



Trompell v Ochs (Civil Suit E030 of 2021) [2025] KEHC 7327 (KLR) (16 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7327 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA**

CIVIL SUIT E030 OF 2021

OA SEWE, J

MAY 16, 2025

BETWEEN

BERND TROMPELL PLAINTIFF

AND

KARL HEINZA OCHS DEFENDANT

JUDGMENT

1. The plaintiff, Bernd Trompell, is a male adult working for gain in Diani and Nairobi within the Republic of Kenya. He approached the Court vide his Plaint dated 22nd March 2021 contending that, on the 20th December 2020, the defendant posted, published and circulated a defamatory article concerning him; and that the post was carried in the following status: <https://dianivillaszerstoertalletraume.de/index.php/posts>
2. The plaintiff further averred that the status was accessible to the whole world and has actually received world-wide viewing. The words complained of were set out by the plaintiff at paragraph 7 of his Plaint as follows:
 - (a) “This person has no character”, “is a fraud”, “the climax of Mr. Trompell’s audacity and arrogance,” “A favorite saying of Mr. Trompell is: “This is Kenya, there is nothing you can do,” “have a nightmare through false promises and lies”
 - (b) “Sorry for the straightforward way he works, he has no idea about building a house, and he cannot read any plans and in no way fulfilled his duty as construction manager...”
 - (c) “Contrary to the (already older) reference list of Mr. Trompell on his website, there are also enough dissatisfied customers (e.g. house completely painted with the wrong color) who want nothing more to do with Mr. Trompell and even bans him property and house to have.”
 - (d) “...the possessed person...”



- (e) “Later he didn’t want to know anything about this agreement and simply wanted himself to be authorized.” “Mr. Trompell didn’t care”
3. Thus, the plaintiff averred that the words contained in the defendant’s publication were intended, calculated, contrived and designed to mean and were understood to mean that:
- (a) He is not an honest man and is a fraud;
 - (b) He is professionally incompetent;
 - (c) He has no character whatsoever;
 - (d) He is mentally incompetent and of unsound mind;
 - (e) He is neither transparent nor accountable; and,
 - (f) He is a difficult and hard person to deal with.
4. The plaintiff further averred that the words in the impugned article were false, laced with malice and presented as the absolute truth designed and intended to disparage, belittle and injure his character and reputation as a building contractor and businessman in the eyes of his clients and prospective clients, both within and outside Kenya. The plaintiff supplied particulars of the false statements presented by the defendant as absolute truth at paragraph 10 of his Plea as follows:
- (a) The plaintiff did not want to know anything about the agreement entered into with the defendant and simply executed the terms of the agreement as he wished.
 - (b) That the defendant reached out to the plaintiff to express concerns over his dissatisfaction with the constructions assigned to the plaintiff.
 - (c) The plaintiff knowingly decided to ignore and/or dismiss the concerns allegedly raised by the defendant and did not take any steps in addressing the said concerns.
5. In addition, the plaintiff also supplied the particulars of malice in his Plea to be:
- (a) The Defendant posted the publication on the website knowing or having reason to know that the words contained therein were false and untrue but nevertheless published them.
 - (b) The statements in the said publication are unfounded accusations made out of spite against the Plaintiff herein
 - (c) The sensational manner in which the publication was written with phrases such as “ The climax of Mr. Trompell’s audacity and arrogance” and “he has no idea about building a house, and he cannot read any plans and in no way fulfilled his duty as construction manager”, were clearly intended to cause irreparable damage to the plaintiff by discrediting the character of the plaintiff in the most damaging way possible and leaving no room in the minds of the readers and his suitability for the work he engages in in the construction industry within the tourism and hospitality sector.
 - (d) The defendant did not lodge any complaint at the courts for breach of contract under the law of contract.
 - (e) The defendant instead posted the publication on the website which is accessible to the whole world and has actually received worldwide view.



