report prepared by the Inspectorate of State Corporations in June, 2010.*

c. *That he did not know the Plaintiff and had no scores to settle with him or anything giving him a reason to act in a manner that would be malicious and/or actuated with malice as against the Plaintiff.*

70. The defendants' counsel submitted that the Plaintiff on the other hand during examination in chief indicated that it is true that he was arrested and charged via **Chief Magistrates Anti- Corruption Court at Nairobi via Case No. 18 of 2011– Republic vs. David Waweru & Hezekiah Oira** with offences relating to matters as reported in the articles published by the Defendants, as evidenced by copy of the judgment in the aforementioned matter.

71. It was submitted that from the above piece of evidence, the following questions flow for determination:

1. Whether the Plaintiff has a cause of action in Defamation against the Defendants. On this point it was submitted that from an analysis of the aforesaid evidence and the entire evidence as presented before this Honourable Court and in reliance on **Section 14** of the **Defamation Act**, Cap 36 of the Laws of Kenya it is true that:

- a. The Kenya Broadcasting Corporation is a state corporation established by an Act of Parliament;
- b. The Plaintiff as a Company Secretary and David Waweru a Managing Director, had previously been suspended from the Corporation over the contract to broadcast the FIFA world cup 2010 matches;
- c. Information and Communication Permanent Secretary Bitange Ndemo informed the press that the Inspectorate of State Corporations was investigating the matter;
- d. That the website of the Plaintiff's former employer www.kbc.co.ke/news reported that the Board Chairman Charles Muoki issued a statement in which he stated that the Plaintiff and David Waweru had been sacked following allegations of impropriety involving the contract to broadcast the FIFA world cup 2010 matches;
- e. Information and Communications PS Bitange Ndemo informed the press that the Inspectorate of State Corporations was investigating the matter;
- f. The Plaintiff and one David Waweru were arrested and charged in an Anti-corruption court over the matters forming the substratum of the suit herein.

72. The defendants' counsel relied on the case of **Andrew Mukite Musangi & Another vs. Standard Group Ltd [2012] eKLR** where the Court held that:

' A defence of fair comment is available to a defendant who is satisfied that the facts which are relied upon in support of the plea are true and he had reasonable evidence to support them or reasonable grounds for supposing that sufficient evidence to prove them will be available at the trial, at which he intends to support the defence.'

73. It was further submitted that in so far as the said article contained words consisting of true reporting of facts relating to a public broadcaster KBC, a State Corporation in which the general public has a considerable public interest and the Defendants have a social responsibility to report on concerns affecting the State Corporation.

74. It was therefore submitted that this court should be alive to the fact that in a tort of defamation, the court is under an obligation to balance the public interest and individual rights.

75. Further, that Article 33 of the Constitution of Kenya, 2010 guarantees the freedom of media and therefore the Defendants were merely exercising a right entrenched in the Constitution.

76. Further, that there was no proof of actual or intrinsic malice, ill will or spite or any indirect or improper motive in the minds of the Defendants at the time of the publication.

77. It was submitted that the plaintiff was unable to show that the Defendants acted with malice in having the articles published.

78. It was further submitted that the information as published by the Defendants is privileged information as protected under **Section 7** of the **Defamation Act**, which states that :-

"Subject to the provisions of this section, the publication in a newspaper of any such report or other matter as is mentioned in the schedule to this Act shall be privileged unless such publication is proved to be made with malice."

79. Reliance was placed on **Phinehas Nyagah v. Gitobu Imanyara[2013]eKLR** where Hon. Odunga J. while determining what amounts to malice in defamation stated:

‘Malice may be inferred from relations between parties before or after publication or in the conduct of the defendant in the course of the proceedings... or if the language used is beyond the facts (emphasis ours).’

80. That an excerpt of the article featured on the front page of the Standard Newspaper on 23rd of June 2010 illustrates that the factual matters upon which the article was founded was from a communication by Information and Communication Permanent Secretary Bitange Ndemo.

81. That there is totally no relation between the Plaintiff and the Defendants to persuade this Honourable Court that the publication was not done maliciously to injure the Plaintiff’s repute and that accordingly, the Plaintiff’s assertion that the article was to settle a score against him because he declined the 1st Defendant’s co-hosting bid is untrue because the article was merely contemporaneous with the events taking place and was made in good faith.

82. It was the defendants’ counsel’s submission that the Article was serving the greater good of public interest and cause and therefore the defendants relied on the defence of qualified privilege.

83. Finally, it was submitted that the Plaintiff had failed to prove all the ingredients of the tort of defamation on the balance of probabilities and therefore the plaintiff’s suit should be dismissed with costs.

