Azangalala v Star Publications Limited & another (Civil Suit 217 of 2016) [2025] KEHC 7575 (KLR) (Civ) (6 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7575 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 217 OF 2016

SN MUTUKU, J

MAY 6, 2025

BETWEEN

FESTUS AZANGALALA ..... PLAINTIFF

AND

THE STAR PUBLICATIONS LIMITED ..... 1ST DEFENDANT

THE STAR NEWSPAPER ..... 2ND DEFENDANT

JUDGMENT

1. On Thursday, 12th November, 2015, the Star Newspaper (the 2nd Defendant) published the following words under the heading: COORIDORS OF POWER- POLITICAL GOSSIP:

> Did President Uhuru Kenyatta meet the appellate judges who cancelled the 50-60 per cent pay increase for teachers? Word has it the head of state met the judges days before the ruling was made. It is not clear what he told them, but some peddling the rumour believe the President could have influenced the judgment.

2. The above publication was informed by the circumstances arising from the Appeal of the Judgment of the Employment and Labour Relations Court (ELRC) delivered on 30th June 2015 in proceedings instituted by the Teachers Service Commission (TSC) against the Kenya Union of Teachers (KNUT) and Kenya Union of Post Primary Education Teachers (KUPPET) in which TSC sought various orders and declarations in respect of a strike commenced by the two unions and their members. In the course of those proceedings, the ELRC Judge, while handling an application filed by the TSC seeking interlocutory injunction pending the hearing and determination of the main petition, converted the petition into an economic dispute in which the unions became the claimants and the TSC the respondent. The Judge awarded the teachers a basic salary increments and allowances of between

50% and 100% with effect from 1st July 2013. That judgment gave rise to the three appeals that were consolidated and heard by a bench of five Court of Appeal Judges, among them the Plaintiff.

3. The publication by the 2nd Defendant caused discomfort to the Plaintiff, Festus Anzangalala, a retired Judge of the Court of Appeal, Kenya, who was serving in that capacity at the time of the above publication. The Plaintiff was perturbed by the publication and felt that it was defamatory of his character as a reputable judge and lawyer. It was his view, as can be discerned from his pleadings, that the publication was done deliberately, recklessly, maliciously and without basis. He understood the words to refer to him in their natural and ordinary meaning as well as by innuendo.

4. The reason for this reaction were that the Plaintiff was one of the judges in the five-judge bench empaneled to determine Civil Appeal No. 196 of 2015: Teachers Service Commission v Kenya Union of Teachers and 3 others, consolidated with Civil Appeal No. 195 of 2015: Salaries and Remuneration Commission v Teachers Service Commission and 2 others and Civil Appeal No. 203 of 2015: The Attorney General v the Teachers Service Commission and 3 others.

The Plaint.

5. By a Plaint dated 11th August 2016 and amended on 10th November 2016, the Plaintiff approached this court seeking judgment against the defendants, Star Publications Limited (1st Defendant) and the Star Newspaper (2nd Defendants). The Plaintiff has based his claim on the publication referred to above and sought the following orders:

    i. An injunction restraining the Defendants either by themselves, their servants or agents and otherwise howsoever from publishing or causing to be published words defamatory of the Plaintiff.

    ii. An apology for public embarrassment and ridicule.

    iii. General damages for defamation and damages.

    iv. Damages on the footing of aggravated or exemplary damages.

    v. Interest and costs.

6. The Plaintiff pleaded that the published words defamed him, and that in their natural and ordinary meaning, or by innuendo, meant and were understood to mean, inter alia, that he was unfit to hold the office of Judge of Appeal or any office of Judge; that he was incompetent, unprincipled, corrupt, unjust, dishonest and a person of questionable character; that he was incapable of holding the independence required of a judge; that he lacked integrity and was a judge who could not decide any appeal without obtaining directions and therefore ought to be removed from the position of a judge.

7. The Plaintiff, further pleaded, that the defendants deliberately, recklessly and maliciously prepared and published the caption complained of for selfish motive and or that the real motive for publishing the words complained of was to maximize profit. He pleaded that as a result of the said publication, he has been injured in character, profession and reputation and has been exposed to ridicule, odium and contempt in the eyes of his family, peers, members of the legal profession and the public. He pleaded that as a result of that publication, he has suffered loss, damage to his reputation, standing in society and public image.

8. The Plaintiff pleaded that the Defendants have failed, refused and/or neglected to apologize to the him and retract or unconditionally withdraw the defamatory statements and or to admit liability. It is for

that reason, that the Plaintiff seeks damages, apology and restraining orders against the defendants to stop publishing or causing to be published defamatory words against him.

The Defence.

9. The 1st and 2nd Defendants entered appearance and filed their joint statement of defence dated 5th October 2016 and amended on 28th July 2022 denying the claim by the Plaintiff in the amended plaint.

10. The Defendants have denied that the published words are defamatory of the Plaintiff or that any reference was specifically made in respect of the Plaintiff. The Defendants have stated that the impugned publication was a fair and accurate report of the nature of proceedings in respect of the Appeal, both during its pendency and until its determination and that in the circumstances, the impugned publication is privileged and, in the alternative, the said publication constitutes a fair comment on a matter of public interest as specifically pleaded in the amended defence.

Plaintiff's evidence.

11. The Plaintiff (PW1) adopted his witness statement dated 10th November 2016 as his evidence in chief and relied on the documents annexed to his witness statement, which he produced as exhibits (Plaintiff Ex.1). He testified that he was appointed as a Judge of the Court of Appeal on 8th November 2012 and served in that capacity until 31st March 2017 when he retired.

12. The Plaintiff highlighted his illustrious career as a lawyer working in various organizations and as a Judge of the High Court and the Court of Appeal. He denied ever meeting the President of the Republic concerning the Appeal or any other matter. He stated that he has had an impeccable record as a Judge and has been independent in the execution of his judicial duties. He stated that many of his colleagues who read the publication, subject of this case, as well as his family members and friends, called him about it in utter shock.

13. In cross-examination, the Plaintiff stated that at the time of the impugned publication, he was serving as a Judge of the Court of Appeal and that he was part of the Bench of five (5) judges that determined the Appeal in question. The Plaintiff further stated that the impugned publication did not specifically mention the Judges handling that Appeal but referred to the bench.

