



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 1454 OF 1999**

**BEDAN MOSES KINYONGU MBAE.....PLAINTIFF**

**-VERSUS-**

**ROBINSON NJAGI GACHOGU..... DEFENDANT**

**JUDGEMENT**

**I. SUPERIOR OFFICER'S ADMINISTRATIVE REPORTS ON MY PERFORMANCE WERE UNTRUE AND INJURED ME: PLAINTIFF'S PLEADINGS**

The plaintiff's suit was commenced by plaint dated 21<sup>st</sup> July, 1999 and filed on 22<sup>nd</sup> July, 1999. The dispute arises between two former senior employees of the Kenya Commercial Bank Ltd, and relates to decisions taken by the defendant as the superior officer.

At all times material to this case, the plaintiff was the manager of the Trustee and Investment Services branch of the Kenya Commercial Bank, while the defendant was the Chief Operating Manager at that same branch of the Bank.

It is the reporting done by the defendant in his capacity as the senior officer of the Bank, and with regard to the plaintiff, that has precipitated the suit. The plaintiff founds a claim on the reporting made by the defendant on **6<sup>th</sup> February, 1998**, to this effect:

“During 1995/96 the branch suffered frauds and forgeries which the reportee could have prevented. The control systems were left on their own, and staff took advantage of the situation to steal from the branch. Against this background **Mr. Mbae** [the plaintiff] had a serious head injury which reduced his reaction time considerably. Weakness[es] pointed out to him have been received with rude correspondence, or [blame directed at] another party for the shortcomings. Correspondence to this effect is in his file.”

In the said report, the defendant had rated the plaintiff's performance as “unsatisfactory”; and the defendant expressed his assessment of the plaintiff as “undeserving or was unfit for promotion, re-grading or enhanced merit increments and needed to be transferred and trained” (para.6 of plaint). The plaintiff feels offended that “No reasons were advanced why the plaintiff did not merit promotion, required re-grading and did not merit increments.”

The plaintiff is offended by the alleged reporting upon him by the defendant, not just due to its negative tone, but also because “the defendant withheld the ...report from the plaintiff until **23<sup>rd</sup> July, 1998** [i.e. just under five months since its formulation] despite instructions from his superiors to show the report to the plaintiff and to discuss the same with him.”

The plaintiff claims (para.8 of plaint) that the said report on his performance by his superior officer injured him in law, in the following particulars:

- (i) by suggesting he, the plaintiff, was not in control of his faculties and was “mentally retarded or unwell”;
- (ii) by suggesting he was unfit to be a manager of the Trustee and Investment Services branch;
- (iii) by suggesting that he was fraudulent, or had colluded with fraudulent members of staff;
- (iv) by suggesting that he was not in control of the subordinate staff;
- (v) by suggesting that he was rude;
- (vi) by suggesting that he had engaged in insubordination;
- (vii) by suggesting that he failed in his duties and then ascribed blame to others;
- (viii) by suggesting he was incompetent and/or undeserving of promotion or upgrading;
- (ix) by suggesting he was responsible for losses incurred by the Bank’s branch.

The plaintiff questioned the truthfulness of the reports thus made by the defendant regarding his performance ? made from an institutional-administrative standpoint. The plaintiff, *inter alia*, asserts: “the defendant is not a medical doctor and did not recommend any medical examination”; the defendant “concealed or withheld the same from the plaintiff even after he was requested by the employer to show and discuss the same with the plaintiff”; the defendant “recommended a transfer of the plaintiff and no promotion”; the defendant made his report belatedly and “only after the plaintiff reminded the defendant of the Bank’s requirements that he makes the report” ? the report was made in **1998** but related to the 1995/96 period; the defendant should not have attributed to the plaintiff blame for the Bank frauds and forgeries, because such problems had been known to exist “over the years”; by making his unfavourable report on the plaintiff, the defendant had had “the aim of denying the plaintiff a financial advantage” or of causing the plaintiff “financial loss by way of promotion or enhanced merit increments or loss of employment”; the defendant failed to bring the offending part of his report to the plaintiff; the defendant knew his report about the plaintiff was not truthful, “or he had no reason to believe [it] was truthful.”

The plaintiff pleads that the defendant’s report was “a malicious falsehood of and concerning the plaintiff”; and that arising out of the said report “the plaintiff was dismissed from the service of the Bank on 6<sup>th</sup> February, 1999 and has suffered loss and damage.”

The plaintiff claims under the following heads: general damages for *libel* and *malicious falsehood*; special damages; costs and interest; further or other relief as the Court deems just and expedient in the circumstances.

## **II. IMPUGNED REPORT WAS IN DISCHARGE OF DUTY TO THE COMMON EMPLOYER WHO HAD A LEGITIMATE INTEREST TO RECEIVE IT; IT WAS COVERED BY QUALIFIED PRIVILEGE; I HAD NO MALICE: DEFENDANT’S PLEADINGS**

The defendant’s statement of defence, dated 31<sup>st</sup> August, 1999 was filed on 2<sup>nd</sup> September, 1999.

The defendant pleads that the plaintiff’s claim is statute-barred, by virtue of the provisions of the Limitation of Actions Act (Cap.22, Laws of Kenya).

As regards the substance of the claim, which rests on an in-house administrative report upon an officer (the plaintiff) by his senior officer (the defendant), it is pleaded that “the words complained of were written concerning the plaintiff only as an employee of Kenya Commercial Bank Ltd. and were published

on an occasion of qualified privilege.” It is pleaded in defence that: “As an employee of Kenya Commercial Bank Ltd., the said Bank had an interest in knowing the plaintiff’s performance as its employee”; “It was the defendant’s role as the plaintiff’s boss to make an appraisal report [on] the plaintiff to the said Bank”; “In the premises, the defendant and Kenya Commercial Bank Ltd. had a common and corresponding interest in the subject-matter complained of”; “The defendant wrote and published the letter complained of in the discharge of his duties to Kenya Commercial Bank Ltd. who had a legitimate interest in receiving it.”

The defendant admits appraising the plaintiff’s performance at work as unsatisfactory, “but states that the rating was based on an objective appraisal and without malice.” The defendant pleads further, “that he was not bound to advance reasons as to why [in his view] the plaintiff did not merit promotion, re-grading or merit increments.”

The defendant denies that the statements in the report occasioning this suit, were actuated by malice; and he denies the claim that the plaintiff is entitled to damages, compensation for loss of pension and earnings or special damages as asserted in the claim.

### **III. IMPUGNED REPORT RECEIVED BELATEDLY, SO RUNNING OF TIME IS POSTPONED; ACTS NOT CONSISTENT WITH QUALIFIED PRIVILEGE; AND MALICE WAS THERE: PLAINTIFF’S PLEADINGS IN REPLY**

In paragraph 11 of the plaint it is pleaded: “the plaintiff became aware of the [impugned] report on or about 23<sup>rd</sup> July, 1998”, to which the defendant in his pleadings has a riposte: “The defendant is a stranger to the contents of paragraph 11 of the plaint.” The implication, I assume, is that the defendant asserts: “I gave to you no report, I had no duty to give you one and, if you got one, I don’t know, and it places no obligations upon me.” This would shift the burden back on to the plaintiff; in his suit he must show that he has complied with the stipulated *limitation period*, which for defamation is one year.

This is the background against which the plaintiff’s reply to defence, dated 13<sup>th</sup> September, 1999 was filed on 15<sup>th</sup> September, 1999, and he thus pleads:

“..the offending statements were withheld from him by the defendant and only became known to him on or about **23<sup>rd</sup> July, 1998** when time began to run.”

Issue is also further joined on the question whether the defendant, though acting in the capacity of the superior officer reporting to his employer on a less senior officer, may not be covered by the operation of qualified privilege. Indeed, the plaintiff also contests the possible application of qualified privilege by re-asserting his claim of *malice* on the part of the defendant.

### **IV. AGREED ISSUES FOR RESOLUTION BY TRIAL**

On 17<sup>th</sup> April, 2000 counsel agreed the issues for trial, which they duly filed on 20<sup>th</sup> September, 2000. These may be set out as follows:

- (i) whether the plaintiff’s claim is statute-barred by the provisions of the Limitation of Actions Act (Cap.22);
- (ii) whether the words complained of at paragraphs 5 and 6 of the plaint were published on an occasion of qualified privilege;
- (iii) whether the defendant’s rating of the plaintiff as pleaded was objective and not malicious;
- (iv) whether the defendant withheld the allegedly offending report from the plaintiff until 23<sup>rd</sup> July, 1998;

- (v) whether the words complained of were defamatory of the plaintiff;
- (vi) whether the words complained of were actuated by malice;
- (vii) whether the defendant's report qualifies to be described as malicious falsehood;
- (viii) whether the defendant is liable to the plaintiff in damages for loss of earnings, pension, etc;
- (ix) if damages are to be awarded, then how much; and
- (x) who should pay the costs of this suit?

## V. WITNESS TESTIMONIES

### 1. *The Plaintiff's Case*

Hearing of this case began on 28<sup>th</sup> January, 2004, the plaintiff being represented by learned counsel **Mr. Kaburu**, and the defendant by learned counsel **Mr. Chacha Odera**. **Mr. Kaburu** introduced the plaintiff's case, and called the plaintiff himself, **Bedan Moses Kinyongu Mbae** who was sworn and testified as PW1.

