



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Civil Case 85 of 2005

KAGWIRIA MUTWIRI KIOGA.....PLAINTIFF

VERSUS

THE STANDARD LIMITED.....1ST DEFENDANT

PATRICK MUTHANGANI.....2ND DEFENDANT

KIPKOECH TANUI.....3RD DEFENDANT

NIXON NG'ANG'A.....4TH DEFENDANT

Defamation - Libel - defamatory statement published in a Newspaper report -

- **Defence of fair comment on a matter of public interest - publisher pleading fair comment.**
- **To dislodge defence of fair comment - Plaintiff must show malice, ill will, spite or other improper motive by the Defendant.**

JUDGMENT

Introduction

This judgment relates to two cases -

- (1) MERU HCCC No. 84 of 2005 between SIRIANKA MWONJIRU KINYUA vs. THE STANDARD LIMITED and NIXON NG'ANG'A and**
- (2) MERU HCCC NO. 85 OF 2005 between KAGWIRIA MUTWIRI KIOGA vs. THE STANDARD LIMITED, as 1st Defendant, PATRICK MUTHANGANI, as 2nd Defendant, KIPKOECH TANUI as 3rd Defendant, and NIXON NGANGA as the 4th Defendant.**

The complaints or statements of claim in both cases are dated 5th September 2005, and were both filed on 12th September 2005. In so far as the claim by Sirianka Mwonjiru Kinyua is concerned, the alleged defamatory words were published on 29th April 2005 by the 1st Defendant's Newspaper, the Standard wherein at p. 4 - Headlines it said -

"AID CASH ended up in a bar probe reveals how government officials extorted money from groups."

REVEALED: "lack of proper monitoring let NACC issuing projection completion certificates to organizations which do not do anything on the ground. It is puzzling that newly registered NGO's could apply and receive money and fraudulently account for a large amount in three months. The report cites the Meru based SIMOA WOMEN GROUP as an example which is lead by SIRIANKA K. Kinyua of the Ministry of Water Development which received Kshs 1.2 million but there was no evidence of project activities.

It proposes that MRS KINYUA be investigated for a conflict of interest and in the management of the received funds."

Sirianka claims that the publication is damagingly defamatory of her as she is a public servant who has been portrayed as a robber, a thief, dishonest and fraudulent, a person with no morals or qualms to steal from the sick and the dying, and therefore unfit to hold public office, or leadership of any kind whatsoever (para. 5). This plaintiff also claimed in paragraph 6 of the plaint that as a result of the publication her reputation and standing in society has been brought into contempt, ridicule and odium and that her image and standing in society and among her workmates, associates and even relatives has been thrust into hatred, refractory and disrespect. The Plaintiff also claimed that she had been riled and poorly portrayed in her job as a Government Servant and that her job was now at stake.

For those reasons, the Plaintiff claimed that she had suffered immense general damage, both, exemplary and aggravated.

In HCCC 85 of 2005, the Plaintiff, Kagwiria Mutwiri Kioga pleaded in paragraphs 4, 5, 6, 7 and 8 of the Plaintiff as follows-

4 (a) that at all material times, the three Defendants, (Patrick Muthangani, Kipkoech Tanui and Nixon K. Ng'ang'a) were employees, servants, or authorized agents of the 1st Defendant, and were at the material time acting in the course of their duty,

employment and/or calling.

(b) that on or about the 28th April 2005 and on other days subsequent, thereto the three Defendants published in the 1st Defendant's Newspaper "the Standard" of that day concerning and about the Plaintiff a purported news item as follows:-

At p.1 Headlines -

"Robbing the dying"

Revealed: Scandal of how government officials and activists turned Aids Council into a cash cow and took money for fighting disease."

It continues:-

"Top Government Officials, University Professors, Doctors and Activists have turned the fight against aids into a cash cow taking home Kshs. 4.3 billion provided by donors to help the sick and the dying".

(c) this report is said to have been written/compiled or published by the 2nd Defendant (Kipkoech Tanui) and the 4th Defendant, Nixon Ng'ang'a.

(d) then the Headline which strands page 2 to page 3 of that day's Papers states:-

"Shame of Public Officers feasting on HIV/AIDS Funds"

Then a column of the said officers is laid down on p.3 starting with Dr. M. W. Gachara and ending with the Plaintiff's name as "K. M. Kioga" starting with her PIN Number - 79 amount to alleged to have been feasted on as Kshs 95,500/= and the year of feasting as 2002.

(e) the report on that page is said to have been compiled by Patrick Muthangani (the 2nd Defendant).

(f) then at p.4 of that day's Newspaper is headlined as follows:-

"How top NAAC officials irregularly paid themselves over Kshs 37 million."

And on column 5 of that page, the report states:

"..... the Council irregularly paid Kshs 6 million in bonuses to staff that had completed a year of service in 2002. The payments which had not been approved by the government were made directly to the workers Bank Accounts without their knowledge."

"However it notes that Kshs 1,580,076/= had been recovered from staff seconded to the Council from Government Ministries." It adds that five Senior Council Officials - Orege, A. S. Taiwa, B. K. Osoro; Mr. Karanja; E. K. Kasaka; K. M. Kioga, irregularly received more than Kshs 1.5 million in salary increments."