14. The Plaintiff testified that the Appeal was challenging a decision of the ELRC and involved KNUT and TSC; that during the course of the Appeal proceedings, KNUT made an application seeking recusal of the Judges handling the Appeal, which application was dismissed; that the Appeal was decided in favour of TSC and that, to his knowledge, the said decision on Appeal was not overturned.

15. The Plaintiff testified, further in cross-examination, that a lay person who was not in the case or in the Judiciary, would have known, from the reading of the impugned article, the identity of the Judges who constituted the Bench handling the Appeal. He stated that, following the judgment in respect of the Appeal, he was not subjected to any proceedings before the Judicial Service Commission (JSC) and that he was subsequently appointed, in 2019, a member of the Tribunal inquiring into the conduct of the then Judge of the Supreme Court, Justice (rtd) Ojwang.

16. The second witness to testify in support of the Plaintiff's case was Hon. Justice (rtd)John Mwera (PW2). He adopted his witness statement dated 3rd May 2021 as his evidence-in-chief and testified that he is a retired Judge of the Court of Appeal and that he and the Plaintiff have known one another for over 50 years.

17. Justice (rtd) Mwera stated that for the period he has known the Plaintiff, he has been a friend and colleague whom he knew as a straight forward man, a person of high integrity and impeccable record

as a judge. He testified that when he saw the article subject of this suit, he was startled and that the publication was as a result of the judgment of the Court of Appeal delivered on 6th November 2015 that had overturned the ELRC decision which was reported widely. He stated that he knew the Plaintiff was one of the judges who had sat on that Appeal and he called him wondering whether there was any truth regarding the publication and asked the Plaintiff whether he was aware of the publication.

18. He stated that the Plaintiff told him that he had read the article and that it was false and misleading and that it had caused him great distress, anguish and embarrassment as he had received numerous calls from his colleagues and peers seeking clarification. He testified that in his interactions with the Plaintiff, he knew him as an honest person who, at all material times, executed his duties fairly and impartially as a judge; that he is a highly respected member of society and legal profession and that the publication portrayed him as a person unfit to hold office of Judge of Appeal or any other office of judge, a person who lacked independence, knowledge or understanding to enable him preside over the subject appeal as he had to be influenced by the President.

19. During cross-examination, the witness testified that the impugned publication made no mention of the Plaintiff by name and that the Plaintiff did not face any adverse proceedings arising therefrom. The witness further testified that following the impugned publication, the Plaintiff continued to serve as a Judge of the Court of Appeal until the time of his retirement. PW2 stated that he still continues to hold the Plaintiff in high regard, the publication notwithstanding.

20. Mr. Ambrose Otieno Weda (PW3) was the third witness in support of the plaintiff's case. He adopted his witness statement dated 10th November 2021 as his evidence in chief. His evidence is that on 12th November 2015 he purchased the Star Newspaper issue of the same day and saw on page 3 of that paper the article by the 2nd Defendant in reference to the Court of Appeal decision of 6th November 2015. He stated that in that Appeal, the Plaintiff was a member of the five-judge bench that determined the appeal; that the dispute between TSC and KNUT was of great public concern and attention; that on reading the caption, he was taken aback and thought that a judge who would meet the Executive to discuss a matter pending decision before him or her is not worth the office and should be removed from office of judge.

21. PW3 testified that if indeed the story was true, then the judges were prima facie guilty of misconduct whether they made the correct decision or not. He testified that he felt low and suspicious of the judges and thought that the Defendants had credible information that they relied on to make such an indictive publication. He stated that the publication formed a basis of gossip in the court corridors among lawyers, with many of them thinking that it was true that the judges could have indeed met the executive and received inducements and rewards for the anticipated decision. He stated that he later met the Plaintiff who refuted the contents of the publication and informed him that he had filed this case.

22. The witness stated that he knew the Plaintiff as a diligent, polite, hardworking, brilliant and honest judge and that after the publication, he started having doubts that maybe the Plaintiff was not as honest as he had thought.

23. In cross-examination, the witness reiterated his evidence that he is a practising Advocate of the High Court of Kenya and that he has known the Plaintiff both in a personal and professional capacity, for over 20 years; that the impugned article concerned a matter of great public interest and that though it did not mention the Plaintiff directly, the members of the Bench were known to him and that following the impugned article, both he and the Plaintiff were appointed to form part of the Tribunal inquiring into the conduct of the Justice (rtd) Ojwang.

Defence case.

24. The Defendants called two witnesses to testify in support of their case. The first witness was Kevin Kabue Kamau DW1, working with the 1st Defendant as a systems administrator. His evidence-in-chief constituted the production of the Defendants' list and bundle of documents dated 2nd February 2022 and part of the Defendant's further list and bundle of documents dated 22nd February 2022. The witness testified that he prepared the video transcription in respect of the press statement issued by KNUT on 28th September 2015 (D. Exhibit 1) as well as the certificate relating to the abovementioned transcription dated 31st January 2022 (D. Exhibit 2). The witness further produced a CD Rom from which the transcription was made (D. Exhibit 3).

25. In cross-examination, the witness stated that his role was limited to the preparation of the transcription and that he never read nor had knowledge of the impugned publication.

26. He was recalled for further cross-examination, on 19th September 2024. He testified that he had no prior knowledge of the impugned article but was merely instructed by counsel for the Defendants to convert the relevant clip, derived from the KTN YouTube channel to video form and that he did not confirm whether the video clip in question did in fact belong to KTN.

27. The Defendants called Paul Ilado (DW2). He adopted his witness statement dated 22nd November 2015 as his evidence in chief. He testified that he was responsible for the impugned publication. He testified that he worked as the Group Head of Content for the 1st Defendant. He produced the Defendants' documents dated 5th October 2016 as D. Exhibits 4, 5 and 6, which documents include the article dated 12th November 2015 and further list of documents dated 2nd February 2022 as D. Exhibit 7; the letters dated 14th January 2016 and 20th January 2016 contained in the Defendants' list and bundle of documents dated 22nd February 2022 as D. Exhibits 8 and 9 respectively; and the judgment in HCC 296 of 16 Philomena Mbete Mwilu v Radio Africa Limited and another delivered on 28th April 2023, contained in the Defendants' list and bundle of documents dated 12.5.2023 as D. Exhibit 10.