PW1 testified that he is at present a farmer and businessman, but previously he used to work at the Kenya Commercial Bank, which he joined in 1981 and left on 6<sup>th</sup> February, 1999 when his service was terminated. He joined the Bank at the rank of Officer Grade II and had attained the rank of Officer Grade VII when he left, as Manager of the Trustee & Investment Services Division. PW1 testified that he was promoted to the rank of Manager on 6<sup>th</sup> April, 1989, and it was his understanding that he rose to that office on account of his commendable performance as a banker. In his own words: "My work record was very good; there were letters of commendation; good annual reports; my performance was good. I wasn't subject to any disciplinary procedures before this termination."

PW1 testified that the defendant was the Chief Operations Manager at the Trustee and Investment Services Division and had joined Kenya Commercial Bank as the plaintiff's senior. The plaintiff was reporting to the defendant, who was the chief officer in charge of the Division. In that capacity, it was the mandate of the defendant, the plaintiff averred: "to guide me, evaluate my work, and make annual reports to Head Office." PW1 drew to the attention of the Court an office memorandum of Kenya Commercial Bank, included in the agreed bundle of documents, which listed the responsibilities which had been carried by the defendant as Chief Operating Manager, Trustee and Investment Services Division; and among the responsibilities listed were:

"(e) Deal with [long-standing] trustee cases which were caused by the mismanagement of the unit;

"(f) Present and discuss monthly report on the operations of the unit."

The endorsement on the said memorandum shows it to have been received by the defendant on 9<sup>th</sup> March, 1994.

PW1 testified that he and the defendant had managed the day-to-day activities of their Division, and that senior management meetings did take place as convened by the Bank's Head Office, at which Heads of Division would present reports on their respective Divisions.

PW1 gave testimony about a document in use at the Kenya Commercial Bank – the "Performance Appraisal and Potential Review." He averred that such a review was based on a designed form, and was either expected or required to be filled at the end of every year, and returned to the Human Resources section of the Head Office. The first column on the form was to be filled in by the officer in respect of whom the assessment was being made; and provision is subsequently made for assessment by the Head of

the Division. It was the plaintiff's evidence that after he filled in his portion of the appraisal form, he then discussed it with the defendant herein. The defendant filled in his appropriate sections of the form, dating it 2<sup>nd</sup> February, 1998; and in these sections he made remarks such as the following:

- "He [plaintiff] has participated in all the [share] flotations which have taken place."
- "Reportee is well versed in Pension Management and Trusteeship."
- "He [plaintiff] identifies priorities. In a few cases returns to KCB Head Office were reported as delayed."
- "He presents his case in a rational manner."
- "As a former educationist [i.e. the plaintiff], communication is not a problem."
- "He makes acceptable judgements. He was, however, party to signing an entry which caused loss to the Bank. He has explained the circumstances in separate correspondence."
- "He consults his colleagues and superiors."
- "He gets along with staff. He has handled clients tactfully."
- "He has marketed our services under difficult conditions but he has managed to win some valuable clients."
- "He only incurs costs which have been properly approved."

PW1 testified that Kenya Commercial Bank had a remarkable management practice, in which the superior officer's assessment – such as is exemplified by the ones set out above – is then formally placed before the officer being assessed, who then makes his own comments; and in respect of the defendant's assessment of 2<sup>nd</sup> February, 1998 the plaintiff endorsed his own comments at Part 3 of the form ("Reportee's Comments"): "an apt assessment. I accept." And the reportee signed off on 4<sup>th</sup> February, 1998. Somewhat curious as it is, as a management practice, the reportee then re-submitted the form to the same superior – the defendant – to now complete Parts 4, 5 and 6, before placing the same before the Human Resources Division of the Head Office. And under Part 4 the defendant adjudged the plaintiff's work as "unsatisfactory"; under Part 5 the defendant recommended: further training for the plaintiff; no promotion; transfer; no regrading; no enhanced merit increment. The defendant elaborated: "Reportee needs training in funds management and credit appraisal"; "he needs to be exposed to the areas of banking." Under Part 6 ("Additional Remarks") the defendant stated: "During 1995/96 the Branch suffered frauds and forgeries which the Reportee could have prevented. The control systems were left on their own and staff took advantage of the situation to steal from the Branch. Against this background [the plaintiff] had a serious head injury which reduced his reaction time considerably. His ability to withstand pressure and assert himself was reduced considerably. Weaknesses pointed out to him have been received with rude correspondence or blaming another party for the shortcomings. Correspondence to this effect is in his files." This final assessment was dated **6<sup>th</sup> February, 1998**.

The plaintiff had objections to the fact that the defendant had later made such assessment of him, when he and the defendant had earlier gone through the plaintiff's own self-assessment and through Part 3 of the reporting form, but, in the words of the plaintiff, "he did not show me any areas of weakness in respect of which I should improve." Only on **23<sup>rd</sup> July, 1998** did the plaintiff, certainly by irregular and unauthorised agency, obtain documents made by the defendant as part of the annual report, making negative remarks on him, the plaintiff. What came into the possession of the plaintiff is an aspect of the fantastic procedures which the Bank was then following, in staff appraisal. The Human Resources Division of the Head Office, after receiving the defendant's final assessment on the plaintiff, by the hand of Assistant General Manager (Human Resources) **Mr. J.K.A. Cheruiyot** sent a memorandum to the defendant dated **20<sup>th</sup> February, 1998** – and annexed to this memorandum was the selfsame assessment

which the defendant had made on the plaintiff, on **6<sup>th</sup> February, 1998**. It is the said memorandum which came by irregular procedure to the *plaintiff*, and he now took it upon himself to communicate directly with the Human Resources Division challenging the details set out in the defendant's appraisal of him, of 6<sup>th</sup> February, 1998. He was revolted by the defendant's remarks about him, and in particular the remarks on an accident which he, the plaintiff, had had in 1994.

Of the said accident, PW1 averred that he had indeed been involved in a vehicle accident in 1994, during which he suffered facial injuries; he was admitted to Nairobi Hospital, was treated, discharged and ordered to take two weeks of rest. PW1 admitted that frauds and forgeries had taken place at the Division of which he was in charge, in the 1995 – 1996 period, but averred that he had continued to work in the Division after the 1994 accident, and that the defendant “had raised no complaint about my work or my health”; and moreover, he, the plaintiff, was not one of those who had been disciplined in connexion with the frauds and forgeries. PW1 averred that after he was treated for the injuries he had suffered in the accident of 1994, the Bank had sought no medical report on his health status; and hence he considered it improper that the defendant should make mention of the said accident in his assessment of the plaintiff's performance.

PW1 thus focussed his objection to the defendant's assessment of his performance, in the appraisal made on 6<sup>th</sup> February, 1998 as follows: “**Mr. Gachogu** has rated me as unsatisfactory. [But] I am a graduate, a holder of the B.A. degree and a diploma in education. **Mr. Gachogu's** remarks are contradictory.”

As already noted, the defendant's assessments had been returned to him by **Mr. Cheruiyot** of the Human Resources Division; and a remarkable aspect of the Bank's management practices emerges when, according to PW1's evidence, “he [the defendant] was required to discuss it with me; he never at any time did.” PW1's protest, it may be recalled, was addressed to the Human Resources Division, and it was copied to the defendant. As clear testimony that what one perceives here is a somewhat odd management practice, neither the Human Resources Division nor his immediate superior – the defendant – responded to him. This, I think, is a plain indication that the Bank, the employer of both the plaintiff and the defendant, was following a personnel appraisal mode that merited an apology – expressed by silence!

The plaintiff also attributed blame to the defendant for not having forwarded appraisal reports on him regularly. Such reports were perceived as important; PW1 testified: “A report on an officer was necessary because it related to transfers, promotion, pay, discipline, etc. An ambitious officer would be keen to know that a report was forwarded on an annual basis. In the absence of an assessment in the annual report, no annual increment could be given, and so benefits to the officer would be limited... Enhanced merit increment was dependent on annual reports.” PW1 testified that the defendant had made no appraisal reports on him for 1995 and 1996; and when at his request, such an assessment was made in 1998, it was an opportunity for the defendant to make comments which worked to his disadvantage.

PW1 continued to testify-in-chief on 16<sup>th</sup> February, 2004 and was cross-examined by learned counsel **Mr. Chacha Odera** on 19<sup>th</sup> march, 2004. PW1 averred that both he and the defendant used to work for one employer, Kenya Commercial Bank, but they had since ceased to work for the said employer. He testified that the defendant had been his superior, and had given him his job description. He averred too that the defendant, in evaluating his performance in office, had been doing so “for the benefit of the employer and of himself.” Evaluation reports would be sent to the Assistant General Manager in charge of Human Resources – and the purpose would be to elicit “necessary action.” The defendant, PW1 testified, “was under duty to forward my annual report to the Head Office; and the Head Office would study and deal with the report.” PW1 averred: “Certain sections of the report were meant for **Mr. Gachogu** and the Head Office – and not for my eyes; but I now have in my position the portion [of the assessment report] which I should not have seen, [save that it] wasn't stolen from **Mr. Gachogu's** office.” PW1 maintained that the defendant's report on his performance “was not conclusive, as it had been referred back.”