5. the Plaintiff states that this publication is damningly defamatory to her as a public servant as she has been portrayed therein as a robber, thief, dishonest, and fraudulent, a person who has no morals or qualms to steal from the sick and dying and therefore unfit to hold any public office or leadership of any kind whatsoever;
 6. that as a result of the said publication, the plaintiff's reputation and stand in society has been brought into contempt, ridicule and odium and that her image and standing in society and amongst her workmates, associates and even relatives has been thrust into hatred reprobation and disrespect;
 7. the Plaintiff states further that she has been cited and poorly portrayed in her job as a Government Servant and that her fate is now at stake;
 8. the Plaintiff has therefore suffered immense general damages, including both exemplary and aggravated;
- And finally -
9. that due notices have been duly issued to all the Defendants who have totally denied the claim and are unwilling either to acknowledge or to negotiate any settlement;

In their joint Statement of Defence dated 19th September 2005 and filed on 20th September 2005, the Defendants at paragraph 3, admit publishing words complained of at paragraph 4 (supra), of the Plaintiff, but deny that the same were falsely and maliciously published or that the same were defamatory of the Plaintiff,

and put the Plaintiff to strict proof thereof. The Defendants:-

- (a) aver that the suit is incompetent frivolous and does not disclose any or any reasonable cause of action against them as the words complained of were published on an occasion of qualified privilege, and that the suit ought to be struck out for being an abuse of the process of the Court; (para 4),
- (b) deny that the words complained of can be construed either in their natural and ordinary sense or by way of innuendo or any necessary implication in the manner or form stated in paragraphs 5 (supra) of the Plaintiff, and put the Plaintiff to strict proof thereof,
- (c) deny that the words complained have exposed the Plaintiff to ridicule or scandal or have lowered the Plaintiff's standing socially as alleged in paragraph 6 (supra) of the Plaintiff, or at all,
- (d) aver that the Defendants are strangers to the Plaintiff's allegations in para. 7 (of the Plaintiff), and put the Plaintiff to strict proof thereof;
- (e) aver that the words complained of contained issues of great public interest published in an occasion of qualified privilege, and in so far as they consist of expressions of opinion, they are fair comment made in good faith and without malice on a matter of public interest namely, that the general public needs to be informed of the use of the funds allocated for HIV/Aids related projects in a country marred by the scourge of AIDS.

Order VI Rule 6A (2) requires that where in an action for libel or slander the Defendant alleges that, in so far as the words complained of consist of statements of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest, or pleads to the like effect, he shall give particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true. In accordance with the requirements of the said rule, the Defendants gave the particulars in paragraph 8 of their Statement of Defence

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- (a) HIV/AIDS is widespread in Kenya and hundreds die daily from complications caused by the disease. AIDS was declared a National Disaster in

1999. This is therefore a matter of great public interest;

- (b) That the public has a direct interest in knowing how funds aimed at reaching and alleviating the condition of AIDS sufferers are used;**
- (c) The creation of the National Aids Control Council (NACC) evidences the extent of the Aids concern by the Government of Kenya;**
- (d) Millions of shillings are allocated every financial year to support the various AIDS/HIV related projects across the country;**
- (e) Corruption in Government establishments has reached epic proportions resulting in public scrutiny and concern;**
- (f) the words published by the Defendants arise from a report, titled FINANCIAL MANAGEMENT AUDIT of the NATIONAL AIDS CONTROL COUNCIL by the Office of the President's Efficiency Monitoring Unit (EMU);**
- (g) the said Efficiency Monitoring Unit has since released the report to the public;**
- (h) the Defendants have a moral duty to publish accurate reports on issues that concern all Kenyans and the public has a commensurate duty and right to receive information of public interest;**
- (i) the Defendants published the words in good faith and without malice;**

Order VI Rule 6A(3) provides inter alia that if the Defendant pleads that any of the words or matters are fair comment on a matter of public interest or were published upon a privileged occasion, and the Plaintiff intends to allege that the Defendant was actuated by express malice, he shall file a reply giving particulars of the facts from which the malice is to be inferred.

In line with the requirements of the said rule, the Plaintiff filed a Reply to Defence dated 26th September 2005;

and in paragraph 2 thereof set out the following FACTS AND MATTERS FROM WHICH THE MALICE MAY BE INFERRED -

- (a) the Defendants published the words complained of recklessly;
- (b) the Defendants had no honest belief in truth of the said words;
- (c) the Defendants have neither withdrawn the words complained of nor have they given or offered any apology or correction;

The Plaintiff also averred that the said words were not fair comment alleged in paragraph 8 of the Defence but were assertions of fact, that the words were neither fair comment nor bore no comment, nor did they relate to any matter of public interest, and the Plaintiff would object that the facts and matters stated in paragraph 9 of the Defence are not sufficient in law to render the occasion of publication privileged, nor do they constitute occasion of qualified privilege, and reiterated the prayer for general, exemplary and aggravated damages.

In addition to the above cited Pleadings/Plaint, Statement of Defence, and Reply to Defence, the Plaintiff was also subjected to Interrogatories filed with the application for the issue thereof dated and filed on 24th February 2006. The Plaintiff replied to the said Interrogatories per Answer to Interrogatories dated 30th March 2006. The Plaintiff denied that she had ever received any bonuses from NACC, except two increments in the year of 2002, in the sum of Kshs 7,000/= and Shs. 10,000/= respectively. The Plaintiff denied ever having been asked to refund any moneys to NACC or being questioned by any Government agency on the matters in issue.