28. During cross-examination, the witness testified that he reviewed the impugned article before publishing it and that the same was sourced from a statement released by Wilson Sossion, the then Secretary General (SG) of KNUT, though the impugned article did not cite Mr. Sossion as being the source of the article. The witness further testified that the impugned article did not name any of the Judges who constituted the Bench handling the Appeal.

29. It is the testimony by DW2 that the Plaintiff was in no way defamed and that the impugned article was based on a ruling delivered on 29th September 2015 (D. Exhibit 5) arising from a petition by KNUT on the question of recusal of the Bench handling the Appeal, as well as the press statement previously released by Mr. Sossion on 28th September 2015.

Plaintiff's Submissions.

30. The Plaintiff filed submissions dated 27th November 2024 and further submission dated 6th February 2025 in answer to the Defendants submissions. The Plaintiff has identified five (5) issues for determination:

    i. Whether the Plaintiff is identifiable in the impugned publication of 12th November 2015?

    ii. Whether the Plaintiff has made out a case of defamation against the Defendant?

    iii. Whether the defence of qualified privilege and fair comment are available to the Defendants?

iv. Whether the Defendants can rely on the evidence DEXB1 and DEXB 3 as produced?

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

31. On whether the Plaintiff is identifiable in the impugned publication, it was submitted that the Plaintiff was a public figure as a Judge of the Court of Appeal and that the Appeal in question had generated great public interest; that the Defendants have also admitted in their Defence that the Plaintiff was one of the five judges who handled the Appeal and that the statement by the Defendants that the Plaintiff was not mentioned in the publication has no relevance as the publication referred to persons of whom the Plaintiff was part. The Plaintiff urged that this court finds that the Plaintiff was indeed identifiable to the Defendants and any reasonable person and that he was defamed in his character and professional reputation.

32. On whether the Plaintiff has made out a case of defamation against the Defendant, the Plaintiff cited Wycliffe A. Swanya v Toyota East Africa Limited & Another [2009] eKLR where the court held that:

> " It is common ground that in a suit founded on defamation the Plaintiff must prove:-
>
> (i) That the matter of which the Plaintiff complains is defamatory in character.
>
> (ii) That 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..."

33. The Plaintiff submitted that the publication was defamatory and lowered the Plaintiff's esteem and reputation as an impartial judge in the estimation of right-thinking members in the society and profession; that the impugned publication, in the ordinary meaning, cast aspersions on the honour and integrity of the Plaintiff and his capacity to serve as a Judge of the Court of Appeal; that the publication imputed on the Plaintiff a character of greed, corruption, lacking impartiality and independence and a judge who gave out judgments to the highest bidder thus unsuitable to carry the title of a judge.

34. The Plaintiff submitted that in the present instance, it has been demonstrated that the impugned publication was made by the Defendants and that the same referenced the Plaintiff, who was a member of the Bench handling the Appeal and that the names of the Judges who constituted the Bench were accessible to any person in the public domain.

35. The Plaintiff further submitted that the Appeal in question constituted a matter of great public interest and hence the impugned publication was in every sense, defamatory of him and that the Plaintiff has called two (2) witnesses who adduced evidence that upon reading the said publication, they believed that the Plaintiff's character and reputation were tainted. The Plaintiff relied on the case of Miguna Miguna v the Standard Group Limited & 4 Others-Civil Appeal No. 164 of 2016 where the Court of Appeal rendered itself thus:

> " 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 of it causes him to be shunned or avoided."

And further, that:

> " ...the test whether a statement is defamatory is an objective one and is not dependent on the intention pf the publisher but is dependent on what a reasonable person reading the statement would perceive of it..."

36. The Plaintiff invited this court to find that a reasonable man, defined as an ordinary citizen whose judgment must be taken as the standard, reading the impugned publication would not understand it in any other way than that the Plaintiff, as part of the bench that heard the Appeal, lacks the integrity, independence and honour as a judge and that he is influenced in his judgments.

37. The Plaintiff submitted, in respect of whether the publication was malicious, that the impugned publication was actuated by malice, since the maker thereof did not seek to contact the Plaintiff in a bid to verify the accuracy of the information before proceeding to make the publication; that the Defendants instead acted recklessly by basing the publication solely on a press release statement made by a KNUT official. The Plaintiff cited the case of Raphael Lukale v Elizabeth Mayabi [2018] eKLR in which the Court of Appeal stated the following on the subject of malice:

> " Malice can be inferred from a deliberate or reckless ignoring of facts. 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 relations between the parties before or after the publication or in the conduct of the defendant in the course of the proceedings."

38. The Plaintiff referred to the evidence of Mr. Paul Ilado (DW2) that the Defendants did not call the Plaintiff to verify the truthfulness of the allegations before publishing the article nor did the Defendants retract the publication or publish an apology even after the Plaintiff demanded for it.

39. On whether the defence of qualified privilege and fair comment is available to the Defendants, it was submitted that the Defendants have not led any evidence to show that the impugned publication was a fair and accurate representation of the facts, or to show that the same was covered by qualified privilege under Section 7(1) of the *Defamation Act*, Cap. 36 Laws of Kenya

40. It was submitted that the impugned publication did not relate to the proceedings in the Appeal before the bench but to the allegations that the Head of State may have influenced the judges. It was submitted that even if this court were to find there was qualified privilege, it is trite that evidence of malice extinguishes the defence of qualified privilege. The Plaintiff relied on J.P Machira t/a Machira & Company Advocates v Wangethi Mwangi & Nation Newspapers (Civil Appeal 179 of 1917) [1998] KECA 46 (KLR) (Judgment) where the Court of Appeal stated that:

> " I think it is trite law, and I must state it here and now that qualified privilege can de destroyed by malice whether express or implied.
>
> "...if a writer makes a statement, induced by anger or other indirect malice, in reckless disregard whether it is true or false that is an abuse of the privileged occasion and disentitles him from protection..."