PW1 averred that the defendant's confidential report on his performance was quite properly in his custody, and he was now using it as the foundation-document for his suit against the defendant. In his

words:

“I do not know how the tea girl got the report. The tea girl would not have been expected to have the document. It is right that I got the document. I was not a party to the securing of that document from **Mr. Gachogu’s** office. I did not tell **Mr. Gachogu** that I had received the document, but I wrote [on the basis that I had received] it.”

Of the said report, the defendant testified: “The report was prepared by **Mr. Gachogu** in the course of his employment at the Kenya Commercial Bank.” He further testified that the said report “was for the Human Resources Division of the Kenya Commercial Bank, and the Human Resources Division had an interest in knowing the content of the report.”

Once the plaintiff came by his superior’s confidential evaluation report, he launched a protest, directed at the ultimate destination of the report – the Human Resources Division. In the plaintiff’s words: “I took up the matter with the General Manager after knowing the content of the communication. I was trying to get some redress. The General Manager, I was hoping, would grant redress. I wouldn’t know what redress they would be able to give”; but “there was no action”; “I lost my job on 6<sup>th</sup> February, 1999.”

After losing his job, several months after he had irregularly obtained the defendant’s evaluation report, the plaintiff sued the employer, Kenya Commercial Bank. What was he seeking? In his testimony: “I wanted to be paid my three months’ salary in lieu of notice. This was not provided for in situations of dismissal. I would be arguing that they were wrong in dismissing me”; and a consent order was made on 23<sup>rd</sup> January, 2004.

On re-examination by learned counsel **Mr. Kaburu**, the plaintiff testified that the motor accident in which he was involved in 1994 had not resulted in his health deteriorating, and that he has since lived normally, and his reaction time did not change on account of the injury he had sustained.

The plaintiff testified that in his suit against the Bank he had sought three months’ pay in lieu of notice, and that the same had been duly paid to him in 2004.

PW2, **Richard Wokabi** was sworn and began on his evidence on 31<sup>st</sup> March, 2004. Prior to this testimony (on 9<sup>th</sup> March, 2004) **Mr. Kaburu** had applied for *subpoena* for certain documents of the Kenya Commercial Bank, for use in the ensuing hearing; and as there was no objection from the defence, I ordered *subpoena* to issue directed to the Head of the Human Resources Division of the Kenya Commercial Bank, for the production of the Bank’s Terms of Service Manual, and the Bank’s regulations regarding annual reports.

PW2 testified that he was Senior Manager (Human Resources Administration) at the Kenya Commercial Bank; he had worked in the same Division since 1980, and he mainly deals with terms of service, staff loans, salary surveys, etc.

PW2 averred that the Bank had a Terms of Service Manual, which was first formulated in 1983 and has since been revised – a private-and-confidential document only found with Managers and Heads of Division. He was working with the Bank when the Performance Appraisal and Potential Review circular was issued in 1981; the purpose “was to know the performance of each manager by the end of the year.” Managers were to prepare annual reports on officers below them: “It was not a requirement; but it was necessary.” The said circular was “a guideline for the reporting officers”; “the reportee is to complete the first and second column; the boss is to complete the third column; the rest is to be completed by the reporting manager.” PW2 testified that while the parties were in employment at the Kenya Commercial Bank, the defendant was the boss of the plaintiff; and Part 4 of the appraisal report “was not supposed to be seen by the reportee; it was supposed to be sent to the Human Resources Department.”

Was there any particular mode in which the assessment forms were to be completed? In the words of PW2: “There always was consistency between the various parts of the forms as completed. If there was

a serious discrepancy, then the Human Resources Division would question. The matter would be remitted to the reporting manager, and even an interview might become necessary. The form as submitted to the Human Resources Department would show the performance of the manager. It *might* lead to transfer, training or, sometimes, promotions, or salary increments. If the performance of the reportee manager is not good, then there might be a recommendation that there be no salary increase.” And now in respect of the plaintiff specifically, PW2 averred: “The Report on **Mr. Mbae** was unsatisfactory. If he is the one who caused the loss to the Bank, this would be seen as a very negative situation. It is the claimed loss to the Bank that made the rating unsatisfactory. The comment on reaction time of the plaintiff is something relevant. It is only after the assessment report had been made, that the question of medical tests upon the reportee Manager might be considered.”

What was the purpose in returning to the defendant his earlier assessments on the plaintiff’s performance? In PW2’s words: “In this case the defendant was being asked to review the Report and discuss with the reportee. This should lead to some correction, before the Report is returned to [the Human Resources Department].”

PW2’s testimony sheds still more light on a curious element in the reporting practices which were then being observed by the Bank. What should the defendant have done with his own adverse assessment on the plaintiff which the Human Resources Department now returned to him? In the words of the witness: “He should have told the reportee that there was this adverse comment; and the reportee would then agree or disagree. The Bank must have known of the accident [in which the plaintiff was involved in 1994] – because the Bank provided medical treatment. I do not think it is for medical reasons that [the plaintiff] left the Bank.” PW2 was not surprised at all that nothing else happened on the defendant’s appraisal of the plaintiff, and that even when the plaintiff wrote letters of protest, no action was taken by any responsible officer of the Bank. Referring to the Bank’s circular No.81/3543 of 27<sup>th</sup> August, 1981 on Appraisal and Potential Review Guidelines, PW2 testified: “The unsatisfactory rating would not have made me promote the plaintiff if I was the decision-making authority of the Bank.”

Learned counsel **Mr. Chacha Odera** cross-examined PW2 on 1<sup>st</sup> February, 2005 when he testified that he had joined Kenya Commercial Bank as a clerk on 4<sup>th</sup> June, 1970, and left as Senior Manager in the Human Resources Division on 6<sup>th</sup> May, 2004. He averred that in the entire period when he had been in the Bank’s employ, “all [he] did was on behalf of the Bank” and, “in the event I did not carry out my duties, it was a disciplinary matter between the Bank and myself ...I executed my functions on behalf of the Bank...” PW2 had joined the Human Resources Division in 1980, and in his period of service there, circulars had been issued from time to time; they would be received by heads of units at the Bank who would then distribute the same to their staff; the purpose was “for improving performance”; and the mode of discharge of such distribution process was not an occasion for disciplinary action against any individual. Reporting officers “were from time to time required to assess their staff and give opinions; but such opinions remained opinions.” The Human Resources Division was able to detect consistencies or inconsistencies in such opinions emanating from reporting officers. The exact manner of handling the case of a particular Bank officer was to be determined by the Human Resources Department “depending on what was recommended.” Whether or not confidential parts of the appraisal report were to be shown to the reportee depended on the “discretion of the reporting officer”; and such a report once completed and sent to the Human Resources Department, “was not supposed to be seen” by the reportee.

PW2 testified that he had not himself seen the report which the defendant made on the plaintiff, and which has led to this suit. He averred that such reporting on officers of the Bank was normal, and that the plaintiff too “had a duty to report on his junior officers.” The said report on the performance of the plaintiff was dated 2<sup>nd</sup> February, 1998 and his dismissal took place one-year-and-four-days later, on 6<sup>th</sup> February, 1999; but the letter of dismissal did not mention the defendant’s appraisal report.

## **2. The Defendant’s Case**

DW1, **Robinson Njagi Gachogu** was sworn and embarked upon his testimony on 17<sup>th</sup> May, 2005. He testified that he had retired from the Kenya Commercial Bank where he used to be Chief Operating

Manager in the Trustee Division. He joined the Bank in November, 1972, and retired in December, 2000.

Of the Chief Operating Manager's job-description which the plaintiff had referred to as requiring him to counsel on improved performance by the plaintiff, DW1 averred that this was a private document prepared by [DW1] himself, addressed to the General Manager and not meant for the sight of the plaintiff herein; in DW1's words: "It was a communication between me and my senior; it wasn't for people at lower levels; I don't know how the plaintiff got hold of it."

Of his assessment of the plaintiff which led to this suit, DW1 testified that there were sections in the appraisal report which were exclusively for the reporting officer to complete – and he had duly completed them as he saw fit; for instance, he had a positive opinion on the plaintiff regarding knowledge of work, personal qualities and managerial skills; with regard to performance in planning, DW1's opinion was that there were some delays; DW1's opinion on analytical ability was positive, as was also his opinion under "communication"; but as regards "judgement," DW1's opinion was negative.

DW1 testified that while he served at the Kenya Commercial Bank, there were standing procedures for discipline; and all dismissal of staff was preceded by collective fora of deliberations; and since he had himself made a report regarding the plaintiff, he could not have been on the committee meeting at which the dismissal decision was taken against the plaintiff. All disciplinary procedures were conducted within the Human Resources Division, to which the defendant did not belong; and, according to DW1, "**Mr. Mbae** must have been subjected to that committee, though I don't know for a fact." Thereafter, the ultimate decision would be made by the Chief Executive Officer of the Bank; and DW1 averred: "I wasn't involved in the decision to terminate **Mr. Mbae's** services."

In his reporting on the plaintiff, DW1 testified, "It was my opinion that the Manager could have prevented the [Division's financial] losses, because he signed for payments to fictitious recipients." Of the plaintiff's health condition, DW1 averred: "I also said **Mr. Mbae** had suffered serious head injuries. I knew about that. I said the injury impairs his performance. I knew him before the accident. So I noticed a change in performance. I had been asked to express an opinion. This was left at my discretion. I thought the Bank should know the circumstances in which these losses occurred. I did not write my opinion out of malice."

