



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

HCCA NO. 37 OF 2009

PAMELA MISIGA OKOLO.....PLAINTIFF

VERSUS

ODERO O. ALFRED.....DEFENDANT

JUDGMENT

The appellant who was the plaintiff in the lower court approached the seat of Justice by way of plaint dated 13th day of January 2004 and filed on 16th January 2004. The salient features of the same are that:-

- Vide paragraph 3 thereof that on or about 22/11/03 the defendants jointly and severally falsely and maliciously and without justification at all caused to be printed and published of the plaintiff and concerning the plaintiff the words set out in paragraph 3 of the said plaint
- Vide paragraph 4 that the said words were published by the defendants of the plaintiff recklessly and or knowing that very well that they had no substance
- Vide paragraph 5 that the said words in their material and ordinary meaning mean and were understood to mean that the plaintiff is an unreliable, Corrupt and dishonest individual and therefore unfit to be entrusted with carrying out any public work and / or duty or to hold any public office.
- Vide paragraph 6 that by the said publication the plaintiff has been greatly, injured in her credit and reputation and has been brought into ridicule and contempt in the eyes of the right thinking members of society.
- Vide paragraph 7 that by reason of the publication the plaintiff has been greatly injured in her character and reputation as well as her credit and she has been exposed to the contempt and odium and/or suffered considerable mental and psychological anguish and has suffered loss damages for which she hold the defendants liable.

In consequence thereof the plaintiff prayed:-

- (a) General, punitive and aggravated damages for defamation of character**
- (b) Costs of the suit**
- (c) Interest**

- (d) Any other and/or alternative remedy this honourable court deem just to grant .**

The defendants we severed and they entered appearance and filed a defence dated 12th day of February 2004 and filed on the 12/2/04. The salient features of the same are as follows:-

- Vide paragraph 3 that the suit was nullity for non-joinder of parties and the defendants were going to apply for the same to be dismissed with costs.
- Vide paragraph 4 that without prejudice to the foregoing that the suit is a nullity and the defendants would apply at an appropriate time to have the same dismissed with costs.
- Vide paragraph 5 that without prejudice to the foregoing the defendants aver that the suit is inchoate, in conclusive and embarrassing as is hereby an abuse of the process of court
- Vide paragraph 6 the defendant denied the entire contents of paragraph 3 of the plaint in its entirety and the plaintiff is put to strict proof.

- Vide paragraph 7, 8 and 9 that the content of the plaint does not disclose any cause of action against the defendants and should be dismissed contends that under the co-operative Societies Act and also under the By – laws of the Society itself the plaintiff ought to have directed her grievances with the Tribunal established under Section 77 of the Act and / or under the By-laws of the Society itself, that for this reason the court has no jurisdiction to under the Co-operative Societies Act.
- Vide paragraph 10, 11 and 12 that the defendants are strangers to allegations in paragraph 4 and 5 of the plaint and as such allegations of injury of the plaintiff in her credit and reputation as well as being brought into ridicule and contempt in the eyes of the right thinking members of Society does not arise. Further that the question of the plaintiff having been greatly injured in her character and reputation exposed to contempt and odium, suffering of considerable mental and psychological anguish and the suffering of loss and damage does not arise.
- Vide paragraph 13, 14, 15 , 16 contended that if the alleged words were published as alleged which is denied they were fair comment they further plead justification, plead qualified, privileges.

In consequence thereof denied the plaintiffs' claim in toto and prayed for the suit to be dismissed with

costs.

There is a reply to defence dated 18th day of February 2004 and filed on 18/2/2004 whereby the plaintiff reiterated the content of the plaint, maintained that the defendants were actuated by malice evidenced by their publishing the words complained of and omitting to clarify the matter with the plaintiff before publishing the same. Added total denial of the allegations of the defence.