84. On damages, it was submitted that strictly without prejudice to the foregoing submissions on liability, the possible award of damages should the court return with an affirmative finding on liability should be based on the following holding:

‘It seems to me that properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was publicly defamed. For this reason, compensation by damages operates in two ways-as a vindication of the Plaintiff to the public and as a consideration to him for a wrong done. Compensation is here a solatium rather than harm measurable in money’ Per. Windeyer J in Uren-vs-John Fair fax & Sons PTY Limited 117 CLC 115 pg 50

85. The above holding it was submitted, was approved and adopted as juridical guideline by the Court of Appeal of Kenya in **Gicheru-vs-Morton & another[2005] 2 KLR.**

86. And that in keeping with the revered doctrine of precedent the decision of the Court of Appeal in **Kenya Tea Development Agency Limited-vs-Benson Ondimu Masese t/a B.O.Masese & Co. Advocates CA No. 95 of 2006** delivered on 11.07.2008 was relevant, wherein the learned Judges of the Court of Appeal proclaimed the principles to be considered by a trial court in determining the amount of damages to be awarded to a plaintiff, while endorsing the principles that were drawn from an English decision of **Jones-vs-Pollard[1997] EMLR 233,243 that:**

- a. The objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published, and any repetition;*
- b. The subjective effect on the plaintiff feelings not only from the prominence itself but from the Defendant’s conduct thereafter both up to and including the trial itself;*
- c. Matters tending to mitigate damages, such as the publication of an apology;*
- d. Matters tending to reduce damages;*
- e. Vindication of the plaintiff’s reputation past and future.*

A. Mitigation of the damages

87. On the objective features of the publication, it was submitted that the publication in question related to an article on former occupants of a public office. Therefore that there was clearly an element of public interest in the serialization.

88. Further, it was submitted that the Plaintiff's own exhibits in court demonstrate that he was a holder of a public office for a specified duration, which is a matter of public notoriety for which the court may aptly take judicial notice. In addition, it was submitted in contention that the 1st Defendant as a Media House had the social duty to write and comment on the reported incident as fair comment and a matter of public interest.

B. No malice, ill will, spite or improper motive established.

89. It was also submitted that there was no proof of actual or intrinsic malice, ill will or spite or any indirect or improper motive in the mind of the Defendants at the time of the publication.

90. The defendants' counsel urged the court to scrutinize paragraph 14 of the Plaint and find that whereas what are alleged to be particulars of malice are set out thereunder there is no specific evidence adduced by the Plaintiff to confirm that the publication was actuated by malice.

91. Also in support of this line of submission the decision of the High Court in **Nation Newspapers Limited-vs-Gibendi/2002]2 KLR** wherein the court emphasized the requirement that a Plaintiff ought to prove actual malice, which is ill will or spite or any direct or improper motive in the mind of a publisher at the time of the publication was cited and that there can as a matter of law and fact be no inference of malice on the part of the Defendants from the wording of the article.

92. That there is absolutely no evidence on the record that publication was actuated by malice or was done deliberately to disparage his character. That malice is a subjective element that has to be established as a fact by admissible evidence.

93. The court was therefore urged to scrutinize the intrinsic evidence in terms of the article in order to appreciate that no realistic inference of malice can be drawn from the article in fact and on the basis of the evidence on record, and that there is therefore no evidential basis to draw inferences of malice where none can be found as there is no extrinsic evidence of malice.

94. On the corollary it was submitted that the acute 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.

C. On the Right of Reply

95. It was submitted that on account of matters tending to reduce damages the Plaintiff did not avail himself the right of reply neither did he state that he was denied the exercise of this right to enable him clarify the inaccuracy if any in the article. Reliance was placed on **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 article complained of.

96. It was submitted that the failure to invoke this right is relevant in the assessment of the damages awardable as set out in **Section 7A (7)** of the **Defamation Act** which is emphatic that:-

'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.'

97. The defence counsel submitted that there is no evidence that the Plaintiff attempted to exercise his

right of reply under section 7A(1) of the Defamation Act and that had he exercised his right of reply under that section and produced evidence to show that the Defendants had failed to publish the reply or had not published it as required by the law, his case for aggravated or exemplary damage would have been clear.

98. The case of Nation Newspapers Limited-vs-Gibendi[2002]2 KLR was relied on where the court held:-

‘In order to be awarded damages for defamation, it is not enough to establish only the defamation. The plaintiff must lead evidence of actual damage to his reputation and character in order to enable the court to assess an appropriate award.’

D. On Exemplary and Aggravated damages

99. A legal difference distinction was made between exemplary and aggravated damages as set out in an excerpt from Halsbury’s Laws of England on Libel and Slander, 4th Edition, and Reissue Vol. 28 at Page 130 para. 256 that states that:-

“Generally exemplary damages will not be awarded for libel or slander where the plaintiff pleads and proves that, at the time of publication the defendant knew that the publication would be tortious, or was reckless as to whether or not it was, and nevertheless decided to publish the words complained of because the prospects of material advantage outweighed the prospects of material loss. The mere fact that the words were published in the ordinary course of a business run with a view to profit is not of itself sufficient to establish the required calculation of material advantage.”

100. Counsel for the defendants submitted that there is absolutely no evidence presented to show that the Defendants at the time of publication knew that the publication would be tortious, or were reckless as to whether or not it was, and nevertheless decided to publish the words complained of.

101. Further, that there is absolutely no evidence presented to show that the Defendants had a direct financial gain brought about by the publication of the item complained of or that the same was reported sensationally, noting that the captioned words were contained at an inner page of the newspaper.

102. That there is therefore no correlation or inference for financial gain as it has not been established that by publication of the article there was an increase in circulation and profit to the publisher.

103. On the prayer for aggravated damages, the same text on page 127 paragraph 248 defined as:-

“The general compensatory damages may be increased to take into account the defendant’s motives in uttering the words complained of, or his conduct before or during the action; such ‘aggravated damages’ (which must be distinguished from exemplary damages) are meant to compensate the plaintiff from additional injury, going beyond that which would have flowed from the words alone, caused by the presence of the aggravating factors.”