On cross-examination by learned counsel **Mr. Mburu**, DW1 testified that in his own job description, it was not stated he "was under any obligation to report on the plaintiff", but he did so when "the plaintiff requested me to prepare reports on him." Although there were report forms in the various units of the Bank, they were meant for unionisable staff, as a matter of agreement, but these were not mandatory in the case of officer grades.

What was DW1's position regarding his assessment report on the plaintiff, which had been returned to him by **Mr. J.K.A. Cheruiyot**, Assistant General Manager (Human Resources)? DW1 considered himself under no obligation to take any action; for at his rank, and in his line of responsibility he reported to the Executive Chairman of the Bank – not to the General Manager. In DW1's words: "I did not respond to **Mr. Cheruiyot's** memo; but I called him and told him why I was not going to respond. This kind of communication was allowed." The comments he had given in Part 6 of the appraisal form "was between the Reporting Officer and the Head Office. I was under no duty to discuss with **Mr. Mbae**...I had done my job. I had given my opinion. I was satisfied. My opinion is clear. I gave my opinion as a professional banker." Of the memorandum he received from **Mr. J.K.A. Cheruiyot**, DW1 testified: "The instruction from **Mr. Cheruiyot** was an unprofessional instruction; I was not bound to comply with it. I made a report in accordance with my convictions."

DW1 testified that it had not been necessary for the plaintiff to demand an appraisal report in respect of himself, and that the mere fact of forwarding such a report was not the condition for grant of certain benefits to employees; such a report was not required before pay-increments could be given; numbers of employees had indeed been substantially promoted in status, without any such reports having been written on them; "the Report was for the Bank, and was only concerned with performance."

DW2, **Laban Sogomo** was sworn on 20<sup>th</sup> July, 2006 and led through the evidence-in-chief by learned counsel **Mr. Chacha Odera**. He testified that he is Senior Manager (Employee Relations) at the Kenya Commercial Bank Head Office, Human Resources Division. He had joined the Bank on 2<sup>nd</sup> January, 1985 when the plaintiff herein was still serving as an officer. DW2 was in charge of employee relations when the Bank, on 6<sup>th</sup> February, 1999 wrote the letter of dismissal to the plaintiff; and the plaintiff protested and sued the Bank, complaining of wrongful dismissal. Several Court hearings took place, but the matter was settled out of Court – with the Bank paying three months’ salary in lieu of notice; and since then, no dispute has remained pending between the parties regarding unpaid dues.

DW2 testified that the decision to dismiss the plaintiff had been taken at the Bank’s Head Office, after it was found by a disciplinary committee which the witness himself chaired, that the plaintiff had committed irregularities while serving as an officer.

DW2 testified that he well knew the defendant, who had been heading the Trustee and Investment Services Division of the Bank; and that all actions the defendant did take while in service, which have been cited as a basis for the plaintiff’s suit, had been taken in the discharge of responsibilities entrusted by the Bank.

On cross-examination by learned counsel **Mr. Kaburu**, DW2 testified that the defendant had not been part of the disciplinary committee of the Bank’s Head Office at which the decision to dismiss the plaintiff was taken. The issues coming up before the disciplinary committee, DW2 averred, were quite clear; there was no need to call the officer concerned (the plaintiff); the decision was taken in accordance with the Bank’s rules in force; already, opportunities had been accorded to the plaintiff, to give his defence.

## VI. SUBMISSIONS OF COUNSEL

### **1. A Claim in the Cognate Torts of Defamation (Libel) and Malicious Falsehood: Submissions for the Plaintiff**

#### **(i) Defamation, malicious falsehood, limitation period**

Learned counsel **Mr. Kaburu** first addressed the question whether the

plaintiff’s suit was *time-barred*. He noted the content of the proviso to s.4(2) of the Limitation of Actions Act (Cap.22) – which is to the effect that an action for *libel* or *slander* may not be brought after 12 months since the emergence of the cause of action, a provision also found in s.20 of the Defamation Act (Cap.36).

The plaintiff’s suit, counsel submitted, was based on *libel* and *malicious falsehood*; and an action for malicious falsehood may be brought any time before the expiration of *three* years since the emergence of the cause of action. It was submitted that the Defamation Act draws a distinction as between (i) slander of title; (ii) slander of goods; (iii) libel; and (iv) malicious falsehood.

Learned counsel submitted that there was a clear distinction between *malicious falsehood* and *libel*. **Clerk & Lindsell on Torts**, 17<sup>th</sup> ed. (London: Sweet & Maxwell, 1995) gives the background and context to the tort of malicious falsehood. The authors of that learned work state that the tort of malicious falsehood goes by different names – and this terminological variability arises from the fact that different types of falsehood may be in reference; provided only that *malice* and *damage* are present. Malicious falsehood as a tort originated from “slander of title” - “false allegations calculated to hamper the disposal of land” (**Clerk & Lindsell**, *op. cit.*, p. 1157 [para. 22 – 01]). The tort then grew in scope to embrace “slander of goods”; and it even expanded further to encompass: “disparagements as to quality as well as title” (**Clerk & Lindsell**, *loc.cit.*). The Court of Appeal in England, in **Ratcliffe v. Evans** [1892] 2 Q.B. 524 held that the tort of malicious prosecution applied in relation to false disparagements about a business. But the authors of **Clerk & Lindsell on Torts** (*loc.cit.*) state that .... “the tort may protect more than simply commercial interests. In the old case of **Shepherd v. Wakeman** [(1662) 1

Sid.79] the plaintiff lost her marriage through the defendant falsely and maliciously alleging that she was already married, and it was held that she had a good cause of action.” In these circumstances, the authors of *Clerk & Lindsell on Torts* (*loc.cit.*) identify the different manifestations of malicious falsehood as: (i) *injurious falsehood*; (ii) *trade libel*; (iii) *slander of title*; (iv) *slander of goods*; (v) *disparagement of goods*; or just (vi) *malicious falsehood*. And the essence of this tort is as stated in *Ratcliffe v. Evans* [1892] 2 Q.B. 524 (at p. 532 – per *Bowen, L.J.*):

**“...an action will lie for written or oral falsehoods, not actionable per se, or even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage...”**

The authors of *Clerk & Lindsell on Torts* state that the tort of *malicious falsehood*, in certain respects, does interface with two separate and well-recognised torts – *passing off*, and *defamation*. The tort of malicious falsehood “protects against the defendant’s falsehood that causes economic harm to the plaintiff” (*Clerk & Lindsell, op. cit.*, p.1157, para. 22 – 02). This overlaps somewhat with *passing off*, which “does not require malice, [but] requires injury to goodwill” (*Clerk & Lindsell, op. cit.*, at p.1157n).

Of the relationship between malicious falsehood and defamation, the authors of *Clerk and Lindsell on Torts* thus write (p.1158; para. 22 – 03):

**“Although malicious falsehood and defamation have different origins, there are obvious similarities between the two actions and the same facts may constitute both torts. This relationship between the two was successfully exploited in *Joyce v. Sengupta* [1993] 1 W.L.R. 337, C.A. The plaintiff alleged the defendant had written a ‘grossly defamatory’ article about her. In order to claim Legal Aid, the plaintiff sued for malicious falsehood, not defamation. The defendant’s application to strike the claim out as an abuse of process (the ‘true’ claim being for defamation) was rejected by the Court of Appeal. The plaintiff was not *obliged to pursue the most appropriate remedy* and although the defendants were denied their automatic right to trial by jury by her action, the Court still had a discretion to order one. However, there are clear and substantial differences between the torts, the most basic of which is that *defamation protects the plaintiff’s reputation, while malicious falsehood protects the plaintiff’s interest in his property or trade (or economic interests more generally)* [Emphases added].**

Learned counsel submitted that while *malicious falsehood* was also statute-barred after the expiration of twelve months, in certain jurisdictions [*Halsbury’s Laws of England*, 4<sup>th</sup> ed., Vol.28, p. 465, para. 902], such was not the case in Kenya; and he, besides, links this argument to the provision of s.26 of the Limitations of Actions Act (Cap.22) which deals with fraudulent concealment of information required for the making of proper judgement on the applicable limitation period. That section stipulates:

**“Where, in the case of an action for which a period of limitation is prescribed, either ?**

**(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or**

**(b) the right of action is concealed by the fraud of any such person as aforesaid; or**

**(c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it...”**

Counsel contended that the evidence adduced had shown that “the defendant withheld the offending words sued upon from the plaintiff from February, 1998 to July, 1999 when the plaintiff got it from a junior worker in the office”; and he sought support to his argument in s.2 of the Limitation of Actions Act (Cap.22) which defines “fraud” to include “conduct which, having regard to some special relationship between the parties concerned, is an unconscionable thing for one to do towards the other.” *Mr. Kaburu* contended that a fraudulent withholding of information from the plaintiff, by the defendant, had been

proved by evidence: “The plaintiff’s evidence on this plea was not challenged by the defendant.” And he sought further support in legal principle, from *Halsbury’s Laws of England*, 4<sup>th</sup> ed., Vol. 28, p. 423 (para.825):

***“The running of time may be suspended where, either contemporaneously with or subsequent to the date of accrual of the cause of action, the defendant deliberately conceals from the plaintiff any fact relevant to the plaintiff’s cause of action.”***

Learned counsel submitted: “The defendant clearly withheld the report after it was returned to him to discuss with the plaintiff and even alleged in cross-examination that the plaintiff stole the report, meaning he never wanted him to ever see it.” And this leads counsel to the submission that even in relation to libel as a cause of action, the plaintiff’s suit was not time-barred: “We therefore submit that the cause of action [based on] libel was not time-barred...” Counsel urged the same argument also in relation to the claim based on malicious prosecution – even “assuming that [the] twelve-month limitation [period] applies to that tort.”