THE EVIDENCE

(1) Meru H.C.C.C. No. 84 of 2005

No evidence was led by the Plaintiff in support of her claims in this suit. On the other hand, at the commencement of the hearing of the Defence, on 25th June, 2009 it was noted, as there was no objection by Counsel for the Plaintiff in this matter, and also in Meru HCCC No. 85 of 2005, that the Report produced by Mr. Gerishon Wangira (DW1) would mutatis mutandis apply to HCCC No. 84 of 2005. That Report showed, as later discussed herein, that it was produced by the Government, and was accessible to any person upon request.

Sirianka Mwonjiru Kinyua led no evidence to countermand the Defendant's defence in respect of fair comment and qualified privilege based on that Report.

The Defendants had filed a single Statement of Defence in that suit pleading fair comment and qualified

privilege. As no evidence was offered by the Plaintiff Siranka Mwonjiru Kinyua in that suit (HCCC 84 of 2005) the same is hereby dismissed with costs to the Defendants.

(2) THE EVIDENCE - MERU H.C.C.C. NO. 85 OF 2005

The trial of this action commenced before my brother Lenaola J. on 14.03.2007 when the Plaintiff testified in support of her claim for general, aggravated and exemplary damages. The evidence showed that she had been employed by Ministry of Planning for one year between February 1990 and February 2001 when she moved to the Kenya Red Cross Society from 2001 to 2002. The Plaintiff joined the National Aids Control Council with effect from 10th July 2002, in the Position of Provincial AIDS Control Coordinator for the North Rift and was based in Eldoret. Her gross salary was Shs 93,500/= inclusive of basic pay, house and entertainment allowance. Other terms included leave allowance and gratuity payable at the rate of 31% of basic salary earned after every 3 years of contract.

The letter of appointment was signed by the then Director - One Dr. Margaret Gachara and after the usual probationary period the Plaintiff was confirmed in her employment on 11.10.2003 by a letter signed under the hand of one Dr. Orege, Acting Director of NACC.

(b) The Plaintiff's Duties

The Plaintiff testified that her duties were:- Coordinating HIV/AIDS activities by all sectors both public and civil (society). The Plaintiff was in-charge of the Regional Office of NACC. She also testified that her salary was determined by the Public Sector Regulations through the Council.

(c) The alleged Defamation

The Plaintiff testified that on 28th April 2005, she read the Standard News Paper and found a Headline - "Robbing the Dying". The article was authored by Defendants, and that her name appeared in a Table including her personal number (No. 79), and salary of Kshs. 93,500/=. The Plaintiff denied being one of those who received Shs 1.5 million salary increments, that she had only been in employment for 6 months, and was only a middle level officer, not a senior manager.

The Plaintiff acknowledged that the source of the Newspaper article was the Efficiency Monitory Unit (EMU) - which had not been released to her, she was never interviewed or consulted before the story was published. The Council refuted the story and termed it unfounded.

The Plaintiff's letter to the Defendants dated 5.06.2005 demanding an apology and admission of liability of

damages to her was replied to by Mr. Moses Kurgat, the 1st Defendant's Consultant - Legal Advisor and there was no apology but an explanation that the source of information was privileged. The letter of reply also said that the Plaintiff was not implicated in any wrong doing.

(d) The ridicule and contempt

The Plaintiff testified that after the report was published she was attending a workshop in Nairobi, and her family which is scattered in Eldoret and Meru called her to express displeasure. Her daughter called her and asked her if she was going to jail. The Plaintiff further testified that she had built a house, and "the public said that I used AIDS money to build it. My career prospects suffered as people asked me in interviews whether I was part of feasting in the AIDS Council". The Plaintiff testified that she has never ever stolen from any one, and that this was her first time in court, and therefore sought damages for the defamation and costs too.

(f) the Cross-Examination

In cross-examination by Mr. Kamunde the Plaintiff testified that she was still an employee of NACC, and had been offered a new 3 year contract. The Plaintiff admitted the Report (by EMU) was made pursuant to corruption allegations in NACC and the investigations were ordered by the Head of the Public Service, and admitted she was one of those who received irregular payment by way of bonuses, and also salary increments, being part of Sh 1,597,200/= million arrears paid without the advice of the Director of Personnel Management (DPM) and a full Council Resolution. The Plaintiff also admitted her name appears at p. 187 of the Report as having received -

(1) Leave allowance - Kshs 93,500/=

(2) Transport allowance - Kshs. 374,194/= and

(3) Increment Arrears - Kshs 57,000/=

All totaling Shs 524,694/=

The Plaintiff also admitted that there was no procedure that a Report should first be given to the person who commissioned it, or that it should have been given to the Plaintiff for comment before publication by a Newspaper. On being shown the Statement of Defence paragraph 8, the Plaintiff's comments were -

(i) it is true that HIV/AIDS is widespread in Kenya and hundreds die daily from it.

(ii) HIV/AIDS was declared a National disaster in 1999.

