



REPUBLIC OF KENYA



KENYA LAW
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**Mwau v Nation Media Group Limited & 2 others (Civil Suit 480 of 2005)
[2025] KEHC 3073 (KLR) (Civ) (6 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3073 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT 480 OF 2005

JN MULWA, J

MARCH 6, 2025

BETWEEN

JOHN HARUN MWAU PLAINTIFF

AND

NATION MEDIA GROUP LIMITED 1ST DEFENDANT

WILFRED KIBORO 2ND DEFENDANT

WANGETHI MWANGI 3RD DEFENDANT

JUDGMENT

1. By a Plaint dated 26/4/2005 and Amended on 8/3/2007, John Harun Mwau (hereafter the Plaintiff) sued Nation Media Group Limited, Wilfred Kiboro and Wangethi Mwangi (hereafter the 1st, 2nd & 3rd Defendant/Defendants) for alleged defamation and sought judgment against them jointly and severally for:-
 - i. Exemplary and Aggravated damages for defamation.
 - (ia) General Damages for Defamation.
 - ii. Special damages of Kshs. 156,000,000/- and other special damages to be particularized at the hearing thereof.
 - iii. A permanent injunction to restrain the Defendants, whether by themselves, servants or agents, authorized to them from further making, printing, broadcasting, televising or publishing defamatory and libelous statements in articles against the Plaintiff.
 - iv. A declaration that matters of public interest do not include or extend to publication of falsehoods.



- v. A declaration that publication of falsehoods does not constitute freedom of press or expression.
 - vi. A declaration that there is a duty imposed on the media and or media houses to verify and or ascertain the truthfulness and or correctness of any or all facts relating to any article or matter prior to publication and or broadcast.
 - vii. A declaratory order that the Plaintiff does not own the Pepe International Container Terminal.
 - viii. Costs of the suit and interest.
2. The Plaintiff in his statement of claim states that during the month of April 2004, he was contracted by an Abu Dhabi based Kenyan businessman to source, negotiate and cause to be supplied a total of 15,000 electric massage chairs at an agreed profit or commission of USD 130 per chair. That on or about 27/04/2004, with obvious and clear intention to mar, nullify, undermine or sabotage the Plaintiff's reputation, integrity and character the Defendants jointly and severally, falsely and maliciously published, invented and or fabricated a news article publication in the online edition of the Daily Nation Newspaper captioned:-

“MP to be quizzed over import racket

An M.P. and former Anti-Corruption Authority Boss Harun Mwau are to be questioned by Police Investigation a multi-million-Shillings tax evasion racket at the Port of Mombasa

CID Officers yesterday were looking for Mr. Mwau and Juja M.P. William Kabogo to assist in their investigations into contraband goods seized at Mombasa in containers which and been labeled to disguise their contents

The goods were bound for the Pepe International Container Terminal owned by Mr. Mwau and were seized in Mombasa in a massive security raid following a tip off.

When a combined team from the Kenya Revenue Authority, Kenya Bureau of Standards, CID and the Anti Corruption Unit swooped on the port, they found the imports about to be re-shipped to Mumbai.

However, all documents indicated they had recently been offloaded form a ship and were to be verified at Mr. Mwau's depot in Embakasi Nairobi.

The goods worth more than Sh15 Million were different from what was indicated in the Container labels, said the Kenya Revenue Authority Corporate and Public affairs Manager for Southern Region, Mrs. Lucy Njoe said.

It is not clear who owned the exports or whether Mr. Mwau and Mr. Kabogo were linked to them but Mrs. Njoe said the assorted goods were seized when their owners attempted to re-ship them to Mumbai after they had already paid duty for them.

"The owners claimed the goods were destined for Mumbai and had come to Mombasa in a mix-up. We however, became suspicious after learning that duty had already been paid for them," she said.

Investigators broke into the eight containers yesterday and discovered that most of the goods declared were different from the containers' contents.

"Although the importers had indicated that the containers had false ceiling material, redo cassettes, gypsum powder, suitcases and honey we have discovered assorted goods that include shoes, jackets, office stationery, lamination machines and even tomato sauce," she said.



Police said the owners of the containers had even obtained a court injunction to prevent port officials and the police from opening the containers, but which has been set aside.

The Government officials involved in the operation are still going through the tedious process of establishing what is contained in all the eight containers even as we are talking," police said

Mrs. Njoe said the operation against tax evaders at the Port of Mombasa involved officers from different arms of the Government.