## ***ii. Can the defendant claim qualified privilege?***

Learned counsel submitted that the defendant by his pleadings in para.5 of the statement of defence, had admitted publication of the words pleaded as the basis of the gravamen set out in the plaint – admitted that those words “related to the plaintiff’s office and calling...” The said publication, it was urged, was “an ingredient of the tort of libel.”

Learned counsel contested the defendant’s reliance on *qualified privilege*, and maintained that “even if there was privilege, the same was destroyed by malice.” He relied on *Halsbury’s Laws of England*, 4<sup>th</sup> ed. Vol. 28 for the principle (para.95) that “if the defendant establishes that his words are protected by qualified privilege, strict liability ceases to apply and the plaintiff must prove that the defendant was actuated by express malice.”

**Mr. Kaburu** sought to controvert the defendant’s claim that he had exercised a duty to his employer when he wrote the appraisal complained of, and that a mutuality of interest in the appraisal had existed between the defendant and the Kenya Commercial Bank. In the words of counsel: “Although the defendant..pleaded..that it was his duty to make an appraisal report on the plaintiff, he categorically denied in [the evidence-in-chief] and in [the] cross-examination that he was under any duty or role to write the report on the plaintiff. Since he said it was not his duty or role to do so, then the defence of qualified privilege is lost, for it cannot arise without duty to [forward] the report and [a] corresponding duty to receive it. This mutuality of duty [and interest] is critical for that defence to be sustained”; and for this proposition counsel sought reliance in two cases ? *Bildad Abiud Mbuthia v. University of Nairobi* [1978] KLR 27 and *I.S. Msangi v. Jumuiya ya Wafanyikazi and Workers Development Corporation* [1992] T.L.R. 259. In the first of those two cases, a decision of this High Court (*Harris, J.*) held that (p.27):

***“A defendant to proceedings for defamation who sets up a defence of qualified privilege must show an interest or duty (legal, social or moral) to communicate the defamatory statement to the persons to whom it was published and their corresponding duty to receive it.”***

The other case was a decision of the Tanzanian Court of Appeal, in which it was held (p.260):

***“Where a person raises the defence of qualified privilege on the ground that he had a duty to make the offending statement it must further be shown that the statement was made in good faith and that the person to whom it was made had a corresponding interest and duty to receive it.”***

Counsel submitted that “if the defendant was not under a duty to make the report as he testified, then there was no qualified privilege.” **Mr. Kaburu** had further submissions, just in case the Court finds that the impugned statements were made on an occasion of qualified privilege: that the defendant had written

the words complained of; that the words concerned or referred to the plaintiff; that the words were defamatory; and, that the words were published. Such a fact-scenario, learned counsel urged, derogated from the claim of privilege by the defendant.

### **iii. Libel**

**Mr. Kaburu** submitted that the defendant, by the impugned words, had painted a picture of an employee “who was not fit to continue being in the employment of the Bank because he was not in control of himself or of the [Bank’s institutional arrangements] due to [alleged] effects of a serious head injury”; and had given the impression that the plaintiff “failed to prevent frauds and forgeries during 1995 and 1996 and that his performance was unsatisfactory.” Counsel urged: “We are saying that the words depicted the plaintiff negatively and/or lowered his estimation in the eyes of right-thinking members of the employer...They were...grave allegations, given that the common employer was a bank where trust, honesty and diligence [were accorded a premium]...”

### **iv. Malice**

Learned counsel urged that the Court do find the defendant to have been actuated by malice, in expressing the impugned words. He contended that the defendant had not pleaded that the words in question were true, or that he honestly believed them to be true: “He has not pleaded that the words were not defamatory. He has not pleaded the defence of justification.”

Counsel attributed malice to the defendant on the grounds that the manner in which the defendant had done his appraisal of the plaintiff’s performance, in the various sections of the standard form, was not consistent; and that when the Assistant General Manager returned to the defendant his assessment he declined to discuss them with the plaintiff.

### **v. Malicious Falsehood**

Learned counsel submitted that in a claim based on malicious falsehood (Defamation Act (Cap.36), s.5(1)(b)) the critical issue is that the impugned statement is calculated to cause material damage to the plaintiff, and hence proof of special damage is not immediately relevant. Counsel urged that it was shown in the evidence that the plaintiff had “lost an annual increment due to lack of an annual report”; and then “the plaintiff’s services were ultimately terminated so soon thereafter.”

Learned counsel drew a faint line between the plaintiff’s claim in the tort of defamation (*libel*) and in *malicious falsehood*; and he cited in aid the High Court decision (**Ringera, J**, as he then was) in **Amir Mughal v. Lakmer Techs Ltd.**, HCCC No. 1022 of 1999:

**“...defamation is not about the publication of falsehoods about 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. In that regard, I am of the opinion that the statement to the effect that the plaintiff had left the defendant’s employment, though false, was not defamatory of the plaintiff. No right-thinking member of society would think any-the-less of a man for having left the employment of another. I do not believe that the words published of and concerning the plaintiff were capable of bearing the meaning attributed to them by the plaintiff. In my opinion what the defendant did was to publish an injurious falsehood concerning the plaintiff. Such a wrong though analogous to defamation is distinct from it. The difference is that an injurious falsehood may not necessarily be an attack on the plaintiff’s reputation. In the matter at hand, the plaintiff having pegged his claim to damages on the tort of defamation which he has not proved, and having not pleaded the tort of injurious falsehood, he must, I am afraid, be left high and dry. His claim for damages for defamation is rejected.”**

Counsel urged that the defendant had raised no specific defence to the claim under malicious falsehood; and that qualified privilege did not apply to this particular tort.

**2. Defamation Claim is Time-barred; Qualified Privilege applies and is not negated by Malice; Defendant's Opinion Honest and True; No Simultaneous Claim against both Principal and Agent: Submissions for the Defendant**

**i. On the claim for libel**

Learned counsel **Mr. Chacha Odera** began with the issue of the *limitation period* applicable in relation to libel claims. He noted that by virtue of s.4(2) of the Limitation of Actions Act (Cap.22), actions in slander and libel must be brought within twelve months, from the date of occurrence of the cause of action; and that the basis of the plaintiff's action was a report dated **6<sup>th</sup> February, 1998** and the suit was filed on **22<sup>nd</sup> July, 1999** – some 17<sup>th</sup> months from the date of the publication.

**Mr. Chacha Odera** submitted that the plaintiff could not very well rely on an exceptional limitation period derived from situations of fraud, as had been urged by learned counsel **Mr. Kaburu**. In counsel's words: "...this is not an action based on fraud. Looking at the plaint, there is no suggestion that the plaintiff is suing on fraud. His cause of action as pleaded in the plaint is based on libel and malicious falsehood. If it were [based] on fraud, [then] by reason of the provisions of Order VI, rule 4(1) the plaintiff was under obligation to specifically plead fraud and render particulars of the said fraud. This has not been done..."

Learned counsel submitted that whereas it was true, on the basis of s.27 of the Limitation of Actions Act (Cap.22), that the prescribed limitation time for a cause of action could be extended, an application for that purpose is to be placed before the Court, for appropriate orders: **Yunes K. Oruta & Another v. Samuel Mose Nyamato**, Civil Appeal No. 96 of 1984 in which the Court of Appeal stated:

***"The procedure for obtaining the extension of time for the purpose of section 27 of the Act is set out in section 28. It is also provided for in Order XXXVI, rule 3C of the Civil Procedure Rules. The application is to be made ex parte and the defendant is not in a position to oppose. In fact he only becomes aware of the order, if obtained, when the order is served together with the plaint."***

**Mr. Chacha Odera** submitted that in the instant case, "there was no attempt to as much as apply to the Court for extension of time." Barring of time for lodging suit has a purpose in law, as stated in A. McGee's **Limitation Periods**, 3<sup>rd</sup> ed., p.27 (para.2 .015):

***"The barring of the remedy has been regarded as the usual response of the law to the expiry of the limitation period."***

Counsel urged that "the plaintiff's action with respect to libel is time-barred."