41. It was submitted that the impugned publication was not a fair comment but a statement of fact; that the publication did not state the basis upon which it was made for it to be regarded as a fair comment; that the publication was actuated by malice and the defence of fair comment cannot stand as the publication was false; that DW2 was unable to prove the truthfulness of the statement and the Plaintiff has testified that the contents of the publication were false.

42. The Plaintiff relied on Nation Media Group & another v Alfred Mutua [2017] eKLR where the court held the view that to sustain a defence of fair comment, the appellants were required to demonstrate that the words complained of are comment, and not a statement of fact, that there is a basis of fact for the comment, contained or referred to in the article complained of; and that the comment is a matter of public interest and that a comment which is based on lies or falsehoods cannot be designed as fair.

43. On whether the Defendants can rely on the evidence DEXB1 and DEXB 3 as produced, it was submitted that the Defendants are not the makers of these exhibits. DEXB3 is a video clip of the press statement attributed to the KNUT Secretary General at the time, on 28th September 2015, and DEXB1 is the transcript of the video in which the Defendants alleged they relied on to make the publication. It was submitted that the Defendants did not make averments that they relied on the said video clip to make the publication dated 12th November 2015; that Mr. Kevin Kabue Kamau (DW1) testified that the clip was not from the 2nd Defendant but from KTN and that he did not confirm the source before downloading it.

44. The Plaintiff submitted that the Defendants were not the makers of the video clip or its transcription and therefore cannot rely on it or call the KNUT Secretary General or KNUT lead counsel who were part of the appeal proceedings to be cross-examined as to the truthfulness of the allegations that the Plaintiff met the President and directed on how to conduct the appeal.

45. It was further submitted that this court should examine the two exhibits and determine what weight, if any, should be placed on them in line with section 35 of the *Evidence Act*.

46. On whether the Plaintiff is entitled to damages, and if so, the quantum, it was submitted that the Plaintiff is entitled to damages calculated at Kshs 27,500,000 broken down as follows:

General damages Kshs 15,000,000/=

Aggravated damages Kshs 5,000,000/=

Exemplary damages Kshs 3,000,000/=

Damages under section 7A (6) for failing

to retract the publication and apologize Kshs 4,500,000/=

47. The Plaintiff justified the above quantum by submitting that in awarding the damages sought, this court should consider the gravity of the libel, that it touched the professional reputation and honour of the Plaintiff; that the 2nd Defendant enjoyed wide readership and so was the Appeal which had generated great public interest. The Plaintiff relied on Nation Media Group Limited & 2 Others v John Joseph Kamotho & 2others (Civil Appeal 284 of 2005) [2010] KECA 360 (KLR) (Civ) where the Court reasoned the following:

> "In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel; the more closely it touches the Plaintiff's personal integrity, professional reputation, honour courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of the publication is also very relevant; a libel published to millions has a greater potential to cause damage than a libel to a handful of people"

48. The Plaintiff has proposed an award in the sum of Kshs.15,000,000/ on general damages while relying on the following authorities:

a. The case of Samuel Ndung'u Mukunya v Nation Media Group Limited & Another [2015] eKLR a Judge of the Environment and Land Court (ELC) received an award of Kshs. 15,000,000/- on general damages, for defamation.

b. The case of Wangethi Mwangi & Another v J.P. Machira t/a Machira & Co Advocates, CIVIL APPEAL NO. 148 OF 2003, where the court awarded the Plaintiff who was a practicing Advocate of the High Court of Kenya, general damages of Kshs. 8,000,000/.

49. In respect of aggravated damages, the Plaintiff has urged this court to award a sum of Kshs. 5,000,000/- on the basis that the Defendants declined to retract the impugned article or to offer an apology to the Plaintiff, for the same.

50. On the subject of exemplary damages, it is the argument by the Plaintiff that going by the reasoning adopted by the Court of Appeal in the case James Mutitu Mworia & Another v Elvis Mutahi Githinji & Ano (CIVIL APPEAL 225 OF 2017) [2024] KECA 6 (KLR) exemplary damages may only be awarded where there is oppressive, or arbitrary action and where the defendant's conduct was calculated to acquire some benefit. In that respect, the plaintiff prays for an award of Kshs.3,000,000/ under that head.

51. The Plaintiff has also sought damages of Kshs. 4,500,000/- in lieu of an apology, plus costs of the suit and interest thereon.

Defendants' Submissions.

52. The Defendants in their submissions identified five (5) issues for determination as follows:

i. Whether the article of 12th November 2015 was defamatory of the Plaintiff?

ii. Whether the publication of the article of 12th November 2015 was actuated by malice?

iii. Whether the 1st and 2nd Defendants can rely on the evidence DEXB1 and DEXB3 as produced?

iv. Whether the Plaintiff is entitled to the remedies sought?

v. Who bears the costs of the suit?

53. On whether the article of 12th November 2015 was defamatory of the Plaintiff, the defendants have relied on the decision John Ward vs Standard Limited [2006] eKLR which defines a defamatory statement as follows:

> " A statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule, or contempt or which causes him to be shunned or avoided or has a tendency to injure him in his office, profession or calling. The ingredients of defamation are: -
>
> i. The statement must be defamatory.
>
> ii. The statement must refer to the plaintiff.
>
> iii. The statement must be published by the defendant.
>
> iv. The statement must be false."

54. The Defendants also cited Phinehas Nyagah v Gitobu Imanyara (2013) eKLR on what constitutes the elements of defamation to the effect that the defamatory 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 and that the words must be malicious and must refer to the plaintiff.

55. The Defendants submitted that the Plaintiff was not directly mentioned in the impugned article; that it was admitted by the Plaintiff that at the time of the publication, there were more than 10 judges of the Court of Appeal and any of them could have constituted the bench of five hearing the Appeal; that it was admitted in evidence that the Plaintiff's name was not mentioned in the article; that an ordinary reading of the article could not be understood to refer to the Plaintiff either directly or otherwise and that the Plaintiff did not prove any reference innuendo in his suit.

56. The Defendants relied on Jakoyo Midiwo v Nation Media Group Limited & another [2018] eKLR where the Court dismissed a similar case by finding, inter alia, that a class of persons is considered defamed only if the publication refers to all its members, particularly if the class is very small, or if particular members are specifically imputed.