104. Accordingly it was submitted that aggravated damages are awarded where the conduct of the defendant increases the injury caused to the plaintiff. Nevertheless that it has not been shown by evidence that the conduct of the Defendants has in any way led to the increase of the injury to the Plaintiff, and that there is also no evidence on record showing that the Defendants in this case acted oppressively or arbitrarily towards the Plaintiff before the filing of the suit and during the hearing of the suit, either was it shown that the Defendants had no honest belief in the truth of what was published.

105. The defendants’ counsel therefore submitted that this is not a case fit for award of exemplary an aggravated damages.

DETERMINATION

106. I have carefully considered the plaintiff's case as against the defendants' defence and the respective parties' advocates' submissions supported by authorities. In my humble view, the issues that flow for determination can be captured from the very definition of what defamation is and therefore the question of whether the plaintiff herein was defamed by the alleged publication.

107. Winfield in J.A. Jolowicz and T. Ellis Lewis- Winfield on tort 8th Edition Page 254 defines defamation as follows:

“Defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of the society generally, or which tends to make them shun or avoid that person.”

A defamatory statement, according to Gatley and Libel and Slander 8th Edition by Phillips Lewis paragraph 4 page 5 discredits a man or tends to lower him on the estimation of others or to expose him to hatred, contempt or ridicule or to injure his reputation in his office trade or profession or to injure his financial credit.”

108. In **RICHARD OTIENO KWACH VERSUS THE STANDARD LIMITED AND DAVID MAKALI NAIROBI HCCA NO. 1099 OF 2004** Visram J observed that:

“Words are defamatory if they involve a reflection upon the personal character or official reputation of the plaintiff...”

109. In **WYCLIFFE A. SWANYA VERSUS TOYOTA EAST AFRICA LIMITED AND FRANCIS MASSAI NAIROBI CA NO. 70 OF 2008** the Court of Appeal held:

“It is common ground that in a suit founded on defamation the plaintiff must prove:-

(i) That the matter of which the plaintiff complains is defamatory in character.

(ii) That the defamatory statement or utterances was published by the defendants publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.

(iii) That it was published maliciously.

(iv) In slander subject to certain exceptions that the plaintiff has suffered special damages.”

110. From the understanding that statement is a false statement of fact or publication that exposes a person to hatred, ridicule, or contempt, causes him to be shunned, or injures him in his business or trade, it follows that statements that are merely offensive are not defamatory. Courts of law generally examine the full context of a statement's [publication](#) when making this determination. It emerges that the publication to a plaintiff alone is not enough, because defamation is an injury to one's reputation and reputation is what other people think of a person who alleges he was defamed and not his own opinion of himself.

111. In order for the plaintiff to prove that he was defamed, he must tender evidence to prove that the published words tended to cause other people to shun or avoid or treat him/ her with contempt following the defamation.

112. The defamatory statement of and concerning a person is one which has a tendency to injure the reputation of the person to whom it refers by lowering him in the estimation of right thinking members of society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike and disesteem.

113. Defamation is thus not about publication of falsehoods against a person; it is necessary to show that the published falsehood disparaged the reputation of the plaintiff or tended to lower him in the estimation of right thinking members of the society generally.

114. Further, an injurious falsehood may not necessarily be an attack on the plaintiff's reputation. The ***words must be maliciously published*** and malice can be inferred from a deliberate or reckless or even negligently ignoring of facts. (See **J P Machira Vs. Wangethi Mwangi and Nation Newspapers Civil Appeal No. 179 of 1997.**)

115. As opposed to slander, libel is punishable *per se* without proof of damage and the actual sum to be awarded is “*at large*” and although a person's reputation has no actual cash value, the Court is free to form its own estimate of the harm taking into account all the circumstances. However, where the plaintiff claims to have suffered some form of loss or damage as a result of the libel then they are under a duty to prove that specific loss or damage to their reputation following the defamation.

116. Malice here does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice. Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice but the law does not weigh in a hair balance and it does not follow merely because the words are excessive, there is therefore malice. Malice may also be inferred from the relations between the parties before or after publication or in the conduct of the defendant in the course of the proceedings. Malice can be founded in the publication itself if the language used is utterly beyond the facts. The failure to inquire into the facts is a fact from which inference of malice may properly be drawn. Any evidence, which shows that the defendant knows the statement was false or did not care whether it be true or false will be evidence of malice. (See **Godwin Wachira vs. Okoth [1977] KLR 24; J P Machira vs. Wangethi Mwangi.**)

117. The ancillary questions that I must answer in relation to the main issue of whether or not the plaintiff was by the impugned publication defamed are:

a. Whether the Publications by the defendants of and concerning the plaintiff are capable of being construed as being defamatory of the plaintiff in their natural and ordinary meaning or by innuendo?

b. Whether the said publications were made maliciously

c. Whether the plaintiff's credibility, character and reputation has been injured and therefore whether he is entitled to damages and if so, how much?

d. What orders should this court make?

e. Who should pay costs

118. On the first question, my commencement point is that the court in deciding defamation cases must balance the provisions of Articles 33, 34 and 35 of the Constitution, dealing with freedoms of expression and media freedom and the individual's right to access information on the one hand and Article 28 of the Constitution regarding the inherent dignity of every person which dignity must be respected and protected.

119. On the right to access information and the freedom of expression, the words of **Lord Denning MR in Fraser v Evans & others (1969) All ER 6** are instructive that:

“There are some things which are of such public concern that newspapers, the press and indeed everyone is entitled to make known the truth and to make their comment on it. This is an integral part of the right of speech and expression. It must not be whistled away.”