It is on record that parties were heard. The plaintiffs testimony is found at page 2002 of the record. The salient features of the same are as follows:-

- On 22/1/03 they had an AGM.
- Minutes from the supervisory committee were read.
- Her name was not mentioned in the report
- There was a deceased member who was a friend of her and her dues were paid to her (plaintiff).
- The report indicated that she took money belonging to the deceased and only gave them 10,000/=.
- The report did not say the amount she was given.
- When the minutes were read to court the plaintiff conceded that her name is not indicated in the report.
- That she was the vice chairlady of Kimute Sacco at the time.
- She proceeded the minutes as the plaintiff exhibits.
- That after presentation of the report people jeered at her and booed at her and shouted that she should be surcharged.
- That action was taken against her as the matter was reported to the police which were later stopped and deductions made from her salary.
- She tried to explain herself to the officials but they couldn't listen to her.
- She came to court because she wants to be assisted to gain back her personality and compensation for defamation.

When cross – examined the plaintiff made the following response:-

- Conceded that she had nothing in court to show that she was the chairlady of Kimute Sacco Society.

- Conceded that her names was not mentioned in the document but the description

- That since it was an AGM people would know she was the chairlady.

- Conceded she had no written authority to receive the money on behalf of the deceased's nominees.

- She could not recall exactly when the money was paid

- Conceded she was paid Kshs. 22, 231.00 by cheque and she was to give to one Kshs. 10,000.00

- She is not aware that Eve complained

- Concedes she was invited to attend a meeting to discuss the issue but she declined to attend that meeting.

- Concedes she later on applied for a loan from the society of Kshs. 12,000.00 and asked the society to retain the same if there was a compliant

- Conceded that the defendant were at the material acting as supervisory committee and they were empowered to discover fraudulent activities which would then be discussed in the general meeting.

- Conceded it was not the defendants duty to disclose it to the members before it is discussed in the AGM

- That she paid out the money to the beneficiary who could not come to give evidence because she was too old.

PW2 gave evidence to the effect that he was in the AGM when the supervisory committee tabled a report talking about a vice chairlady who took money on behalf of deceased person but only gave out a portion. The vice chairlady turned out to be the plaintiff.

- That she had wanted to join the society but by reason of what was said he decided not to join the society till it is proved that the chairlady is a honest person.

When cross – examined the witness conceded that he had nothing to show that he was a teacher in 2003, he had no business being in the AGM convene and conceded that the name of the plaintiff was not mentioned in the report.

- Conceded that he had not made any application to join the said society
- These was no way the witness could have known that the report referred to the plaintiff.

The defence called DW1 who stated the deceased was a member of the defendant's society. The brother who was by then in India wrote a letter asking for the mother's benefits and she was paid Kshs. 10,000.00 by the plaintiff. Later a cheque of Kshs. 40,000/= was paid to her brother Kwame. They are supposed to have been paid Kshs. 62,231.00

- That it is the family which decided on the terms of sharing of the mothers benefits.
- Confirmed that the 1st and 2nd defendants had passed on leaving only the 3rd defendant.

When cross – examined the witness stated that she was not aware that the grand mother was given part of the proceeds of the mother's death benefits.

The 3rd defendant gave evidence as DW2 and the salient features are as follows:-

- He has been the chairman of the supervisory committee since 2003
- The report was prepared by the central management committee and the supervisory committee. It is signed by the chairman and secretary of each committee. He simply appended his signature as a member of the supervisory committee
- The report was prepared by the secretary who was the late George Awiti.
- Confirmed Kshs. 22,231.00 was paid to the plaintiff on 18/7/02. She was the vice chair person

When cross –examined the witness stated that they did write to the plaintiff as that was the business of the central committee.

After hearing both parties the court delivered a judgment on 3/2/2009 and the salient features of the same are as follows:-

- The suit against the 1st defendant was withdrawn because he had passed on before the commencement of the hearing whereas although the second defendant had passed on before the defence the suit against him was not withdrawn.

- Summarized the evidence adduced by both sides and then made the following findings

- (i) That it is not disputed that the defendants published the words complained of in a report read during the societys' AGM
- (ii) It is not disputed that the plaintiff was the vice chairlady referred to in that report.
- (iii) From its ordinary meaning the report implies dishonesty and probably fraud on the part of the plaintiff
- (iv) If the defences put on the defendant do not hold, they will be held liable for defamation.