- (iii) I confirm that issues of HIV/AIDS are of great public interest and the public has a right to know how funds raised for AIDS/HIV are used;
- (iv) NACC was created by the Government to take care of the AIDS concern in Kenya;
- (v) Millions of shillings are allocated generally every year to fight HIV/AIDS. The NACC is allocated money by the office of the President under the recurrent budget
- (vi) I am not aware of corruption efforts by the government in public establishments. I am aware that Kenya Anti-Corruption Commission (KAAC) was created to investigate corruption, including public offices, and that it is a creation of the Government;
- (vii) that the news published by the Defendants is partly from the Report by the Efficiency Monitoring Unit but that the "Robbing the Dying" and AIDS Council as a cash cow "were of their (Defendant's) creation".
- (viii) that if the Plaintiff was a member of the public and saw the report (by EMU), her conclusion would be that people were paid under their contracts but unlawfully because the Report says that payments were not approved by the Council or DPM. That irregular payments ordinarily amount to a scandal. But that what is in the Report of EMU was not a scandal.
- (ix) A Report about NACC is a matter of public interest, and that members of the public are entitled to such documents - even though the Plaintiff was not sure that members of the public are entitled to it,
- (x) agreed that the 1st Defendant has a right to refer to its source of information, that it has a duty to report accurately, and that this time they did not do so. They should have done so in the public interest;

(xi) that the Defendant made their Report with malice, even though she did not know them personally, it was malicious to use her name to sell their newspaper;

In re-examination by Mr. C. Kariuki, learned Counsel for the Plaintiff, the Plaintiff reiterated her contention that the Report by EMU had no mention of a scandal, that it was merely a financial and audit report, with no signature of the person who made it, and neither does it have a date when it was handed over, and it has no news - "Robbing the dying" or some officers feasting on their money or that NACC officials paid themselves money; that she was not involved in payment of NACC moneys, she could not pay herself and that the leave and transport allowance paid to her in 2002-2003-2004 was her lawful entitlement and for those reasons, the story by the Defendant was malicious particularly as the Report by EMU was not itself conclusive.

That was the Plaintiff's evidence. The Plaintiff neither called her daughter who had read the story and asked her whether she was going to jail, nor any member of her family scattered in Eldoret and Meru or participants at the workshop to support her claim she would be shunned by right thinking members of society.

(6) The Defence Evidence

The Defendants called two witnesses, Mr. Gerishon S. Wangira (DW1), and Mr. Patrick Muthangani, the Second Defendant in this suit (DW2). The evidence of DW1 comprised the description of the Efficiency Monitoring Unit and its work. DW1 testified that the copy he produced in Court was neither signed, nor dated, but the original copy in the custody of Unit was signed. He testified that EMU, is one of the Government's Watchdog institutions. It undertakes financial and management audit of all public units.

Patrick Muthangani testified that he is a journalist and works as such for the Standard Ltd - the 1st Defendant. He testified that he was one of the authors of the offending article. The article was based upon the Report prepared by EMU. He testified that he does not know the Plaintiff - Kagwiria Mutwiri Kioga, that apart from the Plaintiff, the Report also referred to five other senior officials of NACC, namely, Dr. P. A. Orege, A. S. Taiwa, B. K. Soro, M. Karanja, E. K. Kasaka and Ms. K. M. Kioga who are also reported to have received part of the sums totaling Shs 1,597,000/= in addition to various earlier irregular payments as bonus. Mr. Mathangani testified that he had no doubt about the Report by EMU. Its authorship or origin is EMU, a public institution. The Report was given to him by Kipkoech Tanui, the 3rd Defendant. He expressed no personal view in the article. The Headline of an article are a preserve of the Editorial Staff but the Headlines relate to what is reported.

The 3rd and 4th Defendants did not testify and I doubt that they would have given testimony different from that of either DW1 or DW2.

ANALYSIS OF EVIDENCE

I have deliberately set out at length, the evidence of the Plaintiff. The evidence by the two defence witnesses was short,

and of necessity, they could not say much more than what they said. The foundation of the allegedly offensive articles was the Report by the Efficiency Monitoring Unit located in the Office of the President. The Plaintiff took offence at the publication by the Defendants of her name among those who were mentioned in the Report and in particular the headlines - **ROBBING THE DEAD REVEALED**, and **HOW TOP NACC OFFICIALS, IRREGULARLY PAID THEMSELVES OVER KSHS. 37 MILLION**.

The Plaintiff claims that she was thereby defamed, and sought general aggravated and exemplary damages, as well the ancillary costs and interest, ostensibly in vindication of her reputation which she alleged has been brought into contempt, ridicule and odium by the publication contained in the 1st Defendants Newspaper, the "Standard".

Proof of liability in this suit like other civil claims, lies with the Plaintiff who must show on the balance of probability that the words pleaded at paragraph 4 of the Complaint would convey in their ordinary meaning or would be understood in light of the attributes set out in paragraph 5 and that the same would have the concomitant effect set out at paragraph 6 of the Complaint and that the same words were ultimately defamatory. The claim is one in tort for libel. The Plaintiff has therefore to show that the words published tend to make people think less or worse of her or that the publication exposed her to ridicule. The proof of these facts would overcome any defence raised by the Defendant to the claim.