- (f) The defendant was careful in choosing the medium of circulation to ensure the unlimited accessibility, most possible circulation and a permanency of his defamatory remarks which are still available online to date.
6. At paragraph 13 of his Plea, the plaintiff averred that he has built and sustained distinguished professional excellence in the construction industry for over 20 years; a fact that could only be possible for a person of high moral character and unquestionable integrity. He added that his standing as a prominent building contractor depends on the perception of his clients, employees, colleagues and members of the public who interact with him in the construction industry. The plaintiff was therefore aggrieved that the article published by the defendant has impinged, infringed and heavily dented his image and brought his character into great disrepute.
7. The plaintiff also stated that, due to the defendant's actions, he has been subjected to public ridicule, contempt, scandal and odium. He added that he has been disgraced, humiliated and subjected to untold embarrassment and ostracism in his personal capacity as well as in his professional and occupational standing as a building contractor and a businessman both within and outside Kenya. The plaintiff also pointed out that, despite a demand for an apology, unequivocal public retraction and notice of intention to sue in default thereof being given, the defendant has declined, failed and/or refused to pull down the publication or to render an appropriate apology.
8. Accordingly, the plaintiff prayed for judgment against the defendant for:
- (a) A declaration that the words posted, published and circulated by the defendant on 29th December 2020 on his website titled Diani Villas/Kenya Villas/Palm Dreams of URL address: <https://dianivillaszerstoertalletraume.de/index.php/posts> of and concerning the plaintiff are false and defamatory.
 - (b) An order directing the defendant to publish a suitable and fitting apology given as much prominence as the defamatory publication on his website address: <https://dianivillaszerstoertalletraume.de/index.php/posts> and in the Daily Nation and Standard newspapers.
 - (c) An order directing the defendant to fully retract, delete and or pull down the text and tenor of the defamatory publication of 29th December 2020 of URL address: <https://dianivillaszerstoertalletraume.de/index.php/posts>
 - (d) A permanent injunction restraining the defendant from publishing any further defamatory posts, publications and/or statements in reference to the plaintiff.
 - (e) General damages for libel.
 - (f) Exemplary damages for defamation.
 - (g) Aggravated damages for defamation.
 - (h) Interest on [e], [f] and [g] above at court rates from the date of judgment until payment in full.
 - (i) Costs of the suit.
 - (j) Any other or further relief that the Court deems fit and just to grant under the circumstances.
9. The defendant denied the plaintiff's assertions vide his Defence dated 29th April 2021, particularly the assertions made in Paragraph 7 of the Plea. He contended that, if the said post or any words alleged in the said paragraph was published about the plaintiff by him then the same was published in good faith,



in public interest and without malice and was not intended to injure the reputation and character of the plaintiff. He likewise denied the allegation made by the plaintiff in paragraph 8 of his Plea and put him to strict proof that the same was accessible to the whole world.

10. At paragraph 9 of the Defence, the defendant contended that the contents of the impugned article were nothing but the truth and that all the statements made were supported by facts expressed pursuant to his freedom of expression. He further averred that on several occasions he requested the plaintiff to honour the agreement between them but that the plaintiff totally refused and or ignored his requests. He posited that, having been in the construction industry of over 20 years, the plaintiff was supposed to build the subject house in accordance with the specifications supplied by him. The defendant therefore prayed for the dismissal of the suit with costs.
11. The plaintiff testified as PW1 and adopted his witness statement dated 22nd March 2021. He testified stated that he is a German citizen and a resident of Diani in Kenya. He also stated that he a developer by profession and owns several businesses including a Hotel in Nairobi. The plaintiff testified that he is one of the directors of Palm Dreams Homes Ltd, a real estate company and a prominent and distinguished building contractor with over 20 years of construction experience.
12. The plaintiff confirmed that defendant is a former client who bought property known as Title No. Kwale/Galu Kinondo/2407 from the company on which he undertook construction of a two-bedroomed villa for him and his wife. He relied on his Bundle of Documents which he produced as the Plaintiff's Exhibit 1 to 9 herein.
13. It was further the testimony of the plaintiff that, upon completion of the villa, the defendant disagreed on the kind of finishing that was to be done; and therefore the company ended up spending more than the negotiated contract price; which amounts the defendant declined to reimburse upon demand. Instead the defendant went ahead to post the impugned article. It was the plaintiff's evidence that the publication is open to all and sundry; and that it was brought to his attention by Andreas Bold. He added that the publication is still on the defendant's website for worldwide viewership.
14. The plaintiff restated the words complained of, their ordinary meaning as well as particulars of falsehoods portrayed thereby. He also reiterated the particulars of malice alleged by him against the defendant. The plaintiff also stated that he demanded for an apology but that this has not been forthcoming from the defendant. The Bundle of Documents produced by the plaintiff as his Exhibits 1 to 9 consisted of copies of:
 - (a) The plaintiff's German passport
 - (b) Foreigner Certificate issued to him by the Government of Kenya
 - (c) Certificate of Incorporation for Palm Dream Homes Ltd
 - (d) Form CR12 for Palm Dreams Homes Ltd
 - (e) The purchase contract in Dutch language
 - (f) The purchase contract in English language
 - (g) Screenshots of WhatsApp communication
 - (h) Screenshot of Blog post published on 29th December 2020
 - (i) Demand letter from M/s Jane Kagu & Co. Advocates dated 22nd January 2021