57. The Defendants submitted that the Plaintiff has failed to prove his case as envisaged under section 107(1) of the *Evidence Act*. They submitted that the Plaintiff testified that he continued performing his duties as a Judge of the Court of Appeal until he retired on 31st March 2017 despite the publication; that he was never subjected to any form of investigations by Judicial Service Commission or any other relevant body concerning the impugned publication; that he was appointed to sit in the Tribunal investigating Justice (rtd) Ojwang and that no evidence of the alleged loss or loss and damage to his reputation.

58. They submitted that Justice (rtd) John Mwera (PW2) testified that he knew the Plaintiff as an honest individual who executed his judicial duties fairly and impartially; that the Plaintiff's integrity and clean working record were affirmed by the Judges and Magistrates Vetting Board which cleared him to continue serving as a Judge and that PW2 testified that despite the publication, he continued to hold the Plaintiff in high regard.

59. The Defendants criticized the evidence of Mr. Ambrose Weda for stating that his esteem for the Plaintiff had diminished after reading the article, which the Defendants found contradictory to the assertion during cross-examination of Mr. Weda that he served in the same Tribunal with the Plaintiff, claiming that it is implausible that PW3's esteem of the Plaintiff would have diminished while still being willing to serve alongside him in the Tribunal. The Defendants submitted that despite the impugned publication, the Plaintiff is still held in high regard in society.

60. The Defendants submitted that the impugned publication was absolutely privileged as provided under Section 6 of the *Defamation Act*, because the publication constitutes a fair and accurate report of the proceedings relating to the Appeal, in the manner set out in the amended defence and evidence tendered by DW1 and DW2; that the impugned publication is a fair comment on a matter of public interest, the same having been made in good faith and without malice, contrary to the allegations being brought forth by the Plaintiff.

61. On whether the publication was actuated by malice, the Defendants submitted that the impugned publication was made in honest belief that the allegations attributed to that publication could have been true; that the said publication did not refer to the Plaintiff by name but was a fair and accurate report of the proceedings in the Appeal; that the impugned publication was fair comment on a matter of great public interest and that the Defendants' letter dated 20th January 2016, the Defendants indicated that the impugned publication was done in good faith and that they did not wish to cause grieve to the Plaintiff and offered to clarify the matter but this offer was not accepted by the Plaintiff who preferred to file this suit.

62. The Defendants relied on Nation Newspapers Ltd v Gilbert Gibendi [2002] eKLR where the Court stated that:

> " ...actual of express malice is ill-will or spite or any indirect or improper motive in the mind of the defendant at the time of the publication...The trial court did not address this issue in its judgment. There was no evidence that in publishing the words complained of the appellant acted from an indirect or improper motive such as spite, ill will or jealousy. Even if it were to be accepted that the reporter was rash or negligent that would not be sufficient.... From the evidence placed before the trial court the respondent failed to prove actual malice on the part of the appellant. The appellant's defence of fair comment on a matter of public interest therefore succeeded, and the trial court should have so held."

63. On whether the Defendant can rely on DEXB1 and DEXB2, it was submitted that the Plaintiff did not raise any objection at the trial stage despite having the knowledge of the exhibits of the defence; that the Plaintiff cannot raise an objection of these exhibits at the submission stage. The Defendants relied on Republic v Chairman Public Procurement Administrative Review Board & another Ex parte Zapkass Consulting and Training Limited & another [2014] eKLR where the court held that:

> " The Applicant, the respondents and the interested party, all introduced new issues in their submissions. Submissions are not pleadings. There is no evidence by way of affidavits to support the submissions. New issues raised by way of submissions are best ignored."

64. It was submitted that DEXB1 is video evidence that was authenticated by DW1 through his testimony and supported it with a Certificate of Authentication, DEXB2, authored and signed by himself and that DEXB3 is the transcription of the same video which verifies the contents and therefore the objection by the Plaintiff fails.

65. On whether the Plaintiff is entitled to the remedies sought, it is the submission by the Defendants that the Plaintiff is not, at all, entitled to any of the reliefs sought in terms of general, aggravated and/or exemplary damages as claimed in the amended plaint, in the absence of proof of defamation. The Defendants have urged this court to dismiss the suit with costs.

66. In a rejoinder, the Plaintiff put in further submissions in which he reiterated his earlier submissions, and submitted that this court is not bound by the decision of the court in Philomena Mbete Mwilu v Radio Africa Limited & Another [2023] eKLR which decision arose from the same impugned publication. The Plaintiff distinguished that case from this case in that in the Philomena Mbete Mwilu case, the court found that the Plaintiff was not defamed basing it on the admission by the Plaintiff's sole witness that she was not aware that the Plaintiff sat in the bench that was referred to in the defamatory article; that in this case, the two witnesses for the Plaintiff were aware that the Plaintiff was one of the judges who sat in that bench; that the Philomena Mbete Mwilu case was decided by a court of equal status (sic) and is only persuasive and that each case is decided on its own unique circumstances.

Analysis and Determination.

67. Allow me to start the analysis and determination of this case by stating that I did not conduct the proceedings in this matter. From the record, this suit was filed on 12th August 2016, with the amended Plaint filed on 11th November 2016. On 15th July 2021, the file was placed before my sister, Hon. Lady Justice Meoli who commenced the trial. The Plaintiff testified on 16th April 2024 and the trial concluded on 19th September 2024. Parties were allowed time to file submissions.

68. The matter was placed before me on 29th January 2025, upon the transfer of Hon. Lady Justice Meoli to the High Court of Kenya at Kajiado. It became inevitable that the task of writing and pronouncing this judgment fell on me by virtue of my taking over the duties of the Presiding Judge at the Civil Division of the High Court of Kenya at Milimani and by reason of non-availability of Hon. Lady Justice Meoli due to her transfer.

69. I have taken time to study the contents of the court records in this matter. I commissioned the typing of proceedings to aid me in understanding the evidence adduced in court before my sister judge and for clarity of that evidence. I have taken time to read all the pleadings of the parties and accompanying documents as well as the evidence of the parties, their submissions and the authorities relied on. I have understood the issues raised by both parties. The Plaintiff and the Defendants have each identified their issues, some of which overlap. For clarity of this judgment I have identified the following as the issues requiring my determination:

    i. Whether the Plaintiff has proved a case of defamation against him by the Defendants?

    ii. Whether the Defence of qualified privilege and fair comment is available to the Defendants?

    iii. Whether the Defendants can rely on DEXB1 and DEXB3 as produced?

    iv. Whether the Plaintiff is entitled to the remedies sought?