120. **Lord Coleridge, CJ in Bernard & another v Perriman (1891-4) ALL E.R 965** stated that:

“The right of speech is one which it is for the public interest that individuals should possess, and indeed, that they should exercise without impediment, so long as no wrongful act is done; and unless an alleged libel is untrue there is no wrong committed.”

121. Speaking about a person’s right to protection of reputation and character, William Shakespeare said:

“Lago: Good name in a man or woman, dear my Lord, is the immediate jewel of their souls. Who steals my purse steals trash; ‘tis something, nothing; Twas mine, tis his, and has been slave to thousands; But he that filches from me my good name Robs me of that which not enriches him; And makes me poor indeed.”(Othello Act 3 Scene 3,155-161).

122. In **Hill v. Church of Scientology of Toronto**, [1995] 2 SCR 1130 it was held:

“False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former lustre. A democratic society, therefore, has an interest in ensuring that its members can enjoy and protect their good reputation so long as it is merited.”

123. Freedom of expression is guaranteed under Article 33 of the Constitution of Kenya, 2010 and it provides that:

“Every person has the right to freedom of expression, which includes-

a. Freedom to seek, receive or impart information or ideas.”

124. On the other hand, Freedom of the media is guaranteed by Article 34 of the Constitution which stipulates that:

“Freedom and independence of electronic, print and all other types of media is guaranteed, but does not extend to any expression specified in Article 33(2).”

125. Article 33(2) and Article 33(3) of the Constitution stipulate:

“that every person has the right to freedom of expression which does not extend to, among others, propaganda for war, incitement to violence, hate speech or advocacy of hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm or is based on any ground of discrimination specified or contemplated in Article 27(4) and that in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.”

126. From the above constitutional provisions, freedom of expression and of the media is guaranteed but that freedom is not absolute as shown by the clearly spelt out limitations to that freedom.

127. In a defamation claim, the claimant must prove to the required standard that the words complained of were published of and concerning him; that the words were published by the defendant; that the words were false; and that the words were defamatory of the character of the claimant; and finally; that the publication was done with malice. See **J Kudwoli vs Eureka Educational and Training Consultant & 2 Others Civil case 126 & 135 of 1990** and **Wycliffe A. Swanya v Toyota East Africa Ltd & another [2009] eKLR**.

128. In the instant case it is not disputed that the defendants published the impugned article on ***How KBC Lost Sh 110m World Cup Deal to Competitor*** due to the alleged impropriety by the KBC officials and that as a result, ***KBC Managing Director and the Corporation Secretary Hezekiel Oira the plaintiff herein were suspended, with the Inspectorate of State Corporations being called in to investigate.***

129. According to the plaintiff, the above words as published were intended to be and were actually read

by the public in which the said Newspaper is one of the leading dailies with an extensive audience in the entire East African Region.

130. The plaintiff further averred that the said article was false and malicious as the plaintiff's then employer KBC did not request or receive any financial support from the Government or elsewhere for the purposes of acquiring 2010 World Cup Rights and that neither did the said employer lose Sh 75 million or any part thereof.

131. It was further claimed by the plaintiff that by the said words, in their natural and ordinary meaning the defendants meant and were understood by right thinking members of society and the world at large to mean inter alia that:

i. By stating that the plaintiff was suspended pending investigations, the defendants were understood to mean that the plaintiff was a suspect in the loss of Kshs 75 million which was a falsity;

ii. that the plaintiff collaborated with the Managing Director of KBC to defraud the Corporation;

iii. that the plaintiff committed offences in his private capacity as a Corporation Secretary;

iv. The plaintiff is corrupt

132. The Plaintiff testified on oath that in 2009 Kenya Broadcasting Corporation acquired non-exclusive broadcasting rights over 2010 FIFA World Cup that took place in South Africa. Because of the huge costs involved, Kenya Broadcasting Corporation invited proposals from other Media houses to co-host the event. That the first Defendant, Nation Media Group and Radio Africa Group were invited to bid after which Kenya Broadcasting Corporation awarded the contract to Radio Africa Group to the protest of the 1st Defendant.

133. That on the eve of the kick-off of the World Cup, there was a misunderstanding between Radio Africa Group and the Kenya Broadcasting Corporation management over the scope of exploitation and marketing of the World Cup. **That KBC enlisted the support of the Board of Directors who sent the Plaintiff and the then Managing Director on 23rd June 2010 on suspension. The Board of Directors then wrote to the Inspectorate of State Corporations (who himself sat on the Board of Directors) to investigate the matter.**

134. That on the same day of 23rd June 2010 the 2nd Defendant then working for the 1st Defendant as an investigative journalist posted online and on the front page of the Standard Newspaper the impugned article as reproduced in this judgment.

135. That the article was published even before the Inspectorate of State Corporations started its investigations into the dispute.

136. That the article was published maliciously in order to firstly settle scores against the Plaintiff and the then Managing Director who purportedly declined the 1st Defendant's co-hosting bid.

137. Secondly that the publication was calculated to incite the public against the Plaintiff to whom it falsely attributed the loss of Kshs.110 million. Thirdly that the publication was calculated to influence the investigations by the Inspectorate of State Corporations and fifthly that because the article imputed the commission of a crime, it was orchestrated to having the Plaintiff prosecuted as well as lynch him professionally.