15. The plaintiff was categorical that he suffered loss because clients would google his company and the article would pop up and they would opt for other developers. He stated, therefore, that he filed the instant suit not only for compensation but also for an apology from the defendant for defaming him and the damage ensuing therefrom for over three (3) years.
16. The plaintiff called Ravji Karsan Hirani (PW2) as his witness. PW2 also adopted his witness statement dated 20th May 2021 as part of his evidence in chief. He testified that he worked as a building contractor and had known the Plaintiff since 2014 as they have worked together in the business of construction of houses. PW2 stated that he worked as the Plaintiff's sub-contractor and that they have built 12 residential villas together. He indicated that of all the houses they have built, there have been no complaints from their clients.
17. PW2 further testified that he also knew the defendant as one of their clients. He confirmed that they built for him a house and that the defendant did not raise any complaint upon completion of the villa. In the evidence of PW2, the defendant took over the house upon being satisfied with its state. He therefore testified that the Article published by the defendant was not true as otherwise the defendant would have complained when the project was handed over to him upon completion.
18. PW2 conceded in cross-examination that the defendant's house plan was drawn by an architect, and that the architect guided the construction. He also conceded that, after construction began, the defendant introduced some changes, which were incorporated, and that he was satisfied with the manner in which they plaintiff executed those changes.
19. On his part, the defendant testified as DW1. He adopted his witness statement filed on 29th July 2021. He conceded that they indeed entered into an agreement with the plaintiff for the construction of villas but maintained that they were not built in accordance with the terms and conditions agreed upon. The defendant testified that he noted several defects which he pointed out to the plaintiff. He denied that the plaintiff had spent any money on the project but confirmed that they had several disagreements over the villas.
20. The Defendant further denied that he posted defamatory words concerning the Plaintiff. He stated that the words alleged to be defamatory were published in good faith and in public interest. The stated that the words outlined in the Plaint were not malicious at all, and were never intended to injure the reputation or character of the Plaintiff. He added that the post was a mere statement of opinion. He further denied that the article was available under the link <https://dianivillaszerstoertalletraume.de/index.php/posts> for the world to access.
21. The defendant further contended that his sentiments in the blog were truthful and supported by facts. He also added that the blog was made in the exercise of his freedom of expression. He produced his List and Bundle of Documents as Defence Exhibits 1 to 5.
22. Upon closure of the Defence case, the parties were given an opportunity to file their closing submissions. The plaintiff filed written submissions dated 10th August 2024. He addressed the Court on the uncontested issues and proposed the following aspects of the case for determination:
 - (a) Whether the defendant posted, published and/or circulated a defamatory, libelous and scandalous blog article concerning the plaintiff on the 29th December 2020 on the website titled Diani Villas/Kenya Villas/Palm Dreams at URL address: <https://dianivillaszerstoertalletraume.de/index.php/posts>
 - (b) Whether the words posted, published and circulated by the defendant on 29th December 2020 on the website titled Diani Villas/Kenya Villas/Palm Dreams at URL address: <https://dianivillaszerstoertalletraume.de/index.php/posts>



dianivillaszerstoertalletraume.de/index.php/posts were defamatory, libelous or scandalous of the plaintiff.

- (c) Whether the words posted, published and circulated by the defendant caused irreparable damage to the professional conduct and reputation of the plaintiff.
 - (d) Whether the plaintiff is entitled to the reliefs sought in the Plaintiff.
 - (e) What order ought to issue on costs and interest.
23. The plaintiff urged the Court to find that indeed the defendant posted the article in question. As to whether the defendant was justified in so doing as contended by him, the plaintiff placed reliance on Articles 27(4) and 33(2) and (3) of *the Constitution* to buttress his submission that the freedom of expression is not absolute; and that in exercising his right the defendant was obliged to respect the rights and reputation of others. The plaintiff therefore urged the Court to find that there was no justification at all for the publication.
24. On the authority of *Gatley on Libel and Slander*, 6th Edition and the case of *Radio Africa Ltd & another v Nicholas Sumba & another* [2015] eKLR, among other authorities, the plaintiff posited that he had demonstrated that the words complained of were false, unwarranted and intended to harm his reputation in so far as they had the effect of lowering him in the estimation of right-thinking members of the society. He consequently urged the Court to find that he is entitled to the reliefs prayed for in his Plaintiff. The plaintiff pointed out that the defendant has never shown any remorse or apologized for the offensive words. The plaintiff relied on *Ken Odondi & 2 others v James Okoth Omburah t/a Okoth Omburah & Company Advocates* [2013] eKLR and urged the Court to award him not only general damages but also exemplary damages in the circumstances.
25. On costs, the plaintiff quoted Section 27 of the Civil Procedure Rules and urged the Court to exercise its discretion in his favour. He submitted that the conduct of the parties ought to be taken into account.
26. In the defendant's written submissions undated written submissions he reiterated his stance that the publication in question was based on the truth of the matter, since the house was not constructed as agreed. He submitted that the publication was made in good faith, innocently and amounted to fair comment on a matter of public interest. He relied on *Joseph Njogu Kamunge v Charles Muriuki Gachari* [2016] eKLR as well as Article 33 of *the Constitution*, among other decisions.
27. As to the essential ingredients of defamation, the defendant relied on the case of *John Ward v Standard Limited* [2006] eKLR and *Black's Law Dictionary*. He submitted that the burden of proof was on the plaintiff to prove all the elements of defamation to the requisite standard. In his view the plaintiff failed to discharge that burden; and therefore is not entitled to the prayers sought by him. The defendant therefore prayed for the dismissal of the suit with costs.
28. From the foregoing summary, there is no contention that the parties entered into an agreement for the sale and development of the suit property, Title No. Kwale/Galu Kinondo/2407. In particular, the plaintiff was to construct a two-bedroomed villa on the land; and it is common ground that the villa was constructed and handed over to the defendant. What was in contention was whether the project was executed by the plaintiff in accordance with the agreed specifications.
29. While the plaintiff contended that the job was well done and that the defendant had no complaint to raise at the time of the handover; the defendant expressed dissatisfaction with the finishing works. He also conceded that an attempt was made by the defendant to introduce some structural changes after the foundation was laid; and that he declined and explained that it was too late for such structural