70. Before delving into addressing the identified issues, I wish to mention that I am aware a matter based on the same circumstances as in this case has been decided by this court (Ongeri, J). That case is Nairobi High Court Civil Case No. 296 of 2016 Philomena Mbete Mwilu v Radio Africa Limited & another. I am also aware that the Defendants have referred to the said decision and relied on it in their submissions. The Plaintiff has also respondent to the issues raised in respect of that case.

71. The decision is by this Court and is not binding to this court. This decision is based on my own understanding of the issues before me and no reference has been made on that decision. I am alive to the fact that each case is decided on its own unique circumstances and that although the cause of action arose from the same publication, I was guided by my own understanding of the issues in this matter and was not persuaded, in any manner, by the decision delivered by my sister judge.

Whether the Plaintiff has proved a case of defamation against him by the Defendants

72. The Black's Law Dictionary, 8th edition defines defamation as:

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

73. In supporting his claim that he was defamed by the publication of 12th November 2015, the Plaintiff relied on Wycliffe A. Swanya v Toyota East Africa Limited & another [2009] eKLR, cited above where the court stated that:

> " It is common ground that in a suit founded on defamation the Plaintiff must prove:-
>
> (i) That the matter of which the Plaintiff complains is defamatory in character.
>
> (ii) That 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..."

74. The Defendants, on the other hand, while addressing the same issue, relied on John Ward v Standard Limited (2006) eKLR in which the court identified the ingredients of the tort of defamation as follows:

> " A statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule, or contempt or which causes him to be shunned or avoided or has a tendency to injure him in his office, profession or calling. The ingredients of defamation are: -
>
> i. The statement must be defamatory.
>
> ii. The statement must refer to the plaintiff.
>
> iii. The statement must be published by the defendant.
>
> iv. The statement must be false."

75. The words contained in the publication of 12th November 2015 were captured above in this judgment and are repeated here for emphasis, as follows:

COORIDORS OF POWER- POLITICAL GOSSIP:

Did President Uhuru Kenyatta meet the appellate judges who cancelled the 50-60 per cent pay increase for teachers? Word has it the head of state met the judges days before the ruling was made. It is not clear what he told them, but some peddling the rumour believe the President could have influenced the judgment.

76. Lest we lose sight of a fundamental issue in determining this dispute, I wish to state that the burden of proving that the impugned publication defamed the Plaintiff lies on the Plaintiff by dint of Section 107 (1) of the *Evidence Act* which provides that:

> Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

77. The Plaintiff, relying on the case of Miguna Miguna v The Standard Group Limited & 4 Others: Civil Appeal No. 164 of 2016, holds the view that even though the impugned publication did not refer to him in person, the test to be used on whether the impugned publication is defamatory is an objective one and that an ordinary citizen, whose judgement is taken as the standard, would have understood the publication to refer to the Plaintiff as part of the bench that heard the Appeal.

78. The Defendants, on the other hand, relied on Jakoyo Midiwo v Nation Media Group Limited & another [2018] eKLR to advance the view that a class of persons is considered defamed only if the publication refers to all its members-particularly if the class is very small-or if particular members are specifically imputed.

79. I have considered this issue. It is clear from the evidence, that the judges referred to in that publication are not named. The article refers to 'the appellate judges who cancelled the 50-60 per cent pay increase for teachers.' It is stated by both parties that the said Appeal under reference, emanating from the trial court, the ELRC, to the Court of Appeal before a bench of 5 judges, generated great public interest.

80. Upon perusal of the impugned article, the contents of which are stated above in this judgment, it is apparent that the same made no specific mention or direct reference to the Plaintiff; rather, it appeared to generally refer to the judges who were tasked to handle the Appeal. In the circumstances, the court concurs with the position taken by the Defendants, that it has not been demonstrated that the impugned article made any reference to the Plaintiff in person, in any specific or direct manner. However, given the emotive nature of that case, and the fact that the Plaintiff was not specifically and

personally mentioned by name, it is not far-fetched, in my considered view, for this court to find, which I hereby do, that the names of the five judges handling that appeal, including the Plaintiff, were easily identifiable, especially in the legal circles.

81. The above position notwithstanding, the question I pose here is whether the impugned publication defamed the Plaintiff; whether it lowered his image and reputation; whether it caused the Plaintiff harm. The answer to these questions can only be answered from the evidence tendered in court.

82. I have no doubt in my mind, basing on the evidence on record, that the Plaintiff has had an illustrious legal career, both as a legal practitioner and as a Judge of the superior courts. He was serving as a Judge of the Court of Appeal at the time the impugned publication was made. A judge is a person held by the society he serves in high regard. His/her behavior and conduct must be above reproach. He/she must remain true to his/her oath of office and uphold the highest standards of conduct. To uphold the dignity, integrity, humility, and independence required of a judge, just to mention few of the qualities, a person appointed to that office must hold and conduct herself/himself in high regard that demands respect.

83. In a defamation dispute, the reputation of a plaintiff is at the centre of any defamatory content allegedly published by a defendant. The Court of Appeal in S M W v Z W M [2015] eKLR restated in the case of Joseph Njogu Kamunge v Charles Muriuki Gachari [2016] eKLR as follows:

> " 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."

84. In Musikari Kombo v Royal Media Services Limited [2018] eKLR the Court of Appeal stated that:

> " The test for whether a statement is defamatory is an objective one. It is not dependent on the intention of the publisher but on what a reasonable person reading the statement would perceive. 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."

85. I am alive to the view that such a publication like the one complained of by the Plaintiff has the effect of adversely affecting the person so defamed and ruining his reputation, his career and his standing in society. The issue is whether this is the effect the impugned publication in this matter had on the Plaintiff to qualify his seeking the remedies contained in his Plaint.