The cost deputy Provincial Commissioner, Mr. Wilson Lithole, said the anti-tax evasion campaign at the port of Mombasa would be intensified until all unscrupulous traders who deny the Government revenue were brought to book.

It is understood the importers of the eight containers had applied for their verification to be carried out at one of the six independent Container Freight Stations or dry ports.

A KRA official said unscrupulous traders were using Container Freight Stations (CFS) to deny the Government millions of shilling in revenue.

They used them for false declaration, under-valuation and importation of counterfeit goods.

The Government has been losing billions of shillings in revenue due to under valuation and false declaration of motor vehicles and goods described as personal and household effects.

Documents seen by the Nation shows that one importer paid (US \$7,500) SHS.85, 000 for a Toyota Hiace mini-bus manufactured in 1998 from Japan but only paid duty based on (Us \$5,250) sh409,500 value, denying the Government more tax revenue.

In another instance a vehicle valued at (US \$4,500) sh351, 000 was declared as worth (US \$ 3,500) shs273, 000.

In another case concerned a Toyota manufactured in 1997 whose nominal scum value was (US \$4,700) Ssh366,600 and for which the importer only paid taxes on (US\$3,000) sh243,000 value.

Another case Involving a Toyota RAV 4 with customs nominal value of (US\$6,500) sh507,000 had duty paid on only (US\$4,000) sh312,00.

It is also suspected that container goods imported through the freight stations were declared as foodstuffs and personal effects yet most of them were new electronic equipment and other high value goods.

Available documents show that all the seized goods were destined for the same consignee address and the packages were of similar quantity and from the same source.

Container Freight Stations or dry ports were started by the Government with the aim of decongesting the port but have become a route for tax evasion and diversion of transit goods into the local market.

Recently, the Government introduced stringent measures for CFS operators as part of efforts to deal with malpractices.

Among the conditions was the need for CFS to have a large area to ensure enough room for stacking and loading containers and availability of cargo handling equipment.

Besides the stipulated conditions, stations must not be less than 3,000 square feet and suitable for use as a customs warehouse, with floodlights.



The Plaintiff shall crave leave of the court to refer to the said article for its full tenure and effect.

3. The plaintiff averred that the said article and publication and the said words to the ordinary members of the public and to those who knew or know the Plaintiff, in their natural and ordinary meaning meant and were understood to mean, to the estimation of the reasonable members of the public that:
- i. The Plaintiff is involved in multi-million shilling tax evasion racket
 - ii. The plaintiff is a racketeer at the port of Mombasa.
 - iii. The Plaintiff was undeserving of being appointed as the Director of the Anti-Corruption Authority.
 - iv. The Plaintiff is a corrupt person working in cohort with one William Kabogo.
 - v. The Police are investigating the Plaintiff in connection with the tax evasion racket at the port of Mombasa.
 - vi. The Plaintiff is a criminal on the run.
 - vii. The Plaintiff is involved in the importation of contraband goods.
 - viii. The Plaintiff deliberately mislabels and disguises containers to evade tax
 - ix. The Plaintiff is a suspect being sought.
 - x. The Plaintiff is hiding, aware that he is being sought by the Police.
 - xi. The contraband goods were bound for Pepe Depot
 - xii. The combined team of C.I.D and Kenya Revenue Authority employees found contraband goods being re-shipped to Mumbai.
 - xiii. The Plaintiff owns a depot at Embakasi, Nairobi
 - xiv. The Plaintiff had imported goods worth Kshs. 15 Million and has deliberately mislabeled them to evade tax.
 - xv. The Plaintiff is a tax cheat, a liar, unscrupulous and unreliable.
 - xvi. The Plaintiff is working very closely with the said Mr Kabogo and the two are conspiring to commit criminal offences, that it has become difficult to differentiate between the two
 - xvii. The owners of the alleged contraband goods were known but were hiding, concealing involvement in criminal activities
 - xviii. The plaintiff had imported goods for which he had paid duty and was trying to export the same without paying tax, a fact confirmed by one Mrs Lucy Njue
 - xix. The Plaintiff changed story when the tax evasion was unearthed and was now saying that the goods were destined for Mumbai
 - xx. It was confirmed that the goods actually belonged to the Plaintiff
 - xxi. The Plaintiff had given false declarations as to the contents of the containers in question.