changes to be made. It is evident therefore that it was this disagreement that led to the publication of the article complained of.

30. In the circumstances, the two issues for determination are:
- (a) Whether the words posted, published and circulated by the defendant on 29th December 2020 on the website titled Diani Villas/Kenya Villas/Palm Dreams at URL address:
<https://dianivillaszerstoertalletraume.de/index.php/posts>
were defamatory of and concerning the plaintiff.
 - (d) Whether the plaintiff is entitled to the reliefs sought in the Plaintiff.
31. The court has looked at the article attached by the Plaintiff and has noted that it was written in both English and German, with the words being complained of being in German. The court has noted that the Plaintiff and Defendant are of German origin and can speak and write both in English and German. There is no dispute that the article was published in German.
32. I therefore take guidance from decision of the Court of Appeal in the case of *Raphael Lukale v Elizabeth Mayabi & Royal Media Services Limited (Civil Appeal 286 of 2016)* [2018] KECA 668 (KLR) (Civ) (20 April 2018) (Judgment), wherein in that case the alleged defamatory words were made on a Radio station “Mulembe” FM, a Luhya dialect radio and one of the questions that the court had to answer was whether the words reproduced in English were the ones uttered in Luhya by the 1st Respondent therein. The Court of Appeal held:

We have keenly looked at the respondent’s version paraphrased above and that contained in the appellant’s plaint and are of the view that there is no substantial distinction in the overall import of the two. Because there is no dispute that the story was aired, the question to be determined is whether the learned Judge misdirected herself in insisting that, without a recording of actual words, the appellant did not prove that the words in question were the same ones which were reproduced in paragraph 7 of the plaint; whether she further misdirected herself in finding that the appellant did not prove actual publication of the words and that they were indeed defamatory of him; whether she erred by holding that those words, in the absence of a literal English translation certificate could not be said to be defamatory; and whether she made an error for insisting that the appellant ought to have disclosed the person who translated the words into English.

Speaking generally a defamatory statement can either be libel or slander. Words will be considered defamatory because they tend to bring the person named into hatred, contempt or ridicule or the words may tend to lower the person named in the estimation of right-thinking members of society generally. The standard of opinion is that of right-thinking persons generally. The words must be shown to have been construed or capable of being construed by the audience hearing them as defamatory and not simply abusive. The burden of proving the defamatory nature of the words is upon the plaintiff. He must demonstrate that a reasonable man would not have understood the words otherwise than being defamatory....

The use of language and participation in culture today under Article 44 of *the Constitution* are fundamental rights. The official languages of the Republic of Kenya according to Article 7 are Kiswahili and English. Although Section 86 of the *Civil Procedure Act* provides that the official language of the High Court and Court of Appeal is English we think that by the aforesaid Article 44 this has changed, at least in so far as oral testimony in the High



Court is concerned. We are of the considered view that today the relevance of that provision remains in the requirement that documents used in the proceedings in the High Court must be translated into English. Translation or certificate of translation of the words does not arise in view of the 1st respondent's own confirmation in both her statement and testimony before the trial court that the translation of the Luhya words used in the broadcast into English in paragraph 7 of the plaint was "reasonable". According to her the broadcast was simply a reproduction of what she had been told by M.

All the law requires is that the plaintiff must try as much as possible to reproduce the words used in a defamation claim. See *Gatley on Libel and Slander*, 11th Edition at 28.17 page 973 "...If the exact words cannot be pleaded, the words must at least be set out with reasonable precision."

33. It is therefore my finding that the words presented have been set out with reasonable precision. In any event, the defendant raised no issue as to the English version of the publication.

34. In Black's Law Dictionary "defamation" is defined as: -

1. The act of harming the reputation of another by making a false statement to a third person. If the alleged defamation involves a matter of public concern, the plaintiff is constitutionally required to prove both the statement's falsity and the defendant's fault.

