



**Hezekiah v Standard Group Plc (Civil Appeal E261 & 238 of 2023
(Consolidated)) [2025] KEHC 9126 (KLR) (19 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9126 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E261 & 238 OF 2023 (CONSOLIDATED)**

RC RUTTO, J

JUNE 19, 2025

BETWEEN

EVANS KEAGO HEZEKIAH APPELLANT

AND

THE STANDARD GROUP PLC RESPONDENT

*(Being an appeal from the judgment of Hon. R.W Gitau (SRM) in
Mavoko MCCC NO. E535 OF 2022, delivered on 26th September 2023)*

JUDGMENT

1. Before me are two appeals namely, HCCA NO. 261 OF 2023 by the appellant, dated the 6th October, 2023 and filed on the same day, and HCCA NO. 281 of 2023 dated the 28th September, 2023 and filed on the 25th October, 2023. These appeals arose from the judgment of Hon. R.W Gitau (SRM) in Mavoko MCCC NO. E535 of 2022 delivered on 26th September 2023.
2. At the trial court the appellant filed claim through a plaint dated 19th July 2022. He claimed that in the month of October 2021, the respondent in its daily news broadcast, aired and printed the list of Judicial Service Commission (JSC) nominees to the position of a judge whom the President declined to appoint to the position of a judge because of integrity issues.
3. It was his case that, the respondent, without due care, severally maliciously, and falsely used his photograph in place of one for Hon. Evans Kiago Makori in its news bulletin aired during the 1:00pm, 4:00pm, 7:00pm and 9:00pm news bulletins, through its KTN news television station, its streaming platform (youtube), and published the photograph of the appellant in its daily newspapers. The appellant's case was that he had never applied for the position of judge. He claimed that the respondent in its news bulletins has irreparably injured his reputation by lowering his reputation in the estimation of the right-thinking members of the society generally and in particular, caused him to be regarded with feelings of hatred, contempt, ridicule, and fear.



4. As a consequence, he sought an apology and retraction of similar prominence as the defamatory publication; general damages for libel; general damages for malicious falsehood; aggravated and exemplary damages; damages for psychological and emotional distress; costs of the suit together with interest thereon; any other remedy that the trial court deemed fit to award.
5. The respondent in its statement of defence, dated 7th September 2022, admitted that it broadcasted the list of JSC nominees to the position of judges of Court of Appeal and Environment and Land Court respectively whom the President declined to appoint. It however, denied that the words contained in the impugned article were malicious and defamatory of the appellant. It averred that it would rely on the defence of fair comment as the publication was done without malice and that at the earliest opportunity, on 11th November 2021, on KTN news, the defendant offered an apology for the erroneously use of the appellant photo in place of Evans Kiago Makori who is also a judicial officer. It asked the court to dismiss the plaint with costs.
6. The trial court in a judgment dated 26th September 2023 found that the appellant had complied with Section 106B of the *Evidence Act* in terms of submission of certificate of electronic evidence for production of the appellant's photograph used by the respondent; that the appellant had proved all the ingredients of the tort of defamation on a balance of probability; that although the respondent had pleaded in their defence that the publication was without malice and particularized why, it did not call any witness to the stand to testify to this. Therefore, their pleadings remained mere unsubstantiated allegations.
7. The trial court found the request for aggravated damages justifiable and considered the inflationary trend and awarded Kshs. 5,000,000, both in general and aggravated damages. The trial court also directed the respondent to tender an apology and retraction of similar prominence as the defamatory publication for 3 days in their Prime News Bulletins within 7 days from the date of the judgment and awarded the appellant costs of the suit together with interest thereon at court rates.
8. Both the plaintiff and defendant were dissatisfied with the trial court's decision prompting the filing of the two the appeals before me.
9. The appellant, being dissatisfied with the decretal sum awarded, filed a Memorandum of Appeal, Machakos HCCA 261 of 2023, dated 6th October 2023 on three grounds, namely:
 - a. That the learned magistrate erred in law and in fact by awarding the Appellant a minute award of Kshs. 5,000,000 for both general and exemplary damages since the trial Court was persuaded that the appellant had proved the ingredients of defamation on a balance of probability.
 - b. That the learned magistrate erred in law and in fact by not considering the award of Kshs. 7,000,000/= for general damages and Kshs. 4,000,000/= for exemplary damages to be sufficient award to the appellant guided by the case of Eric Gor Sungu -v- George Odinga Oraro (2014) eKLR and failed to take into account time and inflation currently in the country from the time of the said award was passed hence the assessed damages are almost half the said award. (c) That the Trial Court failed to take into account the aggravated manner in assessing damages which because the respondent repeatedly used the appellant's photograph in its print, online and electronic media without any due regard for more than 30 days in furtherance of its business.
10. The appellant seeks orders setting aside the award of Kshs.5,000,000 for both general and exemplary damages as provided in the trial court's judgment and allowing the appeal by enhancing the trial court's award as Kshs.7,000,000 in general damages and Kshs.4,000,000 in exemplary damages; cost of the appeal and any relief this court deems fit.