On the determination of the defences of justification, fair comment and qualified privilege, the learned trial magistrate made the following

(a) Particulars of fair comment and justification ought to have been given as required by the old order VI Rule 6A. These should be set out in the defence so that the plaintiff may be prepared to meet them and for that reason the court ruled that the plea of fair comment and justification could not stand.

(b) On qualified privilege the learned trial magistrate found asa fact that the report was presented to the AGM

(c) Also found as a fact that the plaintiff agreed that the by -laws of the society mandated the supervisory committee to discover fraudulent acts among its members.

(d) She had agreed that such issues were supposed to be disclosed at the AGM

(e) That from the evidence a complaint had been lodgedby a nominee of the late Benta Owino.

(f) Dues had been released to the plaintiff for onward transmission to the nominee. A letter had been written to the society by one of the nominees Kwame Owino on how these should be shared and

(g) That it is evident that the plaintiff did not make payments al requested by the nominees

(h) It is the learned trial magistrates' opinion that it was the duty of the supervisory committee to investigate the claim, do a report and present it to the members

(i) The only forum where such a report could have been tabled is at the AGM

(j) According to clause 32 of the by laws this was a meeting of the members and for this reason the learned trial magistrate made a finding that this occasion was privilege because there was a common interest between the publisher, defendants and the members of the society.

(k) And if the report was heard by non- members like PW2 the defendants are not to blame as there was no indication that he had been invited to attend the AGM.

(l) That the defence of qualified privilege was available to the defendants, there being no evidence of malice having been disclosed in the publication of the report.

On the basis of the afore set out reasoning, the learned trial magistrate found that the plaintiff had not proved her case and on that account dismissed the suit with costs to the 3rd defendant

The appellant became thereby aggrieved and filed this appeal citing 5 grounds of appeal namely:-

- 1. The learned trial magistrate erred on principles guiding the principle of qualified privilege**
- 2. The learned trial magistrate erred in finding that there was no malice on the part of the Respondent without considering that recklessness could lead to an inference of malice.**
- 3. The learned magistrate erred in not assessing what damage, she would have been awarded had the suit succeeded contrary to the well known authorities.**
- 4. The learned trial magistrate's decision was against the weight of evidence.**
- 5. The learned trial magistrate erred in making findings which were not supported by evidence on the record.**

Parties elected to file written submissions. Those of the appellant are dated the 25th day of January 2011, and filed on the 26th January 2011 and a perusal of the same reveals that the following points have been stressed:-

- That the learned trial magistrate rightly ousted the defendants defence of justification and fair comment
- That it is on record that the learned trial magistrate relied on the defence of qualified privilege to oust the plaintiffs claim but he failed to note that this defence is only available to a person who acts honestly and without malice
- That there is a requirement that the defendant has a duty to ensure due care when making communication to ensure that the same is communicated only to persons who have a legitimate interest to hear the communication.

- That in the circumstance of this case, qualified privilege is lost because the communication was made to the non members who had been invited by the society with a view to joining the society among them PW2 who attended the meeting with a view to joining the society and heard the content of the report and as a result what PW2 heard his attitude towards the appellant changed adversely.
- The court is invited to note that the defence called no witnesses to controvert the assertion that non members attended the meeting with the defendants knowledge
- The court failed to note that DW2 agreed in his evidence that the AGM was attended by members and invited guests whom the court failed to ask DW2 to clarify who these invited guest were. For this reason the court is invited to find that the lower court's finding that no other people were invited was against the weight of the evidence on the record.
- There was no evidence that the appellant had been invited to sit with the supervisory committee during the investigation
- The court is invited to be guided by the principle that malice may be inferred where no effort to seek clarification has been made.
- That it was wrong for the learned trial magistrate not to make a finding on quantum and for this reason this court should exercise its power under Section 78 of the Civil Procedure Act and make an assessment of the damages available upon allowing the appeal.