Learned counsel would have contended, however, even if time-bar did not apply, that the plaintiff's *sole* evidence does not support a claim based on libel. Counsel disputed the defamatory connotations ascribed to the defendant's appraisal report by counsel for the plaintiff. A similar claim had been made in **Daniel N. Ngunia v. K.G.G.C.U. Limited**, Civil Appeal No. 281 of 1998, and the Court of Appeal thus held:

***"Leaving aside any question of privilege upon which the learned Judge dismissed that aspect of the appellant's claim, we note from the record that the appellant was the only person who testified in support of his claim. 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. [Learned counsel] was, in our view, perfectly right in abandoning the claimed based on defamation. That left only the grounds dealing with the issue of [the] contract of employment between the appellant and the respondent."***

**Mr. Chacha Odera** noted that the plaintiff had pleaded in para.8 of the plaint that the defendant's appraisal report complained of, carried certain connotations which defamed the plaintiff; and urged that "in the absence of...[the] evidence of a *third party* who read the said report", the alleged connotations formulated by the plaintiff remain "speculative and cannot be a basis of proof"; and hence, counsel

urged, the claim based on libel must fail.

Thirdly, the defendant had pleaded *qualified privilege* against the claim based on libel; and counsel urged that the public-policy basis for the claim on this head of privilege was fulfilled, in this particular case. Of this principle, the authors of the authoritative work *Gatley on Libel and Slander*, 8<sup>th</sup> ed. have stated (pp.185) – 186):

**“There are occasions upon which, on grounds of public policy and convenience, a person may, without incurring legal liability, make statements about another which are defamatory and in fact untrue. On such occasions a man, stating what he believes to be the truth about another, is protected in so doing, provided he makes the statement honestly and without any indirect or improper motive. These occasions are called occasions of qualified privilege, for the protection which the law, on grounds of public policy, affords is not absolute but depends on the honesty of purpose with which the defamatory statement is made. The rule being founded on the general welfare of society, new occasions for its application will necessarily arise with continually changing conditions [emphasis added].”**

The same work lists down classes of statements which *exemplify* the category protected by qualified privilege:

- *statements made in the discharge of a public or private duty;*
- *statements made on a subject-matter in which the defendant has a legitimate interest;*
- *statements made by the defendant to obtain redress for a grievance;*
- *reports of parliamentary proceedings;*
- *extracts from, or abstracts of parliamentary reports, papers, votes, or proceedings published by the authority of Parliament;*
- *extracts from registers kept pursuant to Acts of Parliament and which by law the public are entitled to inspect;*
- *reports and broadcasts of judicial proceedings*
- *other reports in a newspaper or broadcast having qualified privilege;*
- *agenda of local authority meetings.*

**Mr. Chacha Odera** submitted that the foregoing classes of privileged statements include “statements made in the discharge of a public or private duty” and “statements made on a subject-matter in which the defendant has a legitimate interest.”

The plaintiff herein, learned counsel urged, had testified that the defendant was “under duty to make the report that contains the matters he now complains about.” When is a defendant to be regarded as being under duty to make such a report? Counsel invoked in aid para.454 (on pp.192 – 193) of *Gatley on Libel and Slander* (*op. cit.*):

**“Whether there is a duty to communicate which the law will recognise as creating a privileged occasion depends on all the circumstances, and no previous decisions can be conclusive. Nevertheless, some circumstances have long been recognised as giving rise to such a duty, and are likely to continue to be so. Where a person is asked a question about another by or on behalf of someone who appears to have a legitimate interest in knowing the answer, the law has recognised that he is under a duty to answer, and that the occasion is privileged; so long as he speaks honestly, he is protected, and the law will not usually inquire into the**

***reasonableness or otherwise of his beliefs. In some cases, on the other hand, a previous relationship with another, or the gravity and apparent reliability of information which a man possesses, may put on him a duty to communicate that information without any prior request [emphases added].”***

**Mr. Chacha Odera**, relying on the above statement of legal principles, submitted that, in the instant case, “it was the plaintiff’s own testimony that the employer had an interest in the report which is the subject of this suit.”

Counsel observed further – correctly, with respect – that “it was common ground among the witnesses who testified, that the [appraisal] report was confidential” ? and that the section of the report which has been the basis of this suit, “was not meant for viewing by the plaintiff”, and that it is through the officious hands of the tea-girl that this report came to the plaintiff’s attention. Counsel urged that the mode of procurement of the assessment report by the plaintiff was “illegal.” What is the status of such improperly-obtained information, when relied on to found suit?

Learned counsel relied on the Court of Appeal decision in ***Robert Njenga Ndichu v. Brush Manufacturers Limited***, Civil Appeal No. 144 of 2001, in which the current state of the law is set out, where matter improperly or illegally obtained, is alleged none-the-less to have created rights now sought to be enforced through the legal process. The relevant matter illegally used here was a fake identity card; and the Court of Appeal thus held:

***“...it is a crime not to apply for [an identity card] upon attaining the age of eighteen years. That being so, it is, inevitably, a criminal offence for one person to use the identity card of another person and that is exactly what this appellant was doing during his employment with the respondent. It is irrelevant that a clerk of the respondent encouraged him in the commission of the offence. The appellant obtained his employment by committing a crime. He was injured in the course of that employment. In these circumstances, we cannot understand how he can complain that [the trial Judge] ought to have compensated him. In our view, the learned Judge was perfectly right in refusing to have anything to do with his injuries. This was the kind of case in which damage must lie where it falls. It fell upon the appellant and he must grin and bear it as best he can.”***

Learned counsel urged that the principle applied in the ***Robert Njenga Ndichu*** case was an apposite one to the instant case: “The plaintiff relies upon a confidential report which he alleges was nicked by a tea-girl and availed to him. A confidential report is as a matter of public policy, a document meant for the exclusive sight of a selected class and when the same is stolen and availed to the plaintiff, it cannot form the basis of a suit.”

#### ***ii. Is the malicious falsehood claim well-founded?***

Learned counsel urged that the common law position under which special damages are to be proved, in a suit based on malicious falsehood, has not been changed in Kenyan statute law, and as the plaintiff has not in this case proved any special damage, then his action must fail. Further still, counsel urged, even had there been proof of special damage, the suit must still fail “in the absence of proof that the [defendant’s assessment] report was false and that it was made maliciously.”

**Mr. Chacha Odera** highlighted the main elements in the said assessment report: in the 1995/96 period the Bank’s Trustee Branch suffered frauds and forgeries which the plaintiff could have prevented; the control systems were left to move at their own pace, and staff took advantage of the situation to commit acts of theft; against that background, the plaintiff had a serious head injury, which reduced his reaction time considerably; the plaintiff had made rude responses to intimations of weakness in his management portfolio, and he had attributed blame to others.

Learned counsel urged that what the Bank required of the defendant, in relation to the plaintiff’s performance, was to express an *opinion* – which could be accepted or not accepted; there was evidence

too that forgeries and thefts had taken place at the Trustee Branch of the Bank, and in the defendant's opinion, the same could have been prevented; it was the defendant's opinion that operating systems at the Trustee Branch had been left to run by their own momentum; there had been uncontroverted evidence that the plaintiff was involved in a vehicle accident, in which he suffered head injuries – and it was “the defendant's honest opinion” that the said injuries had slowed down the plaintiff's effectiveness at work. Counsel urged; “It is the defendant's case that in so pointing out these injuries, he was doing it for the benefit of the plaintiff as the same would be a good reason [to explain] his slow-down.” The contents of the appraisal report, counsel urged, were not false; “indeed, it was expected of [the defendant that he would] render an opinion and it is the defence case that in so rendering the opinion, he cannot be held liable for the tort of malicious falsehood.” Counsel urged that “the basic ingredients of the tort have not been proved.”

### **iii. Damage**

Learned counsel noted that the plaintiff's computation of damage was based on *libel* cases – yet there was a distinction between damages for libel and damages for malicious falsehood. **Mr. Chacha Odera** contested the claim made for the plaintiff, that he lost his job on account of the defendant's appraisal report; the dismissal of the plaintiff by Kenya Commercial Bank took place *one year* following the forwarding to the Head Office of the appraisal report, and hence a nexus had not been established between the two. Even were there to be such a nexus, counsel urged, it would be a matter falling squarely within the domain of the *contract* of employment, and by the applicable principles thereto, the plaintiff had already sued Kenya Commercial Bank and won a contractual recompense which, indeed, the plaintiff had acknowledged in the testimonies. In the premises, counsel submitted: “To claim further compensation from the defendant in this suit, is tantamount to seeking double compensation from one event.” Any claims properly arising, counsel urged, would have to be settled between the plaintiff and the Bank, for: “It should...be noted that the defendant was all along acting in the course of his employment and his action was on behalf of the employer...[who had already] compensated the plaintiff for the termination of the contract.” Counsel submitted that the plaintiff “cannot sue both [the] agent and [the] principal in separate suits based on a report which he now alleges resulted [in] the termination of his employment”, and that a suit so conceived would amount to an abuse of the process of the Court.

Counsel urged that even were it possible for the plaintiff to prove damage, he would have to show actual loss suffered; yet no evidence had been led to prove such particulars of damage.

## **3. Plaintiff's Rejoinder**

### **i. Suit in libel and malicious falsehood**

Counsel made a rejoinder for the plaintiff, urging that the claim was not based on fraud – the only causes of action in the suit are (i) *malicious falsehood*; and (ii) *libel*. **Mr. Kaburu** urged that there was no occasion to plead or prove *fraud* as such, since s.26 of the Limitation of Actions Act (Cap.22) does not require the plaintiff to assume such a burden; and he urged that such fraud none-the-less existed, a factor to be taken into account in considering the *limitation period* for the plaintiff's action in libel; the libel suit, therefore, was not time-barred as claimed for the defendant. Counsel contended that there was no need for the plaintiff to apply for extension of time for the filing of the libel suit – because here there was fraud, and so time is counted as from the time the cause of action broke open. He urged in the premises, that the authority, **Yunes K. Oruta & Another v. Samuel Mose Nyamoto**, C.A. No. 96 of 1984 had no application here insofar as it was concerned with extension of time for filing suit.