138. From the above testimony of the plaintiff, no doubt, the article in question was authored and published on the same day that the plaintiff was suspended from office over what he calls a misunderstanding between Radio Africa Group and the Kenya Broadcasting Corporation management

over the scope of exploitation and marketing of the World Cup.

139. According to the second defendant who authored the article, he sourced the article from the website of KBC and that therefore what he wrote of and concerning the happenings was as stated by KBC. He also denies that there was any malice as he was not known to the plaintiff and that therefore he had no reason to write a malicious report concerning him.

140. Although the KBC publication was different from the impugned publication in the sense that the former concerned the sacking of the for Managing Director of KBC long after the suspension in June, 2010, with plaintiff conceding that he was suspended from office due to allegations relating to the exploitation of World Cup Rights, although he had issues with the article using the term **suspension** as opposed to being send on **compulsory leave**, the question is whether the article as authored was false or that it contained matters of truth or fair comment on a matter of public interest.

141. It is not in dispute that the article subject of this suit was authored by the 2nd defendant and published by the 1st defendant on 23rd June 2010. It is also not in dispute that the impugned article mentioned the plaintiff as one of the persons who had been **suspended** by KBC for alleged impropriety relating to the tendering of the 2010 FIFA world Cup broadcasting/ exploitation rights with third parties in which KBC allegedly lost shs 110 million to its competitor.

142. What is disputed is whether the article was defamatory, of the plaintiff and whether it was maliciously published with the sole intention of disparaging the plaintiff's name thereby exposing him to ridicule and contempt.

143. According to the 2nd defendant he published the impugned article after accessing it from the KBC website at www.kbc.co.ke/news; that he also held an interview with the then Permanent Secretary for information and Communication Dr Bitange Ndemo, which interview entailed information released to the press; and an investigation report prepared by the Inspectorate of State Corporations in June 2010. It is worth noting that the defendants were unable to produce the investigation report by the Inspectorate of State Corporations as their exhibit even after the court indulged them to call a witness to produce it, which document was only marked for identification.

144. On the other hand, there was evidence on the face of the impugned publication to support the allegation that the 2nd defendant held an interview with Dr Bitange Ndemo the Permanent Secretary for Information and Communication in which interview the Permanent Secretary released to the press information on what action had been taken at KBC following the revelations that the State Corporation may have lost money in the World Cup Broadcasting rights issue.

145. On whether the source of the Information was the KCB website cited above, as earlier stated, this court does not find that source credible since the website which was accessed on 3rd October 2011 at 4: 46 shows that the article under KCB news “**Kenyan Public Broadcaster sacks MD**” was written by Clare Wanja and was posted on Monday September 6th, 2010, whereas the impugned article was published on 23rd June 2010 and the latter talks of suspension of the plaintiff and another, as the Inspectorate of State Corporation is called in to investigate. The above information unlike the impugned article does not talk about **suspension** but **sacking** of the Managing Director and the Corporation Secretary of KBC. The latter is the plaintiff herein.

146. In other words, the 2nd defendant must have obtained the information from the interview with the Permanent Secretary as that is demonstrated by the article/ publication itself and which evidence was never controverted.

147. The question, however, is whether the publication was false, and if so, whether it was laced with malice and therefore intended to injure the plaintiff's reputation in the estimation of right thinking members of the society generally and whether the publication, read as a whole, would tend to make those readers who are right thinking members of the society shun or avoid he plaintiff.

148. From the plaintiff's own testimony, both oral and as adopted from his written witness statement filed in court and all other circumstances surrounding this case, I am unable to find that the publication was defamatory. In my humble view, the publication was reporting on the state of affairs of KBC a State Corporation in which the public have an interest on the goings on. I do not find that any reader of the article who is a right thinking member of the society generally would find the article as asserting facts to the effect that the plaintiff was involved in the alleged loss of shs 110 m. The plaintiff himself conceded that he was *suspended* pending investigations into the alleged impropriety regarding the exploitation rights for broadcasting the FIFA World Cup matches, and that is exactly what the article reported.

149. In my view, reading the impugned article shows a mere declaration of the situation at KBC as later uploaded on the KBC Website. The only difference is that the plaintiff claimed that he was sent on *compulsory leave* in his oral testimony but in his submissions he conceded that he was *suspended* by KBC to pave way for investigations by the Inspectorate of State Corporations. The plaintiff does not deny what was published in the KBC website which was in essence reproduced by the defendants herein in the impugned article, save that as at the time the article was uploaded on the KBC website, the plaintiff and Mr David Waweru had already been sacked.

150. The plaintiff even went further and produced court proceedings from Anti Corruption Court vide ACC NO. 18 of 2011 wherein the plaintiff jointly with David Waweru the then Managing Director of KBC were charged with two counts of the offences of *wilful failure to comply with the law relating to the tendering of contracts contrary to section 45(2) (b) as read with section 48(1) of the Anti Corruption and Economic Crimes Act No 3 of 2003*. The evidence in that case also shows that the plaintiff and his co accused were sacked after investigations by the Inspectorate of State Corporations, into the alleged wrongdoing.

151. Although the article may have been published before the investigations by the Inspectorate of State Corporations commenced, this court is unable to find that the publication was calculated to incite the public against the plaintiff or that it falsely attributed the loss of shs 110 million to the plaintiff.