Counsel for the Respondent informed the court that he relies on their submissions filed before the lower court which are found at pages 192 – 195 of the record. A perusal of the same reveals that the following points which were stressed before the lower court, they are still being relied upon by them:-

- It was their stand that the plaintiff had not made out her case against the 3rd defendant on a balance of probability because

(a) Her testimony was simply put as an assertion that as at the time she was the chairlady of Kimute Sacco Society, that none members interested in joining the society had been invited to attend, conceded that she received money Kshs. 22,000.00 on behalf of the nominee of the deceased members (Benta Owino), that nobody except the members could know that she was the one named in the report, she could not prove that she paid Kshs. 12,000/= to the nominee Sarah Owino, conceded to have received a letter from one Kwame Owino nominee of Benta Owino directing on how the monies should be distributed.

- The court is invited to go by the evidence of DW1 that as at the time the minutes were made she had not received Kshs. 10,000/= from the plaintiff / appellant and which money was later paid to her by the society.
- DW2's evidence that the nominees of Benta Owino were DW1 and Kwame Owino were true.
- The court to note that DW2 said the society invited the plaintiff / appellant to a meeting to discuss the benefits of the nominees of Benta Owino but she declined to attend the said meeting a fact conceded by her in her evidence.
- That the society denied knowledge of Sarah Audi as a nominee of Benta Awino a matter not established by the plaintiff / appellant.
- That all that has been stated above all go to establish the existence of the defence of fair comment.
- The court was invited to be guided by the provisions of Sections 15 of the defamation Act which is to the effect that the defendant is not required to prove each and every truthfulness of the allegation of facts made by him.

- That the minutes tabled correctly stated that the plaintiff received money on behalf of the nominee but failed to account for the whole of the amount received considering that it was proved that the plaintiff withdrew Kshs. 22,223.00 from the society's account but only remitted Kshs. 12,223/= to DW1.
- Further that the publication was made by the 1st and 2nd defendants who had since passed on and the 3rd defendant who only appended his signature could not be held accountable
- On damages the court had been invited to be guided by the principles on assessment of damages which is to the effect that this should not be inordinately too high so as to curtail the freedom of expression

(ii) That the court also to be guided by the provisions of Section 16A of the law of defamation Act which pegs damages on an imputation of commission of a crime punishable by three (3) years imprisonment to not less than 400,000/= but herein since the allegation falls short of a crime the damages if any should be less than Kshs. 400,000/= and went on to suggest an award of Kshs. 100,000.00

- Whereas on aggravated damages the court was invited to find that this award of damages is not available to the plaintiff because there had not been demonstration that there was a malicious intention on the part of the defendant to publish the label.
- On malice, the court was invited to note that the plaintiff had not shown any basis for pressing malice on the part of the defendant in making the publication. The court was further invited to note that though the plaintiff pleaded malice in her plaint, she failed to give particulars of the same as required by the old Order VIA (3) and further after the defendant pleaded fair comment and justification the plaintiff did not go a head to supply facts from which malice could have been inferred .
- But if the court is minded otherwise then they suggested an award of Kshs. 30,000/= for aggravated damages.

On case law the applicants counsel relied on the same case law as had been presented to the lower court . An extract from **Gatley on Libel and Slander sixth Edition 1967**, at paragraph 520 page 239 to the effect that: **“The defendant must be careful to make his communication only to those persons who have a legitimate interest or duty in relation to the subject matter.....”** A man ought not to be protected if he publishes what is in fact untrue of someone else when there is no occasion for his publishing it to the persons to whom he in fact publishes it .

The case of **Godwin Wanjiku Wachira =vs= Okoth [1977] KLR 24** where Muli J as he then was held inter alia that **“malice could properly be inferred from the failure of the defendants to inquire into the facts and true position regarding the appeal from the court records which would have disclosed that the plaintiff had appealed against his conviction”**.