Learned counsel disputed the relevance in this case of the authority, **Daniel N. Ngunia v. K.G.G.C.U. Limited**, C.A. No. 281 of 1998 which dealt with the question of a witness or witnesses other than the plaintiff in a defamation suit, testifying as to the impact of the offending words on *right-thinking members of the public*. Counsel urged: “It is [the] function of the Court [in Kenya, unlike in England] to decide whether the words were capable of having the meaning attributed to them. It is not for witnesses [to] decide what is defamatory. It is the Judge to do so as a matter of law. In the **Daniel Ngunia v. K.G.G.C.U.** case ...the expression of opinion...by the Judges of Appeal was *obiter*. We have not come

across any case decided in East Africa holding specifically..that a plaintiff must call another witness to testify on the meaning attributed to the [offending] words.” Counsel cited in aid the Court of Appeal decision in *Johnson Evan Gicheru v. Andrew Morton & Another* C.A. No. 314 of 2000, urging that in that case, only the plaintiff had testified on the meaning of the offending words; and the Court of Appeal did not disturb the finding of libel as made by the trial Judge.

For this proposition, counsel relied on *Winfield and Jolowicz on Tort*, 10<sup>th</sup> ed. (ed. W.V.H. Rodgers) (London: Sweet & Maxwell, 1975) (pp 249 –50):

***“..to be defamatory the words must tend to lower the plaintiff’s reputation in the estimation of right-minded persons, or must tend to cause him to be shunned or avoided. For the issue to be decided, therefore, it is essential to know the very words on which the plaintiff founds his claim. A plaintiff is not entitled to bring a libel action on a letter which he has never seen and of the contents of which he is unaware but which he merely suspects to have been written and to contain words defamatory of him.”***

Counsel also relies on Harry Street’s *The Law of Torts*, 5<sup>th</sup> ed. (London: Butterworths, 1972) (p.291):

***“The judge decides whether a statement is capable of bearing a defamatory meaning, whether in its normal meaning or by innuendo ....The judge has to construe the words used, to decide whether they are capable of a defamatory meaning...”***

Learned counsel also invoked s.143 of the Evidence Act (Cap.80) which provides that:

***“No particular number of witnesses shall, in the absence of any provision of law, be required for the proof of any fact.”***

He urged that a Judge cannot merely rely on the testimony of witnesses to determine whether or not the offending words are defamatory.

### ***(ii) The plea of duty-and-qualified-privilege is negated by contradictory evidence and by malice***

On the application of privilege, learned counsel submitted that while he recognised that the setting in which the publication was made qualified in law for such protection, qualified privilege was on the facts, not applicable – because “the defendant...testified that he was under no duty to do the annual report”; “he denied the duty which would have given him the qualified privilege...” Counsel urged: “[The defendant] took a contradictory position in pleading and in evidence to his detriment ...He cannot plead there was duty and then testify there was none.” In those circumstances, **Mr. Kaburu** submitted, there was no duty which the defendant was performing by the impugned appraisal report; and, that if there was indeed duty – and accompanying privilege ? “the same was destroyed by malice.”

### ***(iii) Of “confidential” reports, loss of confidentiality, and the juridical status of illegally or irregularly-obtained evidence***

Learned counsel submitted that hardly any legal inference turned on the fact that the impugned appraisal report was *confidential*, that the plaintiff had no business coming by it, and that it was clear from the evidence that a busybody had nicked the report and officiously made it over to the plaintiff.

In the words of counsel: “The confidential part of the report though not meant to be discussed between the reporter and the reportee, ceased to be officially confidential when the defendant was directed to show it to the plaintiff and to discuss it with him. That was the official position taken by the employer who had the common interest relied on by the very defendant in support of his plea of qualified privilege.”

Counsel sought to legitimate the presence of the defendant’s appraisal report in his own hands, through the agency of a tea-girl. He urged that the initial fact of publication of the said report, had already given rise to causes of action in *libel* and *malicious falsehood*; so that when the report later came into the

plaintiff's hands, it came only as *evidence*; "The plaintiff had already been defamed [before] those [whom] the report had been published to. There is no such thing in law as confidential defamation... or confidential malicious falsehood."

It is clear from **Mr. Kaburu's** submissions that he believes the defendant's case to be placed too high by **Mr. Chacha Odera's** contention that the defendant's appraisal report, in the hands of the plaintiff, was *illegally-obtained evidence*. But learned counsel goes further to invoke a criminal-law precedent, showing that even if the said evidence was illegally obtained, its integrity in the proof of the plaintiff's case was juridically irreproachable. **Mr. Kaburu** contends that the law on illegally-obtained evidence, in Kenya, is still represented by the old case of **Kuruma s/o Kaniu v. R.** [1955] A.C. 197. This case had gone on appeal from the Court of Appeal for Eastern Africa to the Privy Council in England. The Court of Appeal decision was affirmed, in the following passage from the judgement of **Lord Goddard, C.J.** (p.203):

***"In their Lordships' opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the Court is not concerned with how the evidence was obtained. While this proposition may not have been stated in so many words in any English case there are decisions which support it, and in their Lordships' opinion it is plainly right in principle."***

Such a state of the law, learned counsel urged, had not been the subject of change by way of amendment in the Evidence Act (Cap.80).

Of the busybody who intercepted the defendant's correspondence and bequeathed the same to the plaintiff herein, learned counsel remarked that she has not been subjected to the criminal process – and so it should be presumed she committed no illegality. In counsel's words: "Breach of regulations not having the force of law is not a criminal act." The tea-girl's case, counsel submitted, did not fit into the mould of the authority relied on by the defendant, **Robert Njenga Ndichu v. Brush Manufacturers Limited**, C.A. No. 144 of 2001 – because in that case "criminal acts known to the law had been committed. The issue in that case was not one of illegally-obtained evidence..." Counsel urged that the test of the standing of the defendant's appraisal report in the hands of the plaintiff, must be confined to *relevance*, in accordance with the principle in the **Kuruma s/o Kaniu** case: "In the **Njenga** case, the cause of action arose out of a crime... [and that was not the] case here." Counsel went further to submit: "It was not, at any rate, the plaintiff who got the report illegally, if illegality arises at all. It was the tea-girl who is not a party in this case. It was not shown either that the plaintiff induced that girl to get the report for him. He got it incidentally and innocently."

Learned counsel has contended that the defendant acted improperly when he received his own assessment report returned by the Assistant General Manager (Manpower Division), **Mr. Cheruiyot** for the purpose of discussing with the plaintiff yet he did not do so. In counsel's words: "Should the defendant escape liability for concealing the report even after he was directed to show it to the plaintiff and should he be allowed to rely on qualified privilege on a report he concealed yet he pleads common interest and common duty? We submit, no."

This is an ingenious point raised by counsel; though a consideration of the relevant evidence would show it, I think, not to be valid. Already I have remarked the esoteric "practice" at the Kenya Commercial Bank, at the time the events leading this suit occurred, in which a responsible manager making an appraisal of his junior staff, could be asked to place the appraisal before the selfsame junior, for approval or disapproval. I will take judicial notice that strategic business entities such as banks, which run essential financial services for the public, have to conduct responsible administration incorporating appropriate controls in personnel relations; and on that basis I would find it unbusinesslike, and possibly contrary to public policy, that a senior manager may be placed under obligation to seek popular opinions among junior staff, in respect of confidential communications on financial discipline.

On the evidence, the defendant testified that for one thing, at his level of seniority he was not accountable to the Manager or Assistant Manager in charge of the Human Resources Division; his path of

accountability linked him directly to the office of the Executive Chairman of the Bank. Secondly, the defendant was convinced that it was irresponsible of **Mr. J.K.A. Cheruiyot**, the Assistant Manager (Human Resources) to return his confidential appraisal on the plaintiff and to ask him to discuss the same with the plaintiff, for the purpose of securing the plaintiff's approval. Thirdly, the defendant gave testimony that he had personally discussed such contretemps with the Human Resources Division, and (perhaps) as a consequence, there was not any follow-up on the defendant's failure to act, from the Human Resources Division or anywhere else; indeed, the plaintiff himself wrote his protests (against the defendant's appraisal which had been availed to him by the tea-girl), but by his own testimony, no responsible official of the Bank ever responded to him. These scenarios of fact, I would hold, negative the impression given by counsel for the plaintiff that the defendant was under some duty to place before him the negative appraisal report which had been returned to the defendant by **Mr. J.K.A. Cheruiyot**, Assistant Manager in the Human Resources Division.

**Mr. Kaburu** sought further to justify the plaintiff's surreptitious mode of obtaining the defendant's appraisal report, by invoking public policy considerations. He urged: "There is no public policy in Kenya on how parties to suits should obtain their evidence." He also urged that the plaintiff had a duty of "due diligence ..to discover the fraud" which he associated with the defendant's failure to place the appraisal report before him. I cannot, with respect, accept such an argument as valid, in view of the content of the foregoing paragraphs in which I have depicted as entirely justified the defendant's refusal to place his appraisal report before the plaintiff.