11. The respondent, being dissatisfied with the whole verdict of the learned Magistrate, filed a Memorandum of Appeal, Machakos HCCA 281 of 2023, dated 28th September 2023 on twelve grounds as follows:
- a. The trial magistrate erred in law and fact by finding that the respondent had proved the elements of defamation to the standard required to make the appellant liable for the tort of defamation.
 - b. The learned magistrate erred in law and fact by failing to consider that failure on the part of the respondent to call a character witness was fatal in the circumstance.
 - c. The learned magistrate erred in law when she found that there was publication, when there was no publication in law.
 - d. The trial magistrate misdirected herself on law and fact by admitting the photo as evidence without a certificate of electronic evidence.
 - e. The learned magistrate erred in finding the use of the photo complained of was defamatory without addressing the alleged innuendo.
 - f. The trial magistrate erred in law and fact by returning that the evidence tendered by the appellants could not successfully weave and establish the defence of fair comment.
 - g. The trial magistrate fell into an error of fact by failing to properly address her mind on the apology tendered by the appellant thus making an incorrect finding on the issue of the manifestation of malice in the impugned publication.
 - h. The trial magistrate misdirected herself on law and fact by finding that the publication ruined the reputation of the respondent in the manner, as the respondent did not suffer any loss or damage to the reputation as a result of the publication.
 - i. The trial magistrate misdirected herself in law and fact by awarding general damages and aggravated damages that are excessive, disproportionate and exorbitant in the circumstances.
 - j. The trial magistrate erred by awarding aggravated and general damages of KES 5,000,000 against KES. 500,000 proposed by the appellant.
 - k. The trial magistrate erred in fact by combining general and exemplary damages yet the two are separate and distinct.
 - l. As a result of this decision, a miscarriage of justice has occurred to the appellant.
12. These appeals were consolidated on 8th November 2023 with Machakos HCCA 261 of 2023 being the lead file. Therefore, for purposes of this appeal, the appellant in Machakos HCCA 281 of 2023 will be referred to as the respondent for clarity. This appeal was canvassed by way of written submissions.

Appellant's Submissions

13. The appellant, in his submissions dated 4th April 2024 outlines 10 issues for determination by this court to wit: whether the trial court erred in combining general and exemplary damages and also in awarding the appellant Kshs.5,000,000 only for both general and exemplary damages instead of Kshs.7,000,000 for general damages and Kshs.4,000,000 for exemplary damages; whether the trial court erred in law and in fact by finding that the appellant had proved the ingredients of defamation on a balance of probabilities; whether or not it was fatal in circumstance in a case of this kind for



the appellant not to have called a character witness; whether or not the electronic evidence produced by the appellant was admissible, whether or not there was a publication known in law; and if the answer is in the affirmative, was the publication of the appellant's photograph complained of malicious; whether or not the respondent proved the defense of fair comment in the matter of public interest and qualified privilege; whether or not the trial court erred in finding the use of the appellant's photograph complained of as defamatory without addressing the alleged innuendo; whether or not the trial court fell into error of fact by failing to properly address her mind to the apology tendered by the respondent thus making incorrect findings on the issue of the manifestation of malice in the impugned publication; whether or not the damages awarded by the trial court were excessive and if the answer is in the negative can the award of Kshs.500,000 as proposed by the respondent be reasonable; and who shall bear the cost of the consolidated appeal.