In this case, the Defendant's jointly pleaded the defence of qualified privilege under Section 7 of the Defamations Act (Cap. 36), Laws of Kenya). Section 7 aforesaid says:-

"7(1) Subject to the provisions of this Section the publication in a newspaper of any such report on such matter as is mentioned in the Schedule to this Act shall be privileged unless such publication is proved to be made with malice;

(2) In an action for libel in respect of the publication of any such report or other matter as is mentioned in Part II of the Schedule to this Act, the provisions of this Act shall not be a defence if it is proved that the Defendant has been requested by the Plaintiff to publish, in the newspaper in which the original publication was made, a reasonable letter or statement by way of explanation or contradiction and has refused or neglected to do so, or has done so in a manner not adequate or not reasonable having regard to all the circumstances.

(3) Nothing in this Section shall be construed as protecting the publication of any matter the publication of which is prohibited by law, or of any matter which is not of public concern and the publication of which is not for the public benefit.

Section 7A of the Defamation Act provides for the right of reply, by a Plaintiff or person aggrieved by a publication and the newspaper is bound to publish in its next issue or as soon as possible, such reply, and a correction (if necessary), in the same prominent manner as the original publication. The consequences of either failure to publish such reply or correction may lead to enhanced damages in a civil suit, or reduction of damages if found in favour of the Plaintiff.

Part II of the Schedule to the Defamation Act provides the following statements to be privileged but subject to explanation or contradiction:-

5-8

9. "A copy or fair and accurate report or summary of any notice or other matter issued for the information of the public by or behalf of the government, publisher, local authority or gazette police officer."

By definition "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 tends to make them shun or avoid that person." In the tort of defamation, whether slander or libel the following requisites are common to both and must be proved by the Plaintiff:-

- (1) the words must be defamatory,
- (2) they must refer to the Plaintiff,
- (3) they must be "maliciously" published,

To be defamatory, the words must tend to harm the Plaintiff's reputation in the minds of right thinking persons, or must cause him to be shunned. Who is a right thinking person? He is not a person who is so bad or cynical that he would think the worst of a man whatever was reported to him. He is not a person who is so censorious as to regard such trivial accusations (if they were true) as lowering another's reputation, or is so hasty as to infer the worst meaning from any ambiguous statement. It is not these, but the ordinary (mwananchi) (citizen), whose judgment must be taken as standard. He is neither usually suspicious or unusually naïve and he does not always interpret the meaning of words as would a lawyer, Lord Reid said in LEWIS vs. DAILY TELEGRAPH LTD. [1969] A.C. 234, 258. He is not inhibited by knowledge of rules of construction as Lord Atkin said in SIM vs STRETETCH [1936]2 ALL ER 1237, 1240 - "would the words tend to lower the Plaintiff in the estimation of right thinking members of society generally?"

In this case only one witness the Plaintiff herself, testified. There was no evidence of her workmates, associates and relatives as set out in her Plaint to give testimony as to whether

the alleged publication made them think the worst of the Plaintiff. The principle of law in the cause of action for libel is not the estimation of the Plaintiff that she was in the eyes of the public so estimated and shunned. It is that the Plaintiff or claimant must show that the publication reduced her in the estimation of the right thinking members of society.

Publication to a third party is the essence of libel. It is the communication of the words to at least another person than the person defamed (BATA vs BATA (1948) W. N. 366. Communication to the Plaintiff himself is not enough, for defamation is an injury to one's reputation, and reputation is what makes people think of a man and not his own opinion of himself. I therefore agree with the submission by counsel for the Defendants that the self assessing evidence of the Plaintiff as to the reaction of the public or society to the publication does not corroboratively show the actual alleged impact of the alleged defamatory article. The sole evidence of the Plaintiff cannot therefore be said to be probative of the reaction of the right thinking members of society to the publication. There was no independent evidence on how an ordinary member interpreted the words complained of. That evidence would have been the basic test of determining the natural and ordinary meaning of the words to the receiving and reading public.

It is however correct to say that the publication referred to the Plaintiff but not to the Plaintiff alone. Table 3.3 (irregular payment of leave allowance) p. 19 refers to sixteen (16) officials of the NACC, including the Plaintiff. None of the other fifteen (15) officials came to testify that the payments were regular. Similarly at p. 27 of the Report six (6) officers of the NACC including the plaintiff are cited. None of them was called to testify on the propriety of the increments. The authors of the EMU report at p. 27 say;

"The team is of the view that these salary increments were a scheme to offset irregular bonus payments earlier made to senior managers. The payments were irregular and should be recovered. In addition KACC should investigate possible fraud on the part of the NACC Managers with a view to taking legal action."

There having been absolutely no evidence from any independent witness, I hold that the Plaintiff's own claim is no factual basis that the words complained of reduced either the Plaintiff's reputation or standing in society or for that matter the employer, NACC.

The third test for a defamatory statement is that publication is made with malice. According to the authors of Winfield On Tort 8th Edition p. 278 - "malice" or "expresses malice" as it is commonly called, will defeat any defence of fair comment and qualified privilege. Malice here means "spite" or "deliberateness." Although knowledge by the defendant of the Plaintiff is immaterial and irrelevant, there was no evidence that the publication was made out of spite, hate or vengefulness or outrage.