2. A false written or oral statement that damages another's reputation.

35. The Court of Appeal in the case of *Miguna Miguna v Standard Group Limited & 4 others* [2017] eKLR, relied on the following excerpt from Patrick O'Callaghan's *Common Law Series: The Law of Tort* at paragraph 25.1 which states:

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 neighbor. It supplies a temporal 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."

36. A defamatory statement is thus one that tends to so disparage a person in the eyes of sensible members of society as to expose the person to hatred, contempt or ridicule. The test for determining whether or not a statement is defamatory is an objective one. It is based on what an ordinary reasonable person reading the statement would understand the statement in a defamatory sense. The Court of Appeal in the case of *Wycliffe A Swanya v Toyota East Africa Ltd & another* [2009] eKLR set out the elements of defamation as follows: -

For the purpose of deciding a case of defamation, the Court is called upon to consider the essentials of the tort generally and to see whether these essentials have been established or proved. 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
- (iv) In slander, subject to certain exceptions, that the plaintiff has suffered special damage.”

37. It is important in a defamatory suit for the plaintiff to show that the defamatory statement refers to them. A plaintiff need not be named in a defamation case if ordinary readers can discern to whom the statement referred. In this case, there is no dispute that the article in the issue referred to the plaintiff and was published on the Internet where it could be accessed worldwide. Thus, the statement complained of was thereby published to third parties.

38. The next question to pose is whether the publication is false. The defendant raised the defence that the publication is nothing but the truth; and that it was made in the public interest. Sections 107, 108 and 109 of the *Evidence Act* provide that the burden of proof is on the person who alleges. In *Karugi & another v Kabiya & 3 others (Civil Appeal 80 of 1982)* [1983] KECA 38 (KLR) (Civ) (16 November 1983) (Judgment), the Court of Appeal stated:

The burden on the plaintiff to prove his case remains the same, though it is true that, where the matter is not defended, or, as here, validly defended that burden may become easier to discharge...”

39. This being a civil matter the standard of proof is on a balance of probabilities. This court must interrogate the evidence and the pleadings to determine whether the plaintiff has proved his case to that standard. The Court of Appeal in the case of *Antony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank (Civil Appeal 5 & 48 of 2002)* [2004] KECA 166 (KLR) (2 July 2004) (Judgment) held:

We have carefully considered the judgement of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the Court on the basis of those pleadings pursuant to the provisions of order XIV of the Civil Procedure Rules. And the burden of proof is on the plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail...”

40. Further, the Court of Appeal in the case of *Palace Investments Limited v Geoffrey Kariuki Mwenda & another* [2015] eKLR, held:

The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. Denning J. in *Miller –vs- Minister of Pensions* [1947] 2 ALL ER 372 discussing the burden of proof had this to say: -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot



decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

41. In the instant matter, the defendant denied malice and insisted that the article was written in the public interest and was based on facts. The Defendant maintained that he raised several complaints with the plaintiff, on the poor quality of construction, as the house was not constructed per the drawings provided. He stated that the publication was based on the truth made in good faith and innocently; and was a fair comment made in the public interest. The defendant's main complaint was that the house was not built in accordance with building plans and the finishes were not done in accordance with what had been agreed upon. He further stated that he knew of other customers who had not been satisfied with the Plaintiff's work. He gave the example of one Anne Gohu who was promised an exchange of a kitchen plate and worktop by the plaintiff but the plaintiff never replaced the said items.
42. On his part the plaintiff claims that the Defendant's article depicts him as a man of no character; and as a fraudulent and incompetent contractor and therefore an unscrupulous businessman. It is significant therefore that the defendant conceded, on cross-examination, that he got to know the plaintiff through the internet and that the whole world can access the internet. He posited that, just as he got to know the plaintiff through the internet, other Germans may have known him through the internet of each other online.
43. Looked at objectively, the post was therefore not a sincere lamentation about quality of work as the defendant would have the Court believe, but an attack on the very character of the plaintiff judging from phrases used such as "The climax of Mr. Tompell's audacity and arrogance", "he has no idea about building a house", "he cannot read any plans" and that he "in no way fulfilled his duty as construction manager", The defendant even referred to the plaintiff as a "possessed" person. These expressions were clearly intended to leave no room in the minds of the readers as to the plaintiff's reputation and competence for the work he engages as a developer in the construction industry.
44. Although the defendant denied that the publication was malicious, it is now settled that malice can be inferred from the choice of words. I find instructive the expressions by Hon. Odunga, J. (as he then was) in *Phinehas Nyaga v Gitobu Imanyara* [2013] eKLR that:

...the words must be malicious. 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. That may lead to an inference of malice but the law does not weigh in a fair balance and it does not follow merely because the words are excessive, there is therefore malice. Malice may also be inferred from the relations between the parties before or after publication or in the course of the proceedings. Malice can be founded in the publication itself if the language used is utterly beyond the facts. The failure to inquire into the facts is a fact from which inference of malice may properly be drawn. Any evidence which shows that the defendant knows the statement was false or did not care whether it be true or false will be evidence of malice."