86. The Plaintiff stated in his pleadings and evidence in court that the impugned article would in the natural and ordinary meaning infer, inter alia, that he was incompetent, lacked integrity and independence and was unfit as a Judge of Appeal. In cross-examination, the Plaintiff stated that a lay person who was not in the case or in the Judiciary, would have known, from the reading of the impugned article, the identity of the Judges who constituted the Bench handling the Appeal. He also testified that, he was not subjected to any proceedings before the Judicial Service Commission (JSC) despite the publication and that he was subsequently appointed, in 2019, a member of the Tribunal inquiring into the conduct of the then Judge of the Supreme Court, Justice (rtd) Ojwang. The evidence shows that he served his full term as a Judge of the Court of Appeal until his retirement. He also stated that the judgment of the Appeal was not overturned as far as he was aware.

87. The Plaintiff's two witnesses, PW2 and PW3, also supported his evidence. PW2 served with the Plaintiff in the Court of Appeal. He was his friend and colleague, while PW3 was an advocate practicing in our courts and must have known the Plaintiff well by virtue of practicing in that Court.

88. PW2 testified that when he saw the impugned publication he called the Plaintiff for clarification; that the Plaintiff told him that the publication was false. PW2 told the court that he held the Plaintiff in high regard. In cross-examination, PW2 testified that the impugned publication made no mention of the Plaintiff by name and that the Plaintiff did not face any adverse proceedings arising therefrom. PW2 further testified that following the impugned publication, the Plaintiff continued to serve as a Judge of the Court of Appeal until the time of his retirement and that despite the said publication, which raised questions in his mind regarding the Plaintiff, he continued to hold the Plaintiff in high regard, the publication notwithstanding.

89. PW3, on his part, indicated that he was taken aback by the publication and that rumours were rife in the court corridors about the issue. PW3 indicated that the publication raised doubts in his mind about the Plaintiff, but that despite the publication, he was appointed alongside the Plaintiff, to serve in the tribunal investigating Justice (rtd) Ojwang. It is instructive to note that despite harbouring doubts about the Plaintiff's character, emanating from the impugned publication, PW3 served with him in the tribunal without questioning his competence and his reputation. He must have believed in the Plaintiff's integrity and competence to sit with him in the same tribunal, in my considered view.

90. There is no evidence from any other witness to show that any person, including his family members, shunned the Plaintiff or that he suffered damage in his career as a Judge and lawyer. The evidence tendered, taken alongside the statement by the Plaintiff that he continued serving as a Judge of Appeal until his retirement and also served in the mentioned tribunal, points to the fact that the Plaintiff's reputation did not suffer adversely as a result of the publication.

91. Put differently, there is no evidence tendered to prove on a balance of probabilities, that the Plaintiff suffered injury to his reputation as a result of that publication. There is no evidence from those who knew the Plaintiff, as a friend, colleague or family member, save for PW2 and PW3 whose evidence I have analysed in this judgment, that their opinion of, and interactions with the Plaintiff as an upright and competent Judge and member of society, changed negatively after the impugned publication. The Plaintiff remained a serving Judge of the Court of Appeal until retirement. He was not subjected to any disciplinary proceedings either by JSC or any other body. He was found competent and worthy of an appointment as a member of the tribunal. There is no evidence to show that he was shunned by any member of the society in general.

92. On whether the article was maliciously published, I have considered the evidence on record. I note that in Phinehas Nyagah v Gitobu Imanyara [2013] eKLR, the Court held the view that malice is not restricted to spite or ill will but may extend to reckless actions drawn from the publication in question.

93. In the present instance, the Plaintiff on the one hand, has stated and submitted that the impugned publication was motivated by pure malice and recklessness, whereas the Defendants have stated and argued that the publication simply derived from the press statement release relating to the Appeal proceedings.

94. I have considered this issue and find that there is no evidence tendered by the Plaintiff to prove existence of malice on the part of the Defendants.

Whether the Defence of qualified privilege and fair comment is available to the Defendants?

95. The Defendants have pleaded that the impugned article published on 12th November 2015 was absolutely privileged as testified by Paul Ilado, DW2, who testified that the article related to the proceedings in Civil Appeal No. 196 of 2015: Teachers Service Commission (TSC) v Kenya National Union of Teachers (KNUT) & 3 others; that upon the empaneling of the five (5) judge bench to hear the appeal, KNUT sought recusal of the entire bench of five judges, including the Plaintiff on allegations that the judges had been directed to rule in a particular way, favourable to the TSC, the President of the Court of Appeal and the President of the Republic but the request for recusal was dismissed.

96. The Ruling of the Court in Civil Appeal No.196 of 2015, is dated 29th September, 2015. That Ruling forms part of the documents relied on by the Defendants. I have read that Ruling which is indicated to have been delivered on 29th September 2015. It bears the names of all the five judges of the Court of Appeal. including the Plaintiff, who were tasked with the determination of the Appeal.

97. The relevance of the said Ruling to this judgment is that, in the grounds in support of the application seeking recusal of the judges, the deponent of the Supporting Affidavit was the then Secretary General of KNUT, Mr. Wilson Sossion. He was quoted under paragraph 3 of the Ruling to have deposed in that Supporting Affidavit, inter alia, that "The President of the Court of Appeal handpicked the present bench hearing the matter to achieve a certain end" and that "The President of the Court of Appel was heard quoting the Head of State as to the intent and directions the appeals are to take to the effect that the appeals are to be allowed on the basis that the Judge erroneously converted a petition into an Economic Dispute."

98. In defence of this case, the Defendants have relied on that Ruling to base their argument that the impugned publication was based on these court proceedings.

99. The Defendants also cited section 6 of the *Defamation Act* to support their case, which section provides that:

> A fair and accurate report in any newspaper of proceedings heard before any court exercising judicial authority within Kenya shall be absolutely privileged.

100. Section 7 of the *Defamation Act* provides that:

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

101. The Defendants have pleaded that the article was a fair comment on the matter of public interest as particularized in paragraph 7 of the amended defence, inter alia, that there was public apprehension of possible interference by the Executive, in the decision of the Court of Appeal, as expressed in the Supporting Affidavit in the application seeking recusal of the entire bench of the Court of Appeal handling that matter.