- xxii. The Plaintiff upon being discovered rushed to court to apply for and did obtain orders of injunction to prevent court officials and Police from opening the containers.
 - xxiii. The court later set aside the said court orders, a fact confirmed by the Police.
 - xxiv. The Plaintiff's tax evasion activities is a big issue/operation being investigated by different arms of the Government
 - xxv. The Plaintiff is going to be prosecuted.
 - xxvi. The Plaintiff had made an Application to have his goods verified in a Container Freight Station (CFS) so that as an unscrupulous trader, he denies the Government revenue.
 - xxvii. The Government has lost billions of shillings through the plaintiff's tax evasion tendencies.
 - xxviii. The Defendants jointly and severally have seen and are in possession of documents showing that the Plaintiff imported one Toyota Hiace worth US \$ 7,500 but only paid duty based on US \$ 5,250
 - xxix. The Defendants jointly and severally have documents showing that all the seized containers were consigned to the Plaintiff,
 - xxx. The CFS were established by the Government in order to de congest the port of Mombasa but the plaintiff is using them as a conduit for tax evasion.
4. Further the Plaintiff went on to state that the said publication was false, defamatory and malicious and was calculated to injure and did injure him in his reputation and character and lowered him in the estimation of the reasonable members of the public as hereunder:
- Particulars of malice, spite, and falsity of the publication
- a. The Defendants knew/know that their daily publication has broad and worldwide coverage.
 - b. The Defendants knew/know the logical consequences of portraying the Plaintiff as a tax cheat/evader.
 - c. The Defendants knew/know that the Plaintiff has never committed any criminal offence including tax evasion.
 - d. By according the publication a front-page coverage and boldly printing the words, the Defendants knew/know they would injure the Plaintiff beyond repair.
 - e. The Defendants have boldly posted the said publication on the internet and has caused the same to remain on the internet to date.
 - f. The Defendants never bothered to verify and/or confirm with the Plaintiff the accuracy and/or authenticity of the allegations prior to publication,
 - g. The Plaintiff demanded from the Kenya Revenue Authority full details of any goods or containers which were allegedly seized or were under investigations linking him or any of his companies, but they said that there was none whatsoever
 - h. The Plaintiff demanded from the Kenya Revenue Authority details of any case or incident where he has been involved in tax evasion, past or present, but none whatsoever was so cited.
 - i. The Plaintiff reported the defamatory publication of the Defendants to the Police.



- j. The Defendants are aware and it is a matter of public knowledge that all goods imported in containers are carried under a bill of lading issued to the shipper when the goods are loaded. The bill of lading inter alia describes the goods, the shipper, the notifying party and the consignee.
- k. The defendants are aware that at all times, it is a legal requirement for the in-bound cargo manifest information, giving the nature of the cargo, weight, shipper, container number and the consignee to be submitted to Kenya Revenue Authority 96 hours prior to the docking of the vessel.
- l. The Defendants knew that the aforesaid publication would occasion the Plaintiff immense anguish and distress.
- m. The Defendants knew that the publication would excite immense disaffection and hatred against the Plaintiff.
- n. The Defendants knew that their right to freedom of opinion, publication and press is not a blank cheque.
- o. The Defendants knew that the plaintiff was appointed as the first Director of the Kenya Anti-corruption Authority purely on merit.
- p. The Defendants' sole intention was to attack the moral, ethical character and integrity of the Plaintiff.
- q. The Defendants knew the seriousness with which the international community views or takes matters or allegations of tax evasion worldwide.
- r. The Defendants knew that the Kenya Revenue Authority officials were not the source of their injurious publications.
- s. The Defendants knew the status of the plaintiff in the Republic of Kenya and outside.
- t. The Defendants intended that the Plaintiff be shunned by all reasonable members of the public.
- u. The Plaintiff has never been questioned and/or been a subject of any police questioning or investigation in respect of any or any multimillion-shilling tax evasion racket whether at the port of Mombasa or elsewhere.
- v. There has never been an occasion where the police were looking for the Plaintiff to assist in the investigations of any contraband goods seized at the port of Mombasa in containers which had been deliberately mislabeled to disguise their contents.
- w. The plaintiff does not own Pepe Inland Container Terminal nor is he aware of any goods bound for the said terminal which were seized in Mombasa in a massive security raid.
- x. The Plaintiff has never in any way tried or attempted to re-ship goods worth Kshs. 15 Million to Mumbai.
- y. The plaintiff does not own any depot in Embakasi, Nairobi.
- z. The Plaintiff has never owner and/or claimed any goods to be destined for Mumbai that had gone to Mombasa in a mix-up and that the plaintiff has never paid any duty for any goods at the Mombasa Port.