The case of **Machira t/a Machira & Co Advocates =vs= Wangethi Mwangi Nation Newspapers Nairobi CA No. 179 of 1997**. At page 136 in the judgment of R. S. C. Omollo at line 12 from the bottom that:- **“Malice can be inferred from a deliberate or reckless or even negligent ignorance of facts.....”**

This court has given due consideration to the rival arguments herein and considered them in the light of the principles of case law cited to court for guidance as well as the facts of the record as assessed and the court proceeds to make the following findings on the same:-

1. The jurisdiction of this court has been approached in its appellate capacity and by reason of this, this court's mandate is to revisit this issue as set out by the provision of Section 78 of the Civil Procedure Act which donates the appellate power. This court has duly revisited the same and in its construction of this Section, this court has power to do the following in this appeal:-

- (a) **To determine the case finally**
- (b) **To remand a case**
- © **To frame issues and refer them fro trial**
- (d) **To take additional evidence or to require the evidence to be taken.**
- (e) **To order a new trial .**
- (2) **Subject as aforesaid, the appellate court shall have the same power and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of such instituted therein.**

This court has Judicial Notice of the fact that this provision of law has been construed by the court of appeal and dutifully followed by the superior court to the effect that the call of the appellate court is to revisit and re-evaluate the facts tendered before the court whose decision is appealed from and determine whether the conclusions reached by the lower court are to stand or not. This court has done so and in its opinion the following are its findings on the evidence before the lower court.

- (a) The lower court had found as a fact that
 - (i) Indeed the plaintiff / appellant and the 3rd defendant / respondent were members of the named Kimute Sacco Society.
 - (ii) That both were present during the AGM during which the alleged publication was alleged to have been made.
 - (iii) That indeed the publication complained of had in fact been made because it had been agreed by both sides that the contends were contained in the supervisory committee's report which was tabled to the AGM as a routine in accordance with the society's by laws.
 - (iv) That the defendants did not deny publication but said that this was a routine practice and for this reason they were entitled to publish the same.
 - (v) That the name of the plaintiff / appellant had not been mentioned and it is only the members who could know that it refereed to the plaintiff / appellant
 - (vi) That in so far as the record went to show only members were in attendance.
 - (vii) Further that although PW2 allegedly attended the meeting as a non member, there was no proof that he had been invited to the meeting as he produced nothing to prove the invitation or attendance.
 - (viii) That since it was conceded by the plaintiff that the supervisory committee was entitled to investigate allegation of fraud, amongst the members and then table them to the AGM they were entitled to take refuge under the shield of qualified privilege.
 - (x) That it had been demonstrated and conceded by the plaintiff /appellant that indeed she had received money on behalf of nominees of one deceased Benta Awino but she admitted that not all finds reached the nominees and she had to be deducted the same from her salary and for this reason there was a genuine

complaint and the supervisory committee was entitled to act on it. That the defence of fair comment and justification was available to the defence. However since they had not particularized the same on their defence they are precluded from relying in the same as per the requirement in the old Order VIA Civil Procedure Rules which made it mandatory for such particulars to be given in order for them to held.

(xi) The learned trial magistrate however did not go further to make findings on the merits of the said defences in relation to the evidence adduced on the record whether these could have hold had they bee particularized

(xii) That the learned trial magistrate for the reasons given in the assessment found the defence of qualified privilege well found ed upheld it and then dismissed the plaintiff's /appellants claim as against the defendant.

(xiii) That upon dismissal of the plaintiffs / appellant claim, the learned trial magistrate never went further to make an assessment of damages which would have been awarded had the plaintiff succeeded in her claim.

That the afore set out findings are the ones which guide the appellant necessitating this appeal. There are grounds of appeal already set out herein which this court proceeds to answer as hereunder.

With regard to ground 1, of the appeal, the appellants complaint is that the learned trial magistrate erred on the principle of qualified privilege. The appellant herself through her counsel has exhibited an extract from Gatley On Libel and Slander which states “**clearly that where a publication has been made and the same is not denied like in this case, in order to be shielded the publisher has to demonstrate that the publication was made to those who were entitled to receive it and that the same was not made maliciously**”.