102. I have considered this matter. The court in dealing with the defence of qualified privilege stated as follows in Chirau Ali Mwakere V Nation Media Group Ltd & Another (2009) eKLR:

> " An occasion is privileged where the person who makes a communication has interest or a duty, legal, social or moral to make it to the person to whom it was made and the person to whom it is so made had a corresponding interest to receive it"

103. Further, in Halsbury's Laws of England 4th Edition Reissue Vol. 28 at Para 109, qualified privilege is explained as follows:

> " On grounds of public policy, the law affords protection on certain occasions to a person acting in good faith and without any improper motive who makes a statement about another person even when that statement is in fact untrue and defamatory. Such occasions are called occasions of qualified privilege.
>
> The principal categories of qualified privilege are:
>
> (1) Limited communications between persons having a common and corresponding duty or interest to make and receive the communication,
>
> (2) Communications to the public at large, or to a section of the public, made pursuant to a legal, social or moral duty to do so or in reply to a public attack.
>
> (3) Fair and accurate reports, published generally, of the proceedings of specified persons and bodies...."

104. For a defendant to succeed in raising the defence of fair comment on a matter of public interest, the defendant is required to meet the following threshold set out in the case of Jacob Mwanto Wangora v Hezron Mwando Kirorio [2017] eKLR thus:

> " In Peter Carter – Rucks Treatise on Libel and Slander stated as follows:
>
> "...For the defence of fair comment to succeed it must be proved that the subject matter of the comment is a matter of legitimate public interest; that the facts upon which the comment is based are true and that the comment is fair in the sense that it is relevant to the facts and in the sense that it is expressed of the honest opinion of the writer."

105. I have considered this issue. Based on the evidence on record, from both parties, the appeal generated great public interest. There is on record proceedings in which one of parties to the Appeal, KNUT, had filed an application for recusal of the judges sitting on the appeal. That application gave rise to the Ruling delivered on 29th September 2015. That Ruling considered the application which was supported by an affidavit sworn by the then Secretary General of KNUT. Part of the averments of that affidavit have been captured above in this Judgment. KNUT, through its Secretary General, was complaining of perceived interference of the bench of the judges of appeal by the then President of that court and by the President (head of state).

106. The impugned publication, taken within that context and as argued by the defendants, gives a different meaning. The publication seems to question whether the head of the state (the President of the Republic at the time) met the appellate judges hearing the appeal. The publication refers to "word has it that...." and goes on to state that "some peddling the rumour" as the people who believed that the President could have influenced the judgment of the appeal.

107. To my understanding, the publication was reporting on some rumour going around. The defendants claim and rely on the defences of qualified privilege and fair comment while the Plaintiff refutes that this defence is available to the Defendants. The Plaintiff argued in submissions that even if this court were to find there was qualified privilege, it is trite that evidence of malice extinguishes the defence of qualified privilege.

108. Having found that malice on the part of the defendants was not demonstrated, it is my considered view that the defence of qualified privilege and fair comment is available to the defendants. Having

taken the impugned publication into context, it is my view that it was a fair report and reflects what was contained in the Supporting Affidavit in the application seeking recusal of the judges as shown in the Ruling of 29th September 2015.

Whether the Defendants can rely on DEXB1 and DEXB3 as produced?

109. I have considered rival submissions regarding this issue. The record shows that the Plaintiff did not raise the issue of the admissibility of these two exhibits at the time of the trial. This issue was raised at the submissions stage. The Court of Appeal in the case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR when it held that:

> "Submissions cannot take the place of evidence...Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all."

110. For the reason that the Plaintiff did not raise this issue during the proceedings stage, I hold the view that the Plaintiff cannot be heard to challenge the admissibility of the two exhibits through his submissions.

111. Concerning the third and final issue touching on reliefs, upon the court's finding that the Plaintiff has not proved his case for defamation against the Defendants, it follows that the Plaintiff would not be entitled to the reliefs sought in the amended plaint. Nevertheless, the court is enjoined by law to consider the reliefs it would have awarded if the Plaintiff had succeeded on his claim.

Whether the Plaintiff is entitled to the remedies sought?

112. My considered view, after considering all the circumstances of this case, the Plaintiff, if successful in his claim against the defendants, would have been entitled to the following remedies:

    a. On general damages, I would have considered the personal and profession standing of the Plaintiff, both as a Judge of the High Court and the Court of Appeal, coupled with a long-standing career in law. I would have considered the sums proposed by the Plaintiff, in the absence of any proposed sums by the Defendants. I would have been persuaded by the case of Samuel Ndung'u Mukunya v Nation Media Group Limited & another [2015] eKLR, where the court awarded a sum of Kshs.15,000,000/ under this head to the plaintiff being a lawyer considered for the position of Judge of the High Court of Kenya, and the more recent case of Philomena Mbete Mwilu v Standard Group Limited [2022] KEHC 1375 (KLR) where the current Deputy Chief Justice, previously a Judge of the Court of Appeal, was awarded general damages in the sum of Kshs. 15,000,000/, and award the Plaintiff a sum of Kshs.15,000,000/ under this heading.

    b. On aggravated damages, I would have considered the absence of an apology by the Defendants whilst also noting that there were no subsequent publications, and would have awarded a sum of Kshs.1,500,000/- upon considering a similar award made in Musikari Kombo v Royal Media Services Limited (supra). I would likewise have granted the order for apology sought by the Plaintiff.

    c. On exemplary damages, in the absence of anything to indicate that the impugned publication was retracted by the Defendants, the court upon considering the amount of Kshs. 3,000,000/- proposed by the Plaintiff but which I consider as falling on the higher side, would have awarded a sum of Kshs.2,000,000/ taking into account awards that have been made in the past under this head.

d. Concerning the prayer for an injunction, in the absence of any credible evidence to indicate the risk of subsequent publications of a similar nature, the court would have been hesitant to award the same.

113. However, after careful analysis of all the material placed before the court, it is my considered view that the Plaintiff has not met the threshold of proof on a balance of probabilities as shown in this judgment. Consequently, the claim by the Plaintiff against the Defendants fails and is hereby dismissed. I order that costs of this suit be borne by the Plaintiff.

114. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 6TH MAY 2025.

S. N. MUTUKU

JUDGE

In the presence of:

Mr. Omondi holding brief for Mr. Lutta for the Plaintiff

Ms Gichoya for the 1st and 2nd Defendants