- aa. The Plaintiff has never owned whether directly or indirectly any container where a court injunction had been obtained to prevent port officials and the police from verifying their contents.
 - ab. The plaintiff has never imported and/or applied for any container verification to be carried out at any independent Container Freight station.
 - ac. No goods for container belonging to or consigned to the Plaintiff or any of his companies have ever been seized by any government agency whatsoever.
5. The Plaintiff therefore sought from the Defendants, jointly and severally Special and general damages more particularly as stated in the Amended plaint.
6. In their statement of defence dated 26/03/2007, the Defendants admitted to the impugned publication however denied the other key averments in the plaint; that the words were defamatory, false or libelous nor was the publication done with spite, ill-will, falsely or maliciously. It was further denied that the words could be construed either in their natural and ordinary sense or any implication in the manner or form, as imputed by the Plaintiff in his plaint.
7. In the alternative and without prejudice to the averment in the defence, the Defendants averred that in so far as the words in the publication consist of facts they were substantially true and in so far as they consisted of opinions, they were fair comment on a matter of public interest namely that the public had a right to know of transactions involving operations at a public utility such as the Mombasa Port.
8. The suit proceeded to full hearing during which only the Plaintiff called evidence in support of the averment in his plaint.

Plaintiffs Case and Evidence

9. PW1, Hon. Dr John Harun Mwau, the Plaintiff herein adopted his witness statement dated 20/02/2015 as his evidence-in-chief and produced his lists and bundles of documents dated 29/10/2008 as PExh.1 - 5.

It was his evidence that he was aggrieved by the defamation by the Defendants in bad faith to destroy his reputation and character. That the article published on 27.04.2004 in the “Daily Nation” was done to effect damages upon his character. He went on to state that the article was equally published on their online platform and thus had the effect of being read worldwide; and that the publication being criminal in nature, and concerning the serious offence of tax evasion, and having been repeated more than five (5) times in the article including the description of him being a former Anti-Corruption Director, the publication was injurious to his character. He maintained that he was a law-abiding citizen and was never involved in any criminal activities both locally or internationally.

10. During cross-examination, PW1 stated that he is a prominent businessman that entails the import and export of goods both locally and internationally meanwhile has regular interactions with Kenya Revenue Authority (KRA) on accord of his business; That in respect of the impugned article he was never questioned by investigative authorities despite the article referencing that there was a raid with him being a target. He went on to state that by reading of the article, it was not clear who was targeting him, other than the media, as the police did not question him in respect of the purported raid at the port of Mombasa.
11. Additionally the plaintiff testified that he was not the owner of the container referenced in the article hence it was questionable how his name came up maintaining that as a result of the publication his



reputation was injured, sustained loss business, had contracts cancelled however confirmed having not produced any documents in respect of the latter.

12. He stated that he was also a prominent politician and was elected in 2009 as a Member of Parliament for Kilome despite the publication. In summation, he affirmed that notwithstanding having pleaded loss of business to the tune of one hundred fifty six million, he did not particularize or tabulate damages, loss of profit or business.
13. In re-examination, the plaintiff stated that in respect of the publication, it was not him who was exporting the stated goods and that repetition of his name five (5) times was malicious by linking him to the crime, of which was not fair or just adding that prior to the publication, his opinion was not sought despite the article referring to a company called Pepe International Container Terminal owned by him in Nairobi. He categorically maintained that he did not own such a company as a director or shareholder, reiterating that despite the publication he was elected as Member of Parliament for Kilome Constituency and was cleared to run by the Anti-corruption Authority and Electoral Commission. He however testified that soon after the said publication, he slowly started to lose friends and could not explain to his wife and children why his name was publicized therefore he urged the Court to allow his claim as prayed.
14. PW2, Mr. Michael Oliewo, on his part adopted his witness statement dated 18/10/2023 as his evidence-in-chief, the gist of which was that he had known PW1 from the early 1990s as a reputable, principled, brave and law-abiding citizen; That upon reading the impugned publication the same lowered his estimation of PW1 as law abiding, courageous and of great moral rectitude all of which appeared to be a façade in light of the Defendants article.
15. PW2 further testified that it was his reasonable belief upon reading the article that PW1 should not have been mentioned therein with links to tax evasion or smuggling without the Defendants having conducted some form of journalistic investigation or without evidence. He further stated that after reading the publication he avoided PW1, did not visit him until later when the latter and his counsel explained to him that the article was false having already filed suit as against the Defendants.
16. During cross-examination, PW2 reiterated that he was a businessman and had known PW1 for close to thirty-two (32) years having participated in his campaign in 2002 when he was elected as Member of Parliament. That despite participating in his campaign he shunned and avoided PW1 for close to two years.
17. As earlier stated the Defendants opted and or failed to call any evidence. Upon closure of the respective parties' cases, both parties filed their respective submissions.