In the assessment of evidence in line with this principle the learned trial magistrate accepted as a fact that it had been demonstrated by the defence and accepted by the plaintiff / appellant that:-

(i) The supervisory committee of the Sacco Society was mandated to investigate allegations of fraud.

(ii) The matter giving rise to proceedings before the lower court related to allegations of complaints raised on failure of the appellant to hand over what she had received from the society on behalf of nominee of a deceased member something which turned out to be true as admitted by the testimony of the appellant herself and DW1

(iii) That indeed the appellant had conceded that there is a portion of this money which she did not hand over to the nominees but allegedly handed over to a family member not indicated to be a nominee, that is the mother of the deceased, but who could not come to court to confirm the handing over of those funds to her because she was too old. The appellant further confirmed that this money was recovered from her salary by the society. Although she said the recovery inconvenienced her as she could not apply for a loan to sustain her son in Germany forcing her son to be sent home from Germany, there is no mention on the appellants', part that she protested the recoveries of the said funds from her salary by the society or that she took out an action against the society to recover the same.

By reason of this conduct on the part of the appellant the learned trial magistrate was of the opinion that the complaint was genuine and the supervisory committee was entitled to investigate the same.

The veil of privilege according to the appellant was removed by reason of the information being disclosed to persons like PW2 who were present in the said meeting at the invitation of the Society as potential members as well as alleged guests mentioned by DW2 whom the learned magistrate allegedly never pursued to inquire who those invited guests mentioned by DW2 were.

The learned trial magistrate assessment on the evidence of PW2 was that there was no proof that PW2 had been invited to this meeting or that he attended. In order to fault this findings, it was necessary for the appellant to demonstrate that indeed there was proof that PW2 had been invited to attend the meeting and also that he was in attendance. Such proof would have come from production of a letter of invitation and signed up attendance list of attendees evidence which was not before the court. This court is satisfied that on this basis, the learned trial magistrate was entitled to discount PW2's invitation and attendance of the said meeting.

As for the invited guests mentioned by PW2 the 3rd defendant now Respondent, it was up to the appellant through her counsel to bring out this issue through cross – examination to demonstrate that invited guests were not those who were entitled to be in the meeting. For this reason the learned trial magistrate was entitled to ignore the issue of invited guests more so when DW2 was categorical that only those entitled to be in that meeting were the ones who were in the meeting and no strangers attended.

This being the finding of this court, the court confirms the lower court's findings on privilege and dismisses ground 1 of the appeal.

With regard to ground 2 on failure to find that there was malice. As submitted by the Respondents in their submissions before the lower court which was adopted as their submission on appeal, particulars of malice were not given in the plaint as required by the provisions of the old Order VIA Civil Procedure Rule. The court is alive that when this issue was raised by the defence in their defence the appellant made an attempt to cure that defect by particularizing two clause particulars of malice in the reply to defence. This move did not cure the defect in the main plaint as the reply to defence cannot be taken to be an amendment to the main plaint what the appellant should have done should have been for her to amend the plaint and give particulars of malice. In the absence of such particularization, the issue of malice stands faulted on the same basis as the discounting of the allegations of fair comment and justification which had not been particularized as well by the defence.

The foregoing finding notwithstanding it is on record that the learned trial magistrate made findings as a fact that :-

- (a) The complaint had been raised**
- (b) It was found to be genuine**
- (c) It was responded to and resolved**
- (d) The investigation was within the mandate of the supervisory committee of the Sacco Society to investigate such complaints and table them before the AGM**
- (e) That the tabling was done to the proper audience.**

These afore set out findings coupled with the fact that the appellant conceded to have received the money and gave a portion to a person though alleged to be a relative of the deceased, but who could not come to court to confirm the receipt of that money, and since no complaint was raised by the appellant at her having that amount deducted from her salary, operates to oust any existence of malice and the learned trial magistrate was justified in not making such a finding in favour of the appellant.