The defendant pleaded the defence of fair comment and qualified privilege. Honest criticism must and ought to be and is recognized in any civilized system of law as indispensable to the efficient working of any public institution or office, and as salutary for private persons who make themselves or their work object of public interest. "Otherwise abide our question thou art free" may be true of Shakespeare's in literature. In law it is not true of him or of anybody else. In *SILKIN vs BEAVER BROOK NEWSPAPERS LTD* [1958] 1 W. L. R. 743, 747, Diplock J. described fair comment as the name given "to the right of every citizen to comment on matters of public interest" The Defence of fair comment however rests on four principles:-

(a) The matter commented on must be of public interest

Public interest includes many recognized topics, particular and in general "anything which may fairly be said to invite comment or challenge public opinion" *Gatley on Libel and Slander* PP 345-397. It ranges from the views of a Prime Minister, Ministers, Chiefs of Local Authorities to Heads of Parastatals. It includes the conduct of every public man or woman and every public institution. The words of Bramwell B in the olden case of *KEMSEY vs. SHERLOCK* (1866) L. R. 1 Q.B. 686, 689 ring true today-

"A Clergyman and his flock, an Admiral and his/fleet, a general with his army and a Judge with his jury Are all the subject for public discussion because whoever fills a public position renders himself ... open to public discussion and if any part of his/her public acts are wrong, he or she must accept the attack as a necessary, though - unpleasant circumstance attaching to his office."

The reason is that such people have publicity thrust upon them, others like athletes, novelists, dramatists and writers of books, achieve it. It is for the court or judge or to decide whether the matter is of public interest. In this case, the evidence of both the Plaintiff and the defence converge that the matter was one of public interest. Firstly there is no question that the NACC is a public body established within the Office of the President. Secondly the Plaintiff in cross-examination by Mr. Kamande Counsel for the Defendants, admitted to the propositions including:-

- (i) NACC was created by the government to take care of HIV/AIDS concern in Kenya.
- (ii) HIV/AIDS is widespread in Kenya and hundreds die daily from complications arising from it;
- (iii) HIV/AIDS was declared a disaster in 1999.
- (iv) Issues of HIV/AIDS are of great public interest and the public has a right to know how funds raised for HIV/AIDS are used;

(v) Millions of shillings are allocated generally every year to fight HIV/AIDS. The NACC is allocated money by the Office of the President under recurrent expenditure.

Considering these admissions by the Plaintiff which is easier to say- "hundreds die daily of HIV/AIDS because NACC funds are misapplied?" or "Robbing the dying" or "hundreds die daily of HIV/AIDS related complications because NACC has become a cash cow?"

In these examples the constant fact is that hundred of Kenyans die daily of HIV/AIDS related complications. That fact was admitted by the Plaintiff. The "why" they are dying is the subject of interpretation - what the Plaintiff calls defamatory of her. I am unable to agree. The "headline" is part of Newspapers editorial, comment, whether it is fair, is to be understood from the write up following the headline. If what follows the headline does not connect with the headline, then that reporting becomes sensational, put purely, to attract large readership and would not pass as comment.

If what follows the headline is consonant with it, then the Plaintiff cannot read any defamatory meaning to it and if it is defamatory, (and I hold that it is not), and if it were, then it is only a matter of fair comment by the newspapers editors, on a matter of public interest - death and life - when life can be prolonged by the prudent application of millions of shillings allocated for the purpose - the detection, prevention and control of the spread of a non-curable and debilitating disease - is a matter which calls for open and informed debate and comment.

(b) The comment must be an expression of opinion and not an assertion of fact

I have already partially answered this point. I wish to add however that that it is not always easy to draw the distinction between fact and opinion. If one calls a Matatu (mini cab), driver "a drug inhaler and wreckless road user", or "Matatus are coffins on wheels" is that comment or fact? What about calling a polygamist a bigamist, fact or comment? Again calling a churchman a fornicator or a swindler looks like a statement of fact, but what is calling him "immoral" or a "sinner" are immorality and sin facts or matters of opinion? To this there is no dogmatic answer each statement must be taken on its own merits.

In this case the Plaintiff claims that "robbing the dying" and "NACC is turned into a cash cow" are defamatory of her. I have held for reasons explained above that those words are merely part of editorial comment and in this context are not fact but merely opinion.

(c) The comment must be fair

The principle of law is that for the comment to be fair, it must be based upon true facts. A commentator cannot invent facts about a person and then comment upon them. In this case as already stated (headings (a), (b)) it is a fact that the Plaintiff admitted that hundreds of Kenyans die daily of HIV/AIDS related complications, despite the millions of shillings

allocated to the NACC and which, as the Report by EMU revealed, are being applied to matters such as bonuses and other allowances to personnel of the NACC, and other organizations without proper monitoring of actual projects to benefit persons affected or infected with HIV/AIDS.

(d) The comment must not be malicious

Again, I have covered this consideration. Malice here means evil motive. As stated earlier, knowledge by the Defendant of the Plaintiff is immaterial and DW2 appeared clear and composed while giving his evidence and did not exhibit by his answers and demeanour that he had any malice towards the Plaintiff. There was consequently no proof of malice by the Defendants against the Plaintiffs.

2. OF QUALIFIED PRIVILEGE

The Defendants pleaded the defence of privilege under Section 7 of the Defamation Act. I have already referred to the Section and to Part II of the Schedule to the Act. The law relating to libel recognizes that there are occasions on which there ought to be no liability for defamation because the interest of the public (or exceptionally) those of individuals who originate the defamation, outweigh the Plaintiff's right to his reputation. Such occasions are said to be "privileged". The privilege is however subject to certain conditions as either "absolute" or "qualified privilege". "ABSOLUTE PRIVILEGE" is governed by Sections 9-11 of the Defamation Act. It covers such areas as Parliamentary reports, extracts from such reports. "Qualified Privilege" under the Schedule of the Act is divided into:- Qualified Privilege Part 1 - statements privileged without explanation or contradiction. These relate to fair and accurate reports of any proceedings of public bodies cited in that part.