152. In addition, I do not find any evidence to suggest that the publication was intended to influence the investigations by the Inspectorate of State Corporations as no such investigations report was produced and or a specific part of it pointed out to the court to indicate how the publication influenced the outcome of the investigations.

153. I further do not find any evidence to suggest that the article imputed the commission of a crime by the plaintiff and or that it was orchestrated to having the plaintiff prosecuted as well as lynching him professionally.

154. In his said testimony and witness statement filed on 28th February 2011, he states that him and the Managing Director were put on *compulsory leave* for what he calls "*a misunderstanding between KBC Board and Senior Management on the nature, scope and mode of exploitation of 2010 World Cup Rights*". The plaintiff did not elaborate or give details of the "*misunderstanding*." On the evidence available, this court is unable to find that the plaintiff was charged in court because of the publications.

155. I have also perused the judgment of Hon L. Nyambura (as she then was) acquitting the plaintiff in ACC 18/2010 and I am unable to find any evidence that the plaintiff was charged with the offences therein because of the impugned publication.

156. I note that the plaintiff does not deny the fact that he was later sacked since he testified that he sued his employer KBC for unlawful termination of employment and that he was compensated about kshs 5 million. The plaintiff did not deny that his sacking was as per what his employer uploaded on the website [www://http// kcb.co.ke/news. asp?inid= 66](http://www.kcb.co.ke/news.asp?inid=66): as reported by Clare Wanja on 6th September 2010 to the effect that the plaintiff and the KBC Managing Director who had been on suspension had

been sacked following allegations of impropriety involving the contract to broadcast the FIFA World Cup 2010 matches live from South Africa, which article was produced in evidence as Defence Exhibit No. 2.

157. In my humble view, the fact that the defendants in their article used the term '*suspension*' and not *compulsory leave* which latter term the plaintiff used in his testimony does not mean that the article was false.

158. The plaintiff did not produce any letter from his employer to the effect that he was sent on *compulsory leave* and not suspended to pave way for investigations by the Inspectorate of State Corporations.

159. Furthermore, whether the defendants' publication used the term *suspension* which is defined by the Concise English Dictionary 2011 Edition page 1452 as a temporary debar from a post, duties etc as a punishment, as opposed to the plaintiff's usage of the term *compulsory leave* which literally means being coerced or forced to go on leave by the appointing authority, it is all one and the same thing of being temporarily put out of work. In my view, the use of the word *suspension* in the context of this case was not in any way derogatory of the plaintiff and neither was it a peddling of rumours by the defendants.

160. The court further notes that the judgment in ACC 18 of 2010 gave details of what the plaintiff called misunderstandings between KBC and Board of Management and although the plaintiff was acquitted of all the charges, there is no evidence that the plaintiff was charged in court because of the publication.

161. In addition, this court takes Judicial Notice that to prove criminal charges against an accused person requires a higher standard to be applied, that of beyond reasonable doubt unlike in civil cases where the standard of proof is on a balance of probabilities.

162. Although the plaintiff claims that the article was written before the investigations were carried out, it is clear from the judgment in ACC 18/2010 that the case was investigated, not by the defendants but by the state agencies responsible for investigation of Corruption and Economic Crimes case and none of the witnesses in that case testified to the effect that they used the evidence of the publication to charge the plaintiff with the offences with which he was charged.

163. Further, this court is unable to find any innuendo in the said article as stated by the plaintiff. I find that on the evidence adduced as a whole, the article reported what was happening at KBC to the effect that there were allegations of impropriety relating to FIFA World Cup broadcasting rights and that the Managing Director and the plaintiff herein had been suspended pending investigations into the matter, which is a fact that was reflected in the judgment vide **ACC18/2011 Republic Vs Hezekiel Oira and another**. Although the plaintiff was acquitted of the charges of violating the procurement procedures, there is absolutely no evidence that the impugned article had concluded that the plaintiff was guilty of any offence.

164. This court finds that the impugned article merely reported on what factually led to the plaintiff's suspension pending investigations into alleged impropriety at KBC and what subsequently resulted in the plaintiff being charged in court. This court does not find any malice in the article.

165. I am in agreement with the defendant's counsel's submissions that the article related to information of and concerning the happenings at KBC which is a public broadcaster, a State Corporation in which the general public has considerable public interest, and the defendants have a social responsibility to report on, concerning the affected State Corporation.

166. I had the opportunity to hear and observe the 2nd defendant as he testified in court and I am unable to find that his conduct during the proceedings demonstrated any bad blood or ill will or spite against the plaintiff or that he was being used by the 1st defendant to settle any scores especially on the allegation that the KBC management refused to Partner with the 1st defendants in the World Cup

broadcasting rights and instead partnered with the 1st defendant's media rivals.

167. I have also perused **Industrial Court Cause No, 299/2011- Hezekiel Oira Vs KBC & Another** which I take judicial notice of and wherein the Honourable Linnet Ndolo J of the Employment and Labour Relations Court awarded the plaintiff damages against his employer KBC for unfair termination of employment. This court notes that the court in that Cause did not determine the innocence of the plaintiff in the criminal trial but found at paragraph 18:

“The claimant was suspended on 23rd June 2010 to pave way for urgent investigations by the Inspector General, State Corporations. The claimant testified that he was suspended while out of the country and got to know of his suspension through the internet. He never got to know the outcome of the investigations and did not hear from the respondents until his letter of termination dated 6th September 2010 which was delivered to his house girl.”

168. Paragraph 14:

“In the case before me, the claimant's termination preceded the criminal proceedings.....”