45. Moreover, in *Joseph Njogu Kamunge v Charles Muriuki Gachari* [2016] eKLR, for instance, it was held: -

Allowable defences are justification (i.e. the truth of the statement), fair comment (i.e., whether the statement was a view that a reasonable person could have held), and privilege (i.e., whether the statements were made in Parliament or in court, or whether they were fair reports of allegations in the public interest). An offer of amends is a barrier to litigation.



A defamatory statement is presumed to be false, unless the defendant can prove its truth. Defamation law puts the burden of proving the truth of allegedly defamatory statements on the defendant, rather than the plaintiff....

.... As pointed out above, there is a wide range of defences that may be pleaded in defamation, but the one that is most famously associated with the public interest is “qualified privilege”. The essence of this defence is that the person making a statement has a duty to do so and that the person who hears, or reads, the statement has a corresponding interest in doing so. The defence is by no means limited to the publication of stories by the media, but it is in that context that the idea of publication in the public interest is at its most pronounced. The leading case on the defence remains *Reynolds v Times Newspapers*,^[25] which was an action taken by the former Prime Minister of Ireland in respect of stories about how he had conducted himself while in office. Given the political context to the story, the defendant had argued that the story should automatically attract privilege and that the claimant should be required to show that the defendant had acted with malice. However, the House of Lords was of the view that such an approach would swing the pendulum too far away from the protection of reputation, and it instead proposed a number of guidelines that a defendant should observe if wishing to argue that a publication was responsible and in the public interest. Those non-exhaustive guidelines, listed by Lord Nicholls, require the person publishing the story to consider:-

1. The seriousness of the allegation, i.e. if the allegation is not true what will be the level of misinformation to the public and what will be the corresponding harm to the individual.
2. The nature of the information and the extent to which the subject-matter is a matter of public concern.
3. The source of the information and whether it is reliable or motivated by malice and/or avarice.
4. Whether suitable steps have been taken to verify the information.
5. Whether the allegation in a story has already been the subject of an investigation which commands respect.
6. Whether it is important that the story be published quickly.
7. Whether comment was sought from the claimant, or whether that was not necessary in the context of the story.
8. If the article or story includes the gist of the claimant’s version of events.
9. Whether the article or story is written in such a way as to amount to statements of fact, or whether it raises questions and is suggestive of the need for further investigation.
10. The timing of the publication.



46. The Court of Appeal in the case of *Onyango v Standard Group Limited & 4 others (Civil Appeal 214 of 2018)* [2024] KECA 118 (KLR) (9 February 2024) (Judgment), held: -

38. The ingredients of the defence of fair comment were famously summarized in the decision of Lord Nicholls of Birkenhead in *Tse Wai Chun Paul vs. Albert Cheng* [2001] EMLR 777 as follows:“

16. In order to identify the point in issue I must first set out some non-controversial matters about the ingredients of this defence. These are well- established. They are fivefold. First, the comment must be on a matter of public interest. Public interest is not to be confined within narrow limits today: see Lord Denning in *London Artists Ltd v. Littler* [1969] 2 QB 375, 391.

17. Second, the comment must be recognizable as comment, as distinct from an imputation of fact. If the imputation is one of fact, a ground of defence must be sought elsewhere, for example, justification or privilege. Much learning has grown up around the distinction between fact and comment. For present purposes, it is sufficient to note that a statement may be one or the other, depending on the context. Ferguson J gave a simple example in the New South Wales case of *Myerson v. Smith's Weekly* (1923) 24 SR (NSW) 20, 26: "To say that a man's conduct was dishonourable is not comment, it is a statement of fact. To say that he did certain specific things and that his conduct was dishonourable is a statement of fact coupled with a comment".

17. Third, the comment must be based on facts which are true or protected by privilege : see, for instance, *London Artists Ltd v. Littler* [1969] 2 QB 375, 395. If the facts on which the comment purports to be founded are not proved to be true or published on a privilege occasion, the defence of fair comment is not available.

18. Next, the comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made. The reader or hearer should be in a position to judge for himself how far the comment was well founded.

19. Finally, the comment must be one which could have been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his views: see Lord Porter in *Turner v. Metro-Goldwyn-Mayer Pictures Ltd* [1950] 1 AER 449, 461, commenting on an observation of Lord Esher MR in *Merivale v. Carson* (1888) 20 QBD 275, 281. It must be germane to the subject matter criticised. Dislike of an artist's style would not justify an attack upon his morals or manners. But a critic need not be mealy-mouthed in denouncing what he disagrees with. He is entitled to dip his pen in gall for the purposes of legitimate criticism: see Jordan CJ in *Gardiner v. Fairfax* (1942) 42 SR (NSW) 171, 174.