Analysis and Determination

18. The Court has carefully considered the respective parties' pleadings, the evidence adduced by the Plaintiff and his witness, and the parties' written submissions as well as authorities relied in support thereof.

Issues for determination.

- a. Whether the Plaintiff has made out a case for defamation against the Defendants;
- b. Whether the defence of justification and fair comment are available to the Defendants; and
- c. Whether the Plaintiff is entitled to an award of damages, and if so, the quantum.



19. Before addressing the framed issues, as a preliminary question in limine, the Defendants through their submissions have challenged the competency of the Amended Plaint for lack on an accompanying verifying affidavit pursuant to Order 4 Rule 1(2) of the Civil Procedure Rules (CPR) which provides that the plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in Rule 1(1)(f) - (an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaint). The record shows that the plaintiff did not offer a response to the said contestation.
20. That said, the history leading up to enactment of the provision requiring a litigant to accompany suit with a verifying affidavit was purposefully discussed at length by the Court of Appeal in *Josephat Kipchirchir Sigilai v Gotab Sanik Enterprises Ltd & 4 others* [2007] KECA 369 (KLR). Nevertheless, what this Court garners from the said decision and reading of Order 4 Rule 1(1)(f) as read with Rule 1(2), is that part of the mischief the provision intended to resolve appertained the prevention of litigants from evasive and obscure pleadings and to prevent a multiplicity of suits on the same cause of action, on the backdrop of the consequences on perjury. As at filing of the suit, the plaint was accompanied by a verifying affidavit wherein the Plaintiff already swore to the correctness of the averments in the plaint and that there was no pending suit between the parties. Therefore, this Court reasonably believes that the intention of the said provision was not to be applied every time pleadings are amended. Consequently, it is the Court view that the Defendants objection on the issue is not well taken.

Whether the Plaintiff has made out a case for defamation against the Defendants.

21. In so far as the tort of defamation is concerned, the rationale behind the law of defamation was spelt out by the Court of Appeal in *Musikari Kombo v Royal Media Services Limited* [2018] KECA 801 (KLR), wherein it was stated that;

“The law of defamation is concerned with the protection of a person’s reputation. Patrick O’Callaghan in the Common Law Series: The Law of Tort at paragraph 25.1 expressed himself in the following manner:

“The law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation: ‘As a general rule, English law gives effect to the ninth commandment that a man shall not speak evil falsely of his neighbour. It supplies a temporary sanction ...’

Defamation protects a person’s reputation that is the estimation in which he is held by others; it does not protect a person’s opinion of himself nor his character. The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit’ and it affords redress against those who speak such defamatory falsehoods...”

22. Further, according to Black’s Law Dictionary, 9th Edition at Pg. 479 defamation is defined as:

“The act of harming the reputation of another by making a false statement to a third person.”

23. It must also be remembered that when it concerns the tort of defamation, there exists competition between the private and public interest. The current constitutional dispensation at Article 33(1) guarantees the freedom of expression by way of seeking, receiving or imparting information. Corollary of the forestated, is sub-Article (3) which provides that in exercise of the right of freedom of expression,



every person shall respect the rights and reputation of others. Considering these competing rights Lord Denning MR stated in English Case of Fraser v Evans & Others [1969] 1 ALL ER 8; -

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

24. The Court of Appeal in the case of Wycliffe A Swanya v Toyota East Africa Ltd & another [2009] KECA 379 (KLR) rendered that in a suit founded on defamation the plaintiff must prove the following elements: -

- i. That the matter of which the plaintiff complains is defamatory in character.
- ii. That defamatory statement or utterance was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.
- iii. That it was published maliciously.
- iv. In slander, subject to certain exceptions, the plaintiff has suffered special damage.