We are not concerned with Part 1 of the Schedule. We are concerned with Part II - of the Schedule to the Act - statements privileged subject to explanation or contradiction - and paragraph 9 thereof says:

"9. (a) A copy or fair and accurate report or summary of any notice or other matter issued for the information of the public by or on behalf of any department of the government, minister, local authority or gazette police officer."

A passage quoted by Scrutton L. J. in WATT vs LONGS [1930] 1K.B. 130, 143 page B in TooGood vs Spyring (1934), C. L. & R 181, 183 said;-

"If fairly warranted by any reasonable occasion or exigency and honestly made, such communications are protected for the common convenience and welfare of society."

In this case the report prepared by the EMU at the request of the Head of the Public Service was produced in court and admitted as an exhibit on 25th June, 2009 when DW1, Mr. Gerishon Wangira who identified himself as Deputy Director of the Efficiency Monitory Unit testified. The following salient points are clear from my reading of the Report and the evidence of DW1, Mr. Wangira:-

- (i) The efficiency Monitory Unit is a Department within the Public Service under the Office of the President.**
- (ii) The Unit carries out financial and management audit of public entities and other departments of government.**
- (iii) The financial and management audit of the National Aids Control Council Report of April 2005 was prepared by the Unit in relation to the management of funds by the NACC.**
- (iv) The Plaintiff's name Kagwiria Mutwiri Kioga is among other officials of NACC featured in the Report.**
- (v) The report was available to any member of the public upon request.**

There was no question of the identity or status of DW1, for Mr. Gerishon Wangira in cross-examination produced two official Government Employee Cards and thus dispelled any suspicion that he was not an officer of the EMU. The production and cross-examination of DW1 on the report complied with the provisions of Sections 147 of the Evidence Act (Cap 80 Laws of Kenya). That Section provides that a witness who produces a document may only be cross-examined on the production of the document he was summoned to produce. DW1 appeared in compliance to a witness summons issued by this court.

It is therefore indisputable that the Government of Kenya through the Efficiency Monitoring Unit aforesaid, compiled and produced a report. The report contains facts about the involvement of the Plaintiff and others referred to in the earlier passages of this judgment in relation to the application of funds disbursed through NACC, a public body established, under the State Corporation Act (Cap. 446) Laws of Kenya) by Presidential Order. I therefore accept the submission of counsel for the Defendants that pursuant to Section 7 of the Defamation Act read together with Part II, paragraph 9 of the Schedule thereto, the Report by the EMU qualifies, and is a report by a body constituted to investigate a matter of public concern, that is to say, the application or use of funds disbursed by the government for the management of the HIV/AIDS pandemic. Section 60(1)(o) of the Evidence Act requires all courts to take notice among others, of all matters of general or local notoriety. I am bound to take judicial notice of the public concern, interest and the level of awareness into matters of and relating to HIV/AIDS pandemic, which are indeed matters of considerable general and local notoriety. Indeed it is a truism to say that whereas thousands of Kenyans are infected with the HIV/AIDS

pandemic, yet millions of Kenyans are affected by the pandemic. There is therefore an undeniable interest in matters concerning the disbursement and application of funds towards the management treatment, education and prevention and amelioration of the suffering of those infected and affected by HIV/AIDS pandemic.

The question for determination is whether the Defendants had a duty to communicate the report or any part thereof to its readers. There is no specific provisions in law which determines what a newspaper may or may not publish. The court cannot therefore say that the Defendants had a legal duty to publish the report or any part thereof. Subject only to the limitations set out in section 79(2) of the Constitution, Section 79(1) of the Constitution guarantees to every person the enjoyment of freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

The Defendants in this case are engaged in the media specifically, the dissemination of news through the said media. They are members of the Fourth Estate. Their right to disseminate information is derived from Section 79(1) of the Constitution. The only limitation to that right is in respect of interest of defence, public safety, public order, public morality or public health or where the law provides for the protection of the reputations, rights and freedoms of other persons.

There is nothing in the report that concerns either the interest of defence, public safety, public order or morality. On the contrary where matters of public health like in this has been breached by an organization of which a plaintiff is a member of staff, the Defendants have a public duty derived from Section 79(1) of the Constitution of Kenya as members of Fourth Estate or if you wish, civil society, to disseminate the findings of an investigation by a public body into the affairs of financial management of another public body, namely the expenditure of funds by the National Aids Control Council and the findings on apparent unauthorized and irregular expenditure of those funds. The public and in particular the reading public of Kenya has a corresponding interest and concern to know and receive such information. The National Aids Control Council is after all funded not merely by the Government of Kenya through taxes paid by the Kenyan people but is also substantially funded by development partners such the World Bank, the United Nations Development Programme (UNDP), the United States Agency for International Development (USAID), the United Nations Programme on HIV/AIDS (UNAIDS).