21. These are the outer limits of the defence. The burden of establishing that a comment falls within these limits, and hence within the scope of the defence, lies upon the defendant who wishes to rely upon the defence.”

39.....

40. Explicit from the language of section 15 is that for the defence to be available in the first instance, the words must be partly allegations of fact and partly an expression of an opinion. An allegation of fact alone is not eligible for the defence of fair comment. It bears repeating the words of Lord Nicholls in *Tse Wai Chun* (supra) “...the comment must be recognizable



as comment, as distinct from an imputation of fact. If the imputation is one of fact, a ground of defence must be sought elsewhere, for example, justification or privilege.”

47. In the premises, the defendant’s defence is clearly untenable. It is not lost on the Court that the defendant relied on Article 33 of *the Constitution* that guarantees every person the freedom of expression. Under Article 33(1) of *the Constitution*, every person has the freedom to seek, receive or impart information or ideas. Still, it must be exercised in adherence to Article 33(3), which provides:

In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.”

48. It is therefore my considered finding that the plaintiff has demonstrated the elements of defamation and is therefore entitled to appropriated relief in respect thereof.

49. On quantum the Court of Appeal, in the case of James v Ndirangu & 3 others (Civil Appeal 282 of 2016) [2022] KECA 82 (KLR) (4 February 2022) (Judgment), stated: -

40. On an appropriate award for damages, the guiding principle is that the rationale behind an award of damages in defamation actions is to restore or give back to the injured party what he lost, save in exceptional circumstances where punitive or exemplary damages may be awarded. In its assessment, the trial court’s duty was to look at the whole conduct of the respondents from the time the libel was said to be published to the time the matter was heard in court. On the record, the learned Judge did not analyze the respondents conduct before the action, after the action and in court during the trial which the record is explicit that there were not interrogated. We have played that role in our own and castigate the conduct as being not only unfair but also deplorable. Unfair because upon laying false accusations against the appellant which cost her employment. They never took any steps to justify their actions when challenged by the appellant to do so. See Johnson Evan Gicheru vs. Andrew Morton & Another [2005] eKLR....

42. We are alive to the principle that an award of damages should be fairly compensatory in light of the nature of the injury to reputation and that an award must appear realistic in the circumstances. In the English Court of Appeal decision in the case of John vs. MG Ltd [1996] 1 ALL E.R. 35 the Court held that;“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 take account of the distress, hurt and humiliation which the defamatory publication caused.”

50. Having considered the facts of this case, I find the following authorities pertinent:

- (a) In Kipyator Nicholas Kiprono Biwott v George Mbuguss and Kalamka Ltd [2002] eKLR, the plaintiff was awarded Kshs. 10 million as general damages for defamation.
- (b) In Machira v Mwangi & another [2001] eKLR an award of Kshs. 8 million was made for defamation.
- (c) In Daniel Musinga t/a Musinga & Company Advocates v Nation Newspapers Limited [2006] eKLR an amount of Kshs. 10 million was awarded as general damages for defamation.



- (d) In *Chirau Ali Mwakwere v Nation Media Group Limited & Another* [2009] eKLR the Court awarded Kshs. 8 million as general damages.
51. Taking into account the foregoing authorities, it is my considered finding that an award of Kshs. 8,000,000/= as general damages would suffice in the circumstances.
52. The plaintiff also asked to be awarded aggravated and exemplary damages. It is trite that aggravated damages are only awardable in limited instances, for instance, where the defendant's subsequent conduct, such as failure to apologize, warrants such an award. Hence, in *John v MGM Limited* [1997] QB 586 which was relied on in *Miguna Miguna v Standard Group Limited* (supra), it was held:
- 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 of justification or failure to apologize.”
53. In the same vein, exemplary damages would only be due where there is oppressive or arbitrary action by servants of the government. Other instances are whether the defendant sets out to make profit and where payment of exemplary damages is authorized by statute. Hence, in *C A M v Royal Media Services Limited* [2013] eKLR the Court of Appeal quoted with approval the following passage from *John v MGM* (supra):
- Exemplary damages can only be awarded if the Plaintiff proves that the Defendant when he made the publication knew that he was committing a tort or was reckless whether his action is tortious or not, and decided to publish because the prospects of material advantage outweighed the prospects of material loss...if the case is one where exemplary damages can be awarded the court or jury should consider whether the sum which it proposes to award by way of compensatory damages is sufficient not only for the purposes of compensating the Plaintiff but also for the purpose of punishing the Defendant.”
54. Therefore, in *Kipyator Nicholas Kiprono Biwott v Clays Limited & 5 others* [2000] eKLR the Court observed that:
- the conduct of the UK defendants since the publication has not helped matters - in fact they have deliberately and arrogantly announced that they will neither apologize nor withdraw the book. They have even had the audacity to say that the offending words in the book are true, and that they have witnesses to swear to the truth of these words. Of course, no such witnesses have been produced. Although they have made public announcement that they will vigorously defend any action, they have not bothered to do so. They have simply continued to enjoy the media attention. As the exhibits in this case show, this subject has been headline and/or front page news of many publications in this country. Clearly, this is of great benefit to the defendants who, because of this high media attention, continue to sell more books and make huge profits. They need not advertise the book. It is being done for them free of charge.”
55. And, in *Johnson Evan Gicheru v Andrew Morton & Another* [2005] eKLR, it was proved as a fact that the passages complained of in the offending publication were untrue in every material respect and had been published maliciously; and that when invited by the appellant's Counsel to publish an apology correcting the offending paragraphs, the respondent's solicitors replied that the respondents were a highly respected international publishers and that they do not publish books which contain untrue and defamatory statements. It was also evident from the record that the respondents, during the trial, justified their stance and wanted certain paragraphs of the Plaintiff struck out for disclosing