25. In the instant case, it is undisputed that the 1st Defendant published the article in question on 27/04/200 both in print and on its online platform. It is also uncontested that the articles specifically mentioned the Plaintiff by name when referenced him as a former ‘Anti-graft Czar’ as being sought after by criminal investigation officers in respect of a multi-million tax evasion racket at the Port of Mombasa. By the above, it is apparent that the article was published by the 1st Defendant concerning the Plaintiff, therefore the primary issue to determine, is whether the article was defamatory of the Plaintiff and or whether the defence of fair comment and justification as pleaded are available to the Defendants. The Court proposes to deal concomitantly with these issues.

26. In S M W v Z W M [2015] eKLR, the Court of Appeal succinctly stated: -

“A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right-thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided.”

27. In Halsbury’s Laws of England 4th Edition Vol. 28 at page 23 the authors opined:-

“In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand them in a defamatory sense.”

Also, in Onama v Uganda Argus Ltd (1969) EA the East African Court of Appeal stated as follows:-

“In deciding whether the words are defamatory, the test is what the words could reasonably be regarded as meaning, not only to the general public, but also to all those “who have a greater or special knowledge of the subject matter”.

28. Based on the aforementioned authorities, can it be concluded that the publications tarnished the Plaintiff’s reputation in the eyes of reasonable members of society? The impugned articles were adduced as PExh.1 and Pexh.2, respectively. The former was sub-titled “Tycoon Mwau also targeted



after graft raid". PW1 through his evidence confirmed that he was a former "Anti-graft Czar" whereas the article in itself captured the same. Meanwhile ex facie reading of the article it imputed that the Plaintiff was allegedly part of tax evasion racket that the police, as at the time of publication of the article, were investigating in respect of seized contraband goods. Notably, the impugned article employed the use of words and phrases such as "...tax evasion racket...", "...investigations into contraband goods...", "...goods were bound for the Pepe Internal Container Terminal owned by Harun Mwau...", "...goods.....were seized...in a massive security raid" and ".....anti-tax evasion campaign... would be intensified until all unscrupulous traders who deny government revenue are brought to book" The gist of the article appears to encapsulate that PW1 was under investigation for alleged tax evasion racket and importation of contraband goods.

29. PW1 in his evidence assailed the publication for being false, actuated by malice and that the article was published without seeking prior comments or clarification from the plaintiff. It appears that PW1 read malicious intent by the said publication of which he viewed that other than being intent on tarnishing his name, it was equally aimed at negatively affecting his business empire by portraying him as a criminal, tax cheat, smuggler, a person without reputation and lack of patriotism. PW2 who was called to shore up the defamatory aspect of the publication stated that he had known the Plaintiff from the nineties as a man of repute, an industrious businessman and law-abiding citizen. That on reading the article he knew the same was of and or concerned PW1 since it mentioned him by name, and the imputation created by the article completely destroyed and ruined his view of the plaintiff; that upon reading the article he avoided PW1 for about two years after publication.
30. The Defendants though attempting to qualify in the article that it was not clear to whom the seized exports belonged to, despite pleading in their statement of defence that the article was an opinion, fair comment and was justified, they did not adduce any evidence to demonstrate the truthfulness of the contents of the impugned publication. No police reports, transcripts of interviews with the investigating officers or agencies, bill of lading and letters from either the investigating or the tax revenue agencies capturing that the Plaintiff was under investigations in respect of port smuggling or tax evading racket or owned the containers in question. Certainly, in the absence of either of the above it would appear that there is credence to the Plaintiff's assertion that the statement in the publication and its contents thereto were purposefully false as far as it associated the Plaintiff with the smuggling and tax evading racket.
31. It is not enough for the Defendants to dangle the defences of fair comment and justification without shoring up the same. The publications were passed off as factual by the Defendant whereas one Mrs. Njue who appears to be captured as a source of the said reporting was not called as witness before this Court. Without material to buttress the defence, the contestation of falsehood by the Plaintiff would manifestly sustain. Suffice to say, that in its plain meaning, and as clearly understood by PW2, as an ordinary man, the article had a defamatory tendency, whether it was believed by him or other people to whom it was published.
32. It has since been settled that a comment based on falsehood cannot qualify as fair comment as was addressed by the Court in *Nation Media Group Limited & another v Alfred N. Mutua* [2017] KECA 177 (KLR). In the case of *Uhuru Muigai Kenyatta V Baraza Leonard* [2011] eKLR that: -

"While taking the defence of justification, or qualified privilege in a defamation case, the defendant was required by law to establish the true facts and the plaintiff has no burden to prove the defence raised by the defendant. Once verified, the justification or qualified privilege does not insure the defendant and in any event, the onus that the same is true rests on the defendants to make it a fair publication."