169. Paragraph 23:

***“There is no evidence that the claimant was afforded any opportunity to defend himself before his suspension or termination. This clearly flies in the face of the law and the 1st respondent's code of regulations. An employee who is sent on suspension pending investigations has a legitimate expectation that at the very least, they will be given an opportunity to give their side of the story before termination is concluded*”**

170. Paragraph 24:

“In view of the foregoing, I find the termination of the claimant's employment unfair within the meaning of Section 45 of the Employment Act, 2007.....”

171. From the above decision which this court takes Judicial Notice of, the Employment and Labour Relations Court found that indeed the plaintiff had been ***suspended pending investigations and that the plaintiff was later sacked before being charged in court.*** On the basis of the above facts i find nothing false about the reporting by the defendants, of and concerning the plaintiff's suspension as the Corporation Secretary of KBC on 23rd June 2010. If that reporting was to be found to be defamatory of the plaintiff, in my humble view, then the Employment and Labour Relations Court too, was, in the above case as quoted at paragraph 18 of its judgment defaming the plaintiff by using the term suspensions as opposed to compulsory leave and moreso, it was also peddling rumours against the plaintiff.

172. There is also nothing false about the defendants' reporting that the plaintiff had been subsequently sacked, as reported by Mr James Ratemo on 6th September 2010 since the plaintiff himself conceded in his evidence on oath that he was suspended on 23rd June 2010 and sacked on 6th September 2010. The defendant's publication of 23rd June 2010 did not say that the plaintiff stole the money but that he was suspended pending investigations into how the shs 110 million World Cup deal was lost to competitor, which, in this case, is the whole truth.

173. In the Industrial Court case as shown above, the court found that the plaintiff had been sacked before being given an opportunity to be heard to give his side of the story, and not because the defendants reported in the media.

174. Furthermore, this court finds that the language used in the publication was not contemptuous or reckless. It was merely informative of what was happening at the State Corporation.

175. In ***SLIM –VS DAILY TELEGRAPH*** [1968] 1 All E.R. 497 **Lord Denning MR.** stated;

“If [the writer] is an honest man expressing his genuine opinion on a subject of public interest, then no matter that his words conveyed derogatory imputations; no matter that his opinion was wrong or exaggerated or prejudiced, and no matter that it was badly expressed so that other people read all sorts of innuendos into it, nevertheless he has a good defence of fair comment. His honesty is the cardinal test. He must honestly express his real view. So long as he does this, he has nothing to fear, even though other people may read more into it... I stress this, because the right of fair comment is one of the essential elements of freedom of speech. We must ever maintain this right intact. It must not be whittled down by legal refinements. When a citizen is troubled by things going wrong, he should be free to ‘write to the newspaper’ [or write in the newspaper, as is the case herein] and the newspaper should be free to publish his letter [or article]. It is often the only way to get things put right. The matter must of course be one of public interest. The writer must get his facts right; and he must honestly state his real opinions. But that being done, both he and the newspaper should be clear of any liability. They should not be deterred by fear of libel actions...”

176. In view of the above, this court finds that this is one of those cases where the court would not hesitate to protect the rights of the media (***although the media rarely acknowledges the courts when the courts protect their rights anyway***) in reporting accurately what was happening at a State Corporation, and which reporting I find was fair and accurate and not actuated by malice or ill will or spite but necessitated by the need to inform the general public of what was the state of affairs at KBC a public Corporation.

177. The plaintiff claimed that as a result of the publication, which was in the internet, as only online edition was produced in evidence as (PEX2), his reputation was lowered in the estimation of right thinking members of the society generally and that he was exposed to ridicule, fear hatred and contempt by his friends, clients and even his daughter at Naivasha Girls suffered the humiliation such that other students asked her to share with them her father’s loot of shs 110 million hence he had to transfer her to a different school.

178. The plaintiff claims that he has been libeled and that his dignity has been besmirched by the publication which is based on unfounded allegations and therefore damaging to one’s reputation and calling, by exposing him to public scandal, contempt and diminution of his stature and character as a Corporation Secretary and advocate of the High Court of Kenya.

179. I have no doubt that defamatory words would do exactly that to any person who is defamed. Nonetheless, in defamation cases, the plaintiff is under a duty to adduce evidence to show that any of the right thinking members of the society generally who read the article viewed him differently or that they knew the plaintiff prior to the publication to be a person who was incapable of being linked to the impugned publication and that after the publication, the publication gave them a different picture of who the plaintiff was known to be and that therefore the publication tended to make them shun or avoid or ridicule the plaintiff.

180. In other words, those right thinking members of the society generally who know and esteem the plaintiff as a reputable person must be called to testify and satisfy the court that indeed the publication by the defendants tended to make the plaintiff to be shunned, ridiculed or avoided or viewed differently. The plaintiff could also produce evidence by way of emails or messages send to him by the readers who read the impugned publication and viewed him differently.

181. The plaintiff in this case testified and called no witness to support his claims that the publication was defamatory of him and that it tended to cause him to be shunned or ridiculed by right thinking members of the society generally.

182. It has been held, not once, that in defamation cases, the plaintiff cannot be his own witness on what he or other people perceive to be his good character. This court has had occasion to determine that aspect of proof in **Miguna Miguna vs The Standard Media Group & 4 Others [2016] e KLR** and cited several decisions on that point. I am also fortified by the decision in **Daniel N. Ngunia V K**

Kenya Grain Growers Cooperative Union Ltd CA 281 of 1998 where the Court of Appeal noted that at the trial in a defamation case, the appellant was the only person who testified of his claim and stated:

“In those circumstances, we cannot see how a claim based on defamation could have possibly succeeded even in the absence of the defence of qualified privilege.”