So it follows, in my finding, that no fraud was committed when the defendant failed to inform the plaintiff that his appraisal of the plaintiff had been negative. And it follows, as I find and hold, that there is no fraud in terms of s.26 of the Limitation of Actions Act (Cap.22) and as a result, the plaintiff could not rely on the said s.26 as a basis for a belated suit in defamation. The suit in libel was, therefore, I would hold, *statute-barred* and merits dismissal.

**(iv) In any event, did the defendant defame the plaintiff?**

But in case I am wrong on that point, then, did the defendant's appraisal report amount to a *defamation* of the plaintiff? In his rejoinder the plaintiff calls in aid Professor Harry Street's ***The Law of Torts***, 5<sup>th</sup> ed. (London: **Butterworths**, 1972), at p.289:

***"It is defamatory to impute to a trader or businessman or professional man lack of qualification, knowledge, skill, capacity, judgement or efficiency in the conduct of his trade or business or professional activity, for example, a severe attack on the special aesthetising technique of a practising dental surgeon."***

And **Mr. Kaburu** submitted that it was "clearly defamatory for the defendant to impute to the plaintiff who was the manager of the trustee branch of the Bank, therefore a professional banker or trustee, slow reaction time (capacity)..."

Learned counsel in his rejoinder disputes the point carried in both the evidence and the submissions for the defendant, that the content of the impugned assessment report was in the nature of *opinion* which he was under employment-relations duty to express to the Bank's Head Office. He makes recourse once again to **Street on Torts** (*op.cit.*, p. 289):

***"A statement may nevertheless be defamatory, although the maker states it, not as a fact, but as a mere opinion. One must take into account circumstances of time and place."***

And then counsel submits: "There is therefore no licence to make defamatory statements under the guise of opinion." He further submitted that the defendant had been required to give a *factual* and truthful assessment of the plaintiff's performance – as "such reports are [an important aspect of human-resources] management and do not call for expressions of mere opinions. They call for factual statements backed by the overall annual performance of an employee..." Counsel contended that the defendant had failed "to express himself factually, truthfully...", and that this was "evidence of malice."

## VII. FINAL ASSESSMENT

### (i) *Preliminary remarks*

A substantial degree of assessment of evidence has already taken place during my review of the submissions of counsel, and indeed certain lines of determination of this case have already been set out. To flesh out those positions, and to reconcile the issues so as to determine the outcome, I will now consider those questions that remain unresolved.

I have already concluded that the *libel* element in this suit cannot succeed, because that cause of action was *time-barred*. Just in case I am wrong, however, I have to address the question whether defamation has been proved.

### (ii) *Did the defendant defame the plaintiff?*

It is clear from the evidence that the defendant's appraisal report which is the plaintiff's basis for filing suit, was not the gratuitous statement of a busybody, broadcast to the world at large, all caution cast to the winds; but it was a written report made in the *context of employment*, from a senior manager, relating to a junior manager, and addressed to the Manpower Division of the employer – the section of the Kenya Commercial Bank, the core business of which it indeed was, to receive reports concerning the competence and the performance of staff.

From that fact alone, it should be clear that the occasion of the writing and forwarding of the defendant's appraisal, was an occasion of *qualified privilege*. An institution such as a bank is established to render important financial services to members of the public; and to that end, it is required and expected to have efficient running systems; one of such systems, I would here take judicial notice, is *personnel accountability*, and *probity in personal conduct*; and therefore, a senior manager in the position of the defendant, was under general duty to have oversight in relation to his juniors, and to make indications to Head Office, regarding their efficiency, integrity, and quality of performance.

The law on this subject has been considered earlier. Where qualified privilege applies, the law runs in tandem with a *public policy* which ordains that the publication in question be covered by privilege, so long – and only so long – as the publication is honestly made.

Since the defendant pleaded qualified privilege, and all the evidence on record shows that the defendant had done only his supervisory duty in making his report on the performance of the plaintiff, it fell upon the *plaintiff* to negate the application of qualified privilege, through proof of *actual malice*. Learned counsel for the plaintiff did not clearly indicate the element of express malice which could have tainted the defendant's appraisal report. I think counsel misconstrued some apparent contradiction in the defendant's evidence: about the defendant having or not having a *duty to make a report* on the plaintiff's performance. I have already recognised the defendant's *general supervisory duty* on the staff-performance docket, by taking judicial notice.

The impugned words in the defendant's appraisal report run, in part, as follows:

“...[the plaintiff] had a serious head injury which reduced his reaction time considerably. Weakness[es] pointed out to him have been received with rude correspondence, or [blame directed at] another party for shortcomings.”

Are such words inherently defamatory? Do those words show actual malice? Cannot such words be expressed on an occasion of qualified privilege, in relation to the facts of this case? Would the defendant, as a senior manager, have been entitled to use those very words in expression of his management opinion?

The play of qualified privilege is well recognised in case law, and indeed, in certain such situations, even fairly *strong language* in a publication would still be protected by privilege. The English Court of

Appeal, in *Edmondson v. Birch & Co. Ltd. and Another* [1907] 1K.B. 371 (at p.381, per *Collins, M.R.*) had thus stated the applicable law:

***“I agree that the language used may in some cases be so defamatory, and so far in excess of the occasion, as to be evidence of actual malice, and to shew that the publication of the defamatory matter was not a use, but an abuse of the privileged occasion. But the mere fact that language used is somewhat strong, or not altogether temperate, would not, in the absence of any indication that it was not used bona fide, be evidence of malice.”***

Relevant also to this case, and certainly pertinent in the progress of this judgement towards a verdict, is the English Court of Exchequer’s judgement in *Spill v. Maule* (1869) Vol. IV L.R. Exch.232 (at p.236, per *Cockburn, C.J.*):

***“Now, the communication being privileged, the presumption is in favour of the absence of malice in the defendant, and in order to rebut this presumption, the plaintiff must shew actual malice, and he may no doubt shew this by a reference to the terms of the libel as being utterly beyond and disproportionate to the facts. We must look, then, to see whether the circumstances are such as to rebut on the part of the plaintiff the presumption of the absence of malice in the defendant [emphases added].”***

On the facts of the instant case, I would hold that the plaintiff, whether by his evidence or by the submissions of his learned counsel, has not rebutted the *legal presumption of absence of malice* on the part of the defendant who formulated and forwarded his appraisal report, of and concerning the plaintiff, on a privileged occasion. I would hold, therefore, that even had I been wrong in finding that the plaintiff’s suit was time-barred, the outcome will be the same, as I have now determined also that the defendant had not defamed the plaintiff in such a manner as would give rise to liability to pay damages.

### ***III. Malicious falsehood***

It follows that the plaintiff must only look to his suit in *malicious falsehood*, as a basis of possible redress. A suit in malicious falsehood, as already noted earlier in this judgement, lies only for *written or oral falsehoods maliciously published which are calculated to produce – and which do produce – actual damage*. Under this cause of action it is the plaintiff’s case that, he had “lost an annual increment due to lack of an annual report”; and “the plaintiff’s services were ultimately terminated so soon thereafter.” Such a formulation of the gravamen, in my judgement, does not establish the existence of a “malicious falsehood.” It is not in doubt that the defendant did write and forward to Head Office his personal assessment of the plaintiff’s performance; but in his evidence, this was his *opinion* which of course, was different from the plaintiff’s self-rating in the following terms: “[The defendant] has rated me as unsatisfactory. [But] I am a graduate, a holder of the B.A. degree and a diploma in education.” It was the submission of counsel for the defendant, based on the defendant’s testimony, that the Kenya Commercial Bank had only expected the defendant to express an opinion, which could be accepted or not accepted at Head Office – regarding the plaintiff’s performance in a branch where frauds and thefts had taken place, causing loss to the institution.

### ***IV. Duplicity and abuse of process?***

Counsel for the defendant urged that as the appraisal report which is the basis of this suit was formulated by the defendant purely in pursuance of his employment obligations, a contest of the same could only properly be lodged against the Kenya Commercial Bank as a *contract-of-employment* issue. Counsel noted that the termination of the plaintiff’s employment came about well after the contested assessment report, and that no connection could be made between the two events. Learned counsel also noted that the plaintiff had already sued the Bank, on an employment-related cause of action and he had on that basis been accorded satisfaction; so that a new suit against the Bank’s employee would amount to a suit against both principal and agent over the same cause of action. He urged that the instant suit by the plaintiff was an abuse of the process of the law.

**(v) Verdict**

Such, in my judgement, is the outcome, given as I have already determined, that the suit *lacks a cause* in defamation or in malicious falsehood. Thus, issues canvassed by the plaintiff, such as the status of improperly-obtained evidence, have little practical application in this claim; and I have no hesitancy, in the light of my findings, in dismissing the suit with costs to the defendant.

***Decree accordingly.***

**DATED and DELIVERED at Nairobi this 19<sup>th</sup> day of January, 2007.**

**J.B. OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court Clerk: Mwangi**

**For the Plaintiff: Mr. Kaburu, instructed by M/s. Nelson Kaburu Advocates**

**For the Defendant: Mr. Chacha Odera, instructed by M/s. Oraro & Co. Advocates**