33. It is trite that the legal burden was on the Plaintiff to prove the averments in his pleadings while the evidentiary burden of proving fair comment and justification clearly lay on the Defendants. The Supreme Court in *Munya v The Independent Electoral and Boundaries Commission & 2 others* [2014] KESC 38 (KLR) while considering the twin concept of legal and evidential burden held inter alia that: -

“The person who makes such an allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue”.

34. As to whether there was malice on the part of the Defendants in respect of the said publication, it must be remembered that the suit was filed in 2004 prior to codifying of the Media Council of Kenya in our statute books vide the Media Act (repealed) and later the *Media Council Act*, which in essence sets out The Code of Conduct for the Practice of Journalism, constituting part of the measuring yard stick of the Defendants actions. Nevertheless, in *Phineas Nyagah v Gilbert Imanyara* [2013] eKLR the Court held that:

“Malice here does not necessarily mean spite or ill will but recklessness itself may be evidence of malice. Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts.

....malice may also be inferred from the relationship between the parties before or after the publication or in the conduct of the defendant in the course of the proceedings. Court should however be slow to draw the inference that a defendant was so far actuated by improper motives as to deprive him of the protection of privilege unless they are satisfied that he did not believe that what he said or wrote was true or that he was indifferent to its truth or falsely.”

35. Reviewing the material on record, this Court is of the view that the language used in the publication, especially regarding the use of the word’s “tycoon” in reference to the Plaintiff being a target of an alleged tax evasion racket appeared to sensationalize or dramatize the article and compounded by falsity of the publication, it can be stated that the Defendants actions were clearly reckless and malicious in so far as the publication falsely imputed against the Plaintiff serious criminal conduct that ordinarily would invite penal sanctions, all without first verifying and or justifying the true facts. Therefore, in view of the above the Court reasonably believes that the Plaintiff’s grievance is merited and that the impugned article was indeed defamatory of and concerning the plaintiff. The defendants are therefore found to be liable for the tort of defamation against the defendants jointly and severally.

Whether the Plaintiff is entitled to an award of damages and if so, the quantum.

36. It is well settled that an award of damages is a matter of judicial discretion. In *C A M v Royal Media Services Limited* [2013] KECA 178 (KLR), the Court of Appeal stated that:-

“No case is like the other. In the exercise of discretion to award damages for defamation, the court has wide latitude. The factors for consideration in the exercise of that discretion as enumerated in many decisions including the guidelines in *Jones v Pollard* (1997) EMLR



233-243 include objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published and any repetition; subjective effect on the Plaintiff's feelings not only from the prominence itself but from the Defendant's conduct thereafter both up to and including the trial itself; matters tending to mitigate damages for example, publication of an apology; matters tending to reduce damages; vindication of the Plaintiff's reputation past and future."

37. In the case of Joseph Njogu Kamunge v Charles Muriuki Gachari [2016] eKLR, Mativo J. (as he then was) cited the case of John v MG Ltd (1996) 1 ALL E.R. the English Court of Appeal held: -

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

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

38. Here, it is not in doubt that the publication touched on the Plaintiff's integrity, honour and reputation by demeaning him before right thinking members of the society, going by PW2's evidence. Notably, as at date of publication, the Plaintiff had previously served as an "Anti-graft Czar" and at the time he was a businessman. Further, the impugned publication potentially had the effect of wide reach among readers of the Daily Nation. The article was equally published in the 1st Defendant's online platform going as captured at Pexh.2. However, the court finds no credible evidence that the publication had occasioned the Plaintiff inability to travel and that on arrival in a foreign country he would likely have been subjected and has been subjected to inhuman, degrading, tortuous and embarrassing searches by airport security, appears to be far reaching if not conjecture. It thus goes without saying that Pexh.3, Pexh.4 and Pexh.5 do not aid the Plaintiff's cause in the foretated respect.

39. It appears that the Defendants have to date not retracted the publication or tendered an apology to the Plaintiff yet the imputation created by the article must have affected the Plaintiff's reputation nevertheless.

In the instant case, the Plaintiff seeks Kshs. 12,000,000/- for general damages and in support of the proposed award counsel for the Plaintiff relied on the decisions in William Kabogo Gitau v The Standard Group Civil Appeal No. 74 of 2011, Samuel Ndung'u Mukunya v Nation Media Group Limited & Anor, Kipyator Nicholas Biwott v Clasy Limited & 5 Others [2000] eKLR and Christopher M. Obure v Tom Alakwa & Others HCCC No. 956 of 2003.