183. Further in **George Mukuru Muchai Vs The Standard Limited, HCC 2539/97** the court held:

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

184. Even where the plaintiff relies on innuendo to impute that he was defamed, in **Nation Newspapers Ltd V Chesire [1984] KLR 156** the Court of Appeal held inter alia:

“ (1) An action for libel by innuendo depends for its success on the proof by the plaintiff that special circumstances are known to persons who read the offending publication and evidence of the special circumstances.”

185. From the above authorities, and as correctly submitted by the defendant’s counsel. The plaintiff’s evidence that he was defamed by the publication and therefore that the words used in the publication were defamatory of him because they tended to cause him to be shunned, ridiculed or avoided by right thinking members of the society generally fell short of the standard of proof required, on a balance of probabilities. This is so because the plaintiff could not be his own witness on the issue of perception had by other people who know him on his character, reputation and profession. On that ground alone, this suit would fail.

186. Having found that the impugned publication was an accurate reporting of what action had been taken against the plaintiff and the Managing Director of KBC Mr David Waweru Iam equally unable to find any malice in the publication. Accordingly, I find that the ingredients of defamation in the publication are lacking and that being the case, I have no option but to find that the plaintiff has failed to prove his case against the defendants jointly and severally on a balance of probabilities. I proceed to dismiss the suit herein against the defendants.

187. The law, however, requires that I should assess damages I would have awarded the plaintiff had he proved his claim against the defendants.

188. Therefore as to what damages I would have awarded him had he proved his case to the required standard; I would have applied the established legal principles for awarding of damages in defamation cases. Section 16A of the *Defamation Act* Cap 36 Laws of Kenya provides:

“In any action for libel, the court shall assess the amount of damages payable in such amount as it may deem just:

Provided that where the libel is in respect of an offence punishable by death the amount assessed shall not be less than one million shillings, and where the libel is in respect of an offence punishable by imprisonment for a term of not less than three years the amount assessed shall not be less than four hundred thousand shillings.”

189. In **CIVIL APPEAL NO. 115 OF 2003 THE STANDARD LIMITED V G.N KAGIA T/A KAGIA & COMPANY ADVOCATES** where 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 altar of profiteering by authors and publishers”.

190. 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.

191. The plaintiff’s counsel prayed for damages assessed as follows:

e. General damages Kshs. 10,000,000/=

f. Exemplary damages Kshs. 8,000,000/=

g. Punitive damages Kshs. 3,000,000/=

h. Costs of the suit and interest.

192. The plaintiff is and was an advocate of the High Court of Kenya and Corporation Secretary of KBC which is still the national broadcaster. He sat on various Boards including The Copyright Board and at the regional level he was a former legal advisor to the African Union of Broadcasters and a Director with Multichoice (K) Ltd. Which latter positions the plaintiff, being a public officer then, must have held by virtue of his employment with KBC, the national broadcaster.

193. 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 alleged falsehood or 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 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.’

194. In **John v MG Ltd.**[1996] I ALL E.R. 35 the Court held:

“The successful plaintiff in a defamation action is entitled to recover, the general compensatory damages such sum as will compensate him for the wrong he has suffered. That must compensate him for damages to his reputation, vindicate his name, and taken account of the distress, hurt and humiliation which the defamatory publication caused.....”

Exemplary damages on the other hand had gone beyond compensation and are meant to “punish” the defendant. Aggravated damages will be ordered against a defendant who acts out of improper motive e.g where it is attracted by malice; insistence on a flurry defence of justification or failure to apologize”

195. In MIKIDADI VERSUS KHAIGAN AND ANOTHER (2004) KLR 496 Ochieng Ag J as he then was now J held inter alia that:-

“A successful plaintiff in a defamation action is entitled to recover as general compensation damages such sum as will compensate him for the wrong he has suffered. That sum must compensate him for the damages to his reputation, vindicate his good name and take account of the distress, hurt and humiliation which the defamatory publication has caused. The court must take the necessary precaution to ensure that whatever award it gives to a successful plaintiff is generally in line with what courts have been awarding ...”

196. On the authority of **Ken Odondi & 2 others v James Okoth Omburah T/A Okoth Omburah & Company advocates [2013] eKLR** where the Court of Appeal awarded Kshs 4,000,000 general damages and upheld exemplary damages of kshs 500,000 to an advocate of the High Court of Kenya, **I would in this case award the plaintiff Kshs 6,000,000 general damages and Kshs 1,000,000 aggravated damages** had malice been proved. I would not award punitive and exemplary damages as there was no evidence of the conduct of the defendants before, during and after the trial of the suit herein that the defendants republished the alleged defamatory words of and concerning the plaintiff and with a sinister motive.

197. In the end, I find that the plaintiff has failed to prove his case against the defendants jointly and severally on a balance of probabilities. The plaintiff’s suit as against the defendants is dismissed with costs.

Dated, signed and delivered in open court at Nairobi this 18th day of November, 2016.

R.E.ABURILI

JUDGE

In the presence of

Mr Okoth H/b for Mr Mayende for the defendants

N/A for the plaintiff

CA: Adline