14. On the first issue, it is the appellant's case that the trial court erred in law and in fact by combining general and exemplary damages yet the two are separate and distinct. The appellant urges this court to be guided by the decision *Eric Gor Sungu v George Odinga Oraro* (2014) eKLR on this issue. The appellant urges this court to separate the award of Kshs.5,000,000/= for both general and exemplary damages that were combined by the trial court and make a distinct award of Kshs.7,000,000 for general damages and Kshs.4,000,000 for exemplary damages.
15. On the second issue, it is contended that the trial court did not error in law or fact in finding that the ingredients of defamation were proved. It is submitted that the trial court was satisfied that the respondent used the appellant's photograph without the authority or justification by the respondent to his detriment. It is also urged that the broadcasts complained of were defamatory. It is contended that it was within the public knowledge that the photographs of the declined aspirants that were being used in the news broadcasts of the respondent were seen as corrupt and lacked the threshold to be judicial officers.
16. It is submitted that the photo publication was intended to lower or actually lowered the reputation and character of the appellant in the eyes of the right-thinking members of the society. The appellant places reliance on the decision in *Daniel Kaimasach V Kalamka Ltd & Another* [2005] eKLR and *Gatley* on libel and slander 11th Edition Sweet and Maxwell 1998 page 11 on what elements constitute defamation.
17. It is the appellant's case that the broadcasts by the respondent were to portray the aspirants as corrupt and that is why it was news for the respondent.
18. The appellant submits that the respondent irreparably injured his reputation by lowering the reputation the appellant in the estimation of the right-thinking members of the society generally and in particular, it has caused the appellant to be regarded with feelings of hatred, contempt, ridicule, and fear when he presides over his court.
19. It is the appellant's case that the publication was false in that he is not referred as Hon. Evans Kiago Makori and has never applied for the position of a Judge in Kenya.
20. It is submitted that the respondent knew that the appellant was a magistrate but knowingly went forth to emboss the appellant's photograph in place of Hon. Evans Kiago Makori just to injure the reputation of the appellant hence the defense of a mistake does not hold water on stilts.
21. It is submitted that there was no denial that the impugned print and broadcasts were aired and distributed by the respondent to the world as conceded by the respondent's in the witness statement of John Mwaura dated the 21st September, 2022.



22. On whether it was fatal in circumstances of this case for the appellant not to have called a character witness, it is submitted that for defamation, one must prove the elements of the tort of defamation; what need not be proved is the damage suffered, hence the appellants case was proved.
23. On the issue of electronic evidence, it was urged that the trial magistrate did not misdirect herself in law and fact by admitting the photograph as evidence.
24. On the fifth and sixth issues, it is the appellant's case that there was a publication by the respondent known in law through the broadcasts. The appellant relies on the decision in *Pullman -v -Walter Hill & Co (1891) 1 QB 524* to buttress this assertion.
25. It is urged that the broadcast by using the photograph of the appellant was actuated by malice and therefore the defenses of qualified privilege and fair comment on public interest are not available to the respondent. Reliance was placed on the decisions in *Stanbic Bank Limited V Stephen Mutoro & 2 Others (supra)* and *Dorcas Florence Kombo V Royal Media Services Limited (2014) e KLR* for this assertion.
26. It is submitted that the respondent's acts showed deceit, misrepresentation and spite towards the appellant and the respondent's failure to counter check the truthfulness of the information it used to air and print in its news bulletins showed recklessness and malice on its part.
27. On fair comment, the court is referred to the decision in John Orii *Onyango vs standard Group Limited & 4 others Nairobi Civil Appeal No. 214 of 2018*.
28. On this seventh issue, it is urged that the appellant clearly pleaded innuendo and the particulars of the innuendos are to be found in the material paragraphs though the appellant did not use the express word of "innuendo" in his Complaint or pleadings.
29. On the eighth issue, it is urged that the trial court had nothing to refer to as evidence that an apology had been tendered to the appellant.
30. On the ninth issue, this court is referred to the decision in *Eric Gor Sungu v George Odinga Oraro [2014] eKLR*. The appellant submits that with regard to the evidence adduced and the circumstances of this case, and considering awards made in similar cases in the recent past and inflation, an award of 7,000,000 for general damages for defamation would compensate him for his injured reputation and character.
31. On the final issue of costs, it is submitted that costs follow events and since this appeal is necessitated due to the respondent's actions which have seriously injured the appellant, the respondent should be compelled to pay costs and interest of this consolidated appeal from the time of filing the suit at the lower court.