no reasonable cause of action contending the words complained of were not capable of bearing the meanings attributed to them by the appellant.

56. It is manifest that the plaintiff is justified in seeking aggravated damages, taking into account the fact that the defendant has failed to apologize or pull down the article. I hereby award the plaintiff Kshs. 1,000,000/= under this head.
57. The plaintiff sought an order of permanent injunction to restrain the Defendant from publishing similar articles in reference to the plaintiff. I have read and was persuaded by the decision of John Ntoiti Mugambi Alias Kamukuru v. Moses Kithinji Alias Hon. Musa [2016] eKLR, where it was held: -

The way the orders sought are styled- borrowing from the words of Justice Ringera- is a net cast too wide over a large body of water, and out of all the lake or sea, it will catch all manner of creatures. In defamation cases, it is not possible to issue such boundless injunction which restrain any and all persons from saying anything about the Applicant; that will be a complete impairment of freedom of expression and public interest that truth should be out. An injunction in such cases must be specific in order to prevent such impairment or impediment of freedom of free speech and expression. Care should be taken, therefore, not to issue injunctions which will rapture the law and *the Constitution*...

If this order is granted as prayed, what yardstick will a person confronted with the order use to know or discern which interviews, articles, comments and or words are libelous or injurious falsehood or are similar words defamatory of the plaintiff? On this subject, see what Mabeya J said in the case of Francis Atwoli & 5 *Others –v Hon Kazungu Kambi & 3 Others Nairobi High Court Civil Suit No.60 Of 2015*, that;

“One other thing, even if the Plaintiffs were successful, it would have been difficult to grant the orders as sought. The orders sought as set out at the beginning of this ruling are too wide. I am doubtful if a court of law directing its mind properly can issue such an order. The order is too general, wide, imprecise and incapable of comprehension. A Defendant faced with such an order will be at a loss as to what words or statements that are defamatory that he is being restrained from using or uttering. To my mind, a Plaintiff who wants a court to issue an order of injunction in a defamation case must set out the words sought to be restrained with precision and exactitude for purposes of enforcement of such an order. In the present case, I am afraid; the order sought was too general to have any precise meaning.”

58. For an order of injunction to be issued, the plaintiff must set out the words sought to be restrained with precision and exactitude for purposes of enforcement of such an order. It is not enough that this court should stop the publication of similar articles that will be in reference to the Plaintiff. An injunction order must be directed on specific acts complained of. In this case, the injunctive order sought by the Plaintiffs refers to current and future contemplated defamations. This aspect of the claim is too imprecise to be granted. It is therefore declined.
59. In the result, the plaintiff's claim succeeds in part and orders issued as hereunder:
- (a) A declaration be and is hereby issued that the words posted, published and circulated by the defendant on 29th December 2020 on his website titled Diani Villas/Kenya Villas/Palm Dreams of URL address: <https://dianivillaszerstoertalletraume.de/index.php/posts> of and concerning the plaintiff are false and defamatory.
- (b) An order be and is hereby given directing the defendant to publish a suitable and fitting apology given as much prominence as the defamatory publication on his website



address: <https://dianivillaszerstoertalletraume.de/index.php/posts> and in the Daily Nation and Standard newspapers.

- (c) An order be and is hereby made directing the defendant to fully retract, delete and or pull down the text and tenor of the defamatory publication of 29th December 2020 of URL address: <https://dianivillaszerstoertalletraume.de/index.php/posts>
- (e) General damages for libel be and is hereby awarded to the plaintiff in the sum of Kshs. 8,000,000/=.
- (g) Aggravated damages for defamation be and is hereby awarded to the plaintiff in the sum of Kshs. 1,000,000/=.
- (h) Interest on [e], [f] and [g] above at court rates from the date of judgment until payment in full.
- (i) Costs of the suit be borne by the defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 16TH DAY OF MAY 2025.

OLGA SEWE

JUDGE