With regard to ground 3, this court is satisfied that although the plaintiff's claim had been dismissed it was imperative on the trial magistrate to make an assessment of the damages the appellant would have been awarded had she succeeded. The appellant is therefore entitled to ask this appellate court to revisit that issue. The jurisdiction to do so is donated by Section 78 (2) of the Civil Procedure Act already set out herein. When so revisited, it is clear that as per the content of the submissions the court would have been enjoined to be guided by provisions of law applicable namely the defamation Act Cap 36 law of Kenya. Section 16 A of this Act pegs damages of defamation where there is an imputation of a crime punishable with three (3) years imprisonment to not less than Kshs. 400,000.00. It had been alleged by the appellant that the issue had been reported to police but then it was either withdrawn or not followed up but it is not clear who reported, either the Society or the appellant. The details did not come out clearly.

This court has revisited this issue in the light of the submissions of both counsels that was before the lower court and now current before this court and this court is of the opinion that having found as a fact that the complaint raised against the appellant was genuine, and that the investigation confirmed its existence, and that the appellant made good that complaint and never moved to recover from the Society what was deducted from her in satisfaction of the said complaint the court agrees with the respondents' submission that damages receivable would have been minimal.

Indeed it is on record that there was mention that the society should have sought clarification from the appellant before publishing the report. Despite this assertion on the part of the appellant, there appear to be a general consensus from the evidence, that the usual practice was that investigation are carried out and reports tabled in the AGM. It is however clear from the evidence that when called upon to discuss the issue she declined to attend the supervisory committee meeting a matter admitted by the appellant. This would have been a mitigating factor. Another mitigating factor is that the appellants name was not mentioned in the report meaning that it is only those who were privy to the information of her having received the money in question who could link her to the report.

Turning to the other general principles of law on assessment of damages, that this court has judicial notice of a court of law when assessing damages, has to bear in mind the following principles

- (a) Damages at large are within the discretion of the assessing court but like all other Judicial discretions the court is enjoined to exercise the same Judiciously, not capriciously and with a reason.**
- (b) Damages are not meant to enrich a party but to compensate for the injury suffered and restore the victim to the position they were in before they suffered the injury.**
- (c) The damages assessed should not be too low or too high.**
- (d) Where past awards are taken into consideration by the court these should be treated as mere guides and each case should be treated on its own facts.**
- (e) Where past awards are taken into account as guides, the age when assessed and the strength of the Kenya shilling when the awards were made and when the current award is being made also**

has to be taken into consideration.

When the afore set out principles of both Section 16 A of the Defamation Act as well as the afore said cardinal principles are taken into consideration and applied to the facts herein had the appellant succeeded an the award of damages would have been within the range suggested by the Respondent's counsel of Kshs. 100,000 to Kshs. 150.000.00 The reason being that:-

- (1) There was demonstration of a genuine compliant having been raised necessitating the investigations being carried out by the supervisory committee.**
- (2) The investigation was within the mandate of the supervisory committee.**
- (3) The appellants name was not highlighted in the report and reference to her was limited to those who knew the facts.**
- (4) Appellant conceded to have received the proceeds complained and alleged to have given a portion to the mother of the deceased who could not be called to court to confirm receipt.**
- (5) Appellant conceded that the short fall was deducted from her dues but she did not protest or recover the same from the society which means she agreed with the genuiness of the compliant.**
- (6) She was not expelled from the Society**
- (7) Had the defence of justification and fair comment been pleaded in accordance with the law, these could have been upheld as there were facts to support them.**
- (8) Aggravated damages were not available as ,malice had not been established on the facts and secondly the same had not been pleaded by way of particularization and as such could not be upheld in favour of the appellant.**

With regard to ground 4 and 5, on the basis of the assessment done herein above the decision of the learned trial magistrate was supported by the evidence before him. The same is solid and so the decision of the lower court cannot be said to be against the weight of the evidence.

For the reason given in the assessment the appellant's appeal is dismissed with costs the Respondent.

Delivered, dated and Signed at Kisumu this 29th day of September, 2011

R. N. NAMBUYE

J U D G E

RNN/aao