40. The Defendants in retort proposed Kshs. 100,000/- as the total damages to be awarded to the Plaintiff should the court find them liable. All considered, the Plaintiff's proposal on general damages does not appear justifiable on the facts of this case. The sum proposed is manifestly excessive, especially in comparison with awards made in the persuasive decisions cited by the Plaintiff, some of which are distinguishable on material facts. On the other hand, the proposal by the Defendants was not readily comparable with the instant case and seems too low on the facts before the Court.

41. Upon consideration of the totality of the matter, the Court is persuaded that an award of Kshs. 5,000,000/- (Five Million) in general damages would be adequate compensation for the Plaintiff's injury and reputational damage.



On exemplary damages, in the case of *Mansion V Associated Newspapers LTD* (1965) 2 ALL ER 954 at 957 the English court stated that exemplary damages may be awarded: -

“In a case in which a newspaper quite deliberately published a statement which it either knows to be false or which it publishes recklessly, carelessly, whether it be true or false.”

42. The gravitas of the contents of the publication herein called for prior verification of facts by the Defendants, or comment by the Plaintiff, if any. The failure by the Defendants to verify and or justify the facts resulted in injury to the Plaintiff's reputation. The Plaintiff is thus entitled to exemplary damages assessed at Kshs. 1,000,000/- (One Million).
43. On special damage, it has since long been settled that special damages ought to be specifically pleaded and proved. Vide his pleadings the Plaintiff sought for special damages for loss of business, reputation, profits and loss of current and future business transactions all to the tune of Kshs. 156,000,000/- Upon perusal of the material placed before the court, no evidence was tendered to justify the award as sought in respect of the cancellation of the supply of electric chairs on accord of the Defendants publication. Therefore, without belaboring much on the claim this Court respectfully declines to award the same.
44. Equally, having awarded exemplary damages the Court will decline to award aggravated damages, there being no basis laid to warrant such an award in the circumstance.
45. The plaintiff also seeks a permanent injunction to restrain the Defendants, whether by themselves, servants or agents, authorized to them from further making, printing, broadcasting, televising or publishing defamatory and libelous statements in articles against the Plaintiff. However, the Court notes that the alleged defamatory statements were published more than twenty years ago, and it is unlikely that the defamation will be repeated. Furthermore, granting such an injunction would unjustifiably infringe on the Defendants' constitutional right to freedom of expression. Therefore, the request for a permanent injunction is denied.
46. In respect of the declarations sought in prayer (iv), (v) & (vi) this Court reasonably believes that its has addressed the Plaintiff's particular grievance in the body of this judgment by dint of the [Media Council Act](#) and accompanying Code of Conduct for the Practice of Journalism, in the Second Schedule to the Act which mandates compliance on the part of the 1st Defendant with respect to the said declarations being sought thereto. As such it would be moot in the circumstance to render the said declarations being sought by the plaintiff. As to the declaration sought in respect of prayer (vii), the embodiment of this judgment as to a finding of defamation as against the Defendants resolves the question in itself. In totality the declarations (iv), (v), (vi) & (vi) are declined.
47. Lastly, it would be remiss not to mention that the article in question was undisputedly published by the 1st Defendant. The authors of the article were not party to these proceedings and ideally would have been the more appropriate parties unlike the 2nd and 3rd Defendant. The Court does not see any sustainable cause of action as against the 2nd and 3rd Defendants despite their description as captured in the Plaintiff. Consequently, the Plaintiff's cause of action as against the 2nd and 3rd Defendants cannot be sustained in the circumstance and is accordingly dismissed with no orders on costs.

Disposition

48. Accordingly, the court finds and holds the 1st Defendant wholly liable for the tort of defamation against the Plaintiff and enters judgment accordingly as hereunder:-
 - a. Liability 100% against the 1st Defendant.



- b. Special damages Nil
- c. General damages Kshs. 5,000,000/-
- c. Exemplary damages Kshs. 1,000,000/-

Total Kshs. 6,000,000/-

The above amount shall attract interest at court rates from the date of this judgment until full settlement.

Costs of the suit shall be borne by the 1st Defendant to the plaintiff.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 6TH DAY OF MARCH 2025.

.....

JANET MULWA.

JUDGE