At P.2 of the report, the EMU observes as follows;_

"NACC'S in fighting HIV/AIDS in the country has been hampered by various constraints. Key among these is corruption among officials and those implementing organizations. It was because of suspected corruption at the Council that the Permanent Secretary to the Cabinet and Head of the Public Service directed that the Efficiency Monitoring Unit undertake a value for money audit of the NACC."

The EMU was mandated in its terms of reference among others to:-

- "(a) examine adherence to laid down financial regulations and procedures, and
- (b) assess the over all performance of NACC in discharging its mandate especially with regard to mobilization of resources in the fight against HIV/AIDS."

The summary of its recommendations are set out in Chapter 9 of the Report, the EMU recommended that the Director of Anti-Corruption Commission should carry out further investigations among others into:-

(g) Irregular payments of a total of Kshs 1,557,200/= as salary incremental arrears to Dr. P. A. Orege, A. G. Taiwa, B. K. Ororo, M. M. Karanja E. Kisaka, and Ms. K. M. Kioga (the Plaintiff herein) contrary to the advice by DPM and said Council resolution

And in chapter 9(3)(f), P. 192 of the Report, the EMU recommended that the NACC should - recover monies amounting to Kshs 39,372,504.60 paid to various NACC officers detailed in Appendix 5 and if not recovered, the officers responsible for the payments should be surcharged. The officers concerned included one K. M. Kioga the Plaintiff, who is listed to have irregularly received a total of Kshs 524,694 out of the total Kshs 30,372,504.60 stated above.

What has come down to legal practitioners and Commonwealth Judges as the Reynold's defence was set out in the case of REYNOLDS vs TIMES NEWSPAPER LTD [1999] 3 W.L.R. 1010, a defence of qualified privilege, of the principles of public duty and the corresponding public interest to receive information or news.

The basis of the general public interest defence the (Reynolds defence) is that where the subject matter of the "alleged" defamatory material is of sufficient importance to the public and the defendant behaved reasonably and responsibly, the publication will be protected. The test applied by the Court of Appeal in England in determining the application of the defence, is of great persuasive authority in this case, namely;-

- (i) the nature of the information and the extent to which the subject matter is a matter of public

concern;

(ii) the source of the information;

(iii) the status of the information;

In this case, information is a matter of great public concern. HIV/AIDS is such a serious national disaster that a whole statutory agency, the NACC was formed as a state corporation to fight it. The source of the information was NACC an agency of government itself, the conclusions and recommendations are alive. The proper application of government and development partners monies is a matter of great public concern, and that should include the Plaintiff.

There is consequently no doubt in my mind that the findings and recommendations in the EMU Report produced in court were made by a team of persons appointed by the Head of the Public Service as stated above, to investigate a matter of public concern namely, the expenditure of public funds earmarked for the management, control and coordination of AIDS programmes in the country. A report or an article by the Defendants of the findings and conclusions made in the Report is a matter of public concern and is for the benefit of the public and does in my considered opinion enjoy qualified privilege under Section 7 of the Defamation Act.

In the case of NATION NEWSPAPERS LIMITED VS GIBENDI [2009] 2 KLR 406 Waweru, J. said:-

"The Appellant had pleaded the defence of fair comment on a matter of public interest i.e. qualified privilege. To defeat that defence the Respondent needed to prove actual malice, which is, ill will, or spite or any indirect or improper motive in the mind of the Appellant at the time of the publication."

In this case, the Plaintiff has not shown that the publication of the findings of the EMU were motivated by malice or that the Defendant or anyone of them had acted from indirect or improper motive such as spite, ill will or jealousy.

In my view, in order to be awarded damages for defamation it is not sufficient only to prove the defamation, (which in my further opinion the Plaintiff has not proved) the Plaintiff must lead evidence of actual damage to her reputation and character to enable the court to assess an appropriate award. I have already in the earlier passages of this judgment stated that the Plaintiff failed to call any witness to corroborate her testimony with regard to the damage she claimed to have sustained or suffered to her reputation and character. The Plaintiff in fact testified that she still has her job. There is no evidence on record that the Plaintiff has suffered any damage. Even if she had so proved, she would have met the defence of Qualified Privilege.

In the case of UREN vs JOHN FAIRFAX & SONS PTY LIMITED 117 CLC 115 at p. 50, Windeyer J said -

"It seems to me that properly speaking, a man 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 a vindication of the Plaintiff to the public and as a consideration for a wrong done, compensation is here a solatium rather than measurable in money."

In the instant case the Plaintiff has not shown in her evidence, that the publication of the findings of the Efficiency Monitoring Unit were actuated by malice or that the Defendants or any one of them acted from indirect or improper motive such as spite, ill-will or jealousy. There is therefore no question for assessment of damages. It is therefore my considered opinion and conclusion that the defence established by the defendants clearly meets the tests and qualifies to be considered a qualified privilege publication and one that enjoys considerable public interest. Being of this mind, therefore, the Plaintiff's suit dated 5th September, 2005 and filed on 12th September, 2005 is dismissed with costs to the Defendants.

Also dismissed with costs with costs to the Defendant is the H.C.C.C. No. 84 of 2005 Sirianka Mwonjiru Kinyua vs. The Standard Limited and Nixon Ng'ang'a, as the Plaintiff in that suit offered no evidence whatsoever in his suit. There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 21st day of May 2010

M. J. ANYARA EMUKULE

JUDGE