Respondent's Submissions

32. The respondent opposes this appeal. By written submissions dated 16th June 2024, it is submitted that this appeal raises six issues for determination; to wit: whether all the ingredients of defamation were met; should the appellant's appeal stand without pleading innuendo; whether the appellant's suit was defective for lack of production of a certificate of electronic evidence; was the publication actuated with malice; is the defence pleaded by the respondent available; and whether the appellant entitled to the relief sought.
33. On the first issue, it is submitted that the Court of Appeal in *Selina Patani & Another v Dhiranji Patani [2019] eKLR* held that it is the duty of a plaintiff to adduce reliable evidence in proof of the adverse



- impact of the article to his reputation. It is urged that the appellant discharges the burden of proving how his reputation was disparaged as a result of the publication by calling a witness and not his view of himself.
34. It is submitted that at the trial court, no other third party or witness was called to testify as to the publication and injury to reputation of the appellant. It is urged that despite the appellant stating that it is not is not fatal on his case not call a character witness, the courts have pronounced themselves to the contrary. The respondent relies on the decision in *Chemno v Nation Media Group Limited* [2022] eKLR to buttress this assertion.
 35. It is submitted that the appellant has failed to discharge the burden of proving how his reputation was disparaged as a result of the impugned publication by failing to call a witness and as such the decision of the trial court should be set aside in its entirety, the appeal dismissed and the cross appeal by the respondent upheld with costs for the trial court and both appeals to the respondent.
 36. On the second issue, it is submitted that in establishing whether the meaning of the words complained of is defamatory, the court should consider the ordinary and natural meaning of the words. In doing so, the court must take into account the whole article and not the part only cherry-picked by the appellant to suit his narrative about the impugned article. The meaning given to words must be deduced contextually. The decisions in *J Kudwoli & another v Eureka Educational and Training Consultants & 2 others* [1993] eKLR, *Hiranandani-Vandrevala v Times Newspapers Ltd* [2016] EWHC 250 (QB) (12 February 2016), and *Hall v Welz and Others (4960/94)* [1996] ZAWCHC 2 (27 September 1996) were relied to reinforce this assertion.
 37. It is urged that despite the appellant pleading the natural and ordinary meaning as per paragraph 11 of the plaint, the appellant ought to have pleaded and particularized the innuendo as required under Order 2 Rule 7 13 of the Civil Procedure Rules 2010, because the two are separate and distinct. The decision in *Stephenson v Standard Group Limited (Civil Suit 249 of 2016)* [2022] is relied on for this assertion. It is urged that hat the appellant's case would have been better placed, had he pleaded and particularized innuendo in his pleadings and failure to do so is fatal.
 38. On whether the appellant's suit was defective for lack of production of a certificate of electronic evidence, it is urged that in blatant disregard of the court's candid directions, the appellant closed his case without executing the consent allowing the filing of the certificate of electronic evidence and further have it produced and adopted by the court.
 39. It is contended that the appellant may have filed the Certificate of Electronic Evidence but failed to produce it. It is urged that the appellant closed his case without producing the Certificate of Electronic evidence authenticating the photo he intended to rely on which is fatal to his case.
 40. The respondent relies on the case of *Wycliffe Aswanya v Toyota East Africa Ltd & Another* [2009] eKLR where the Court of Appeal ruled that malice is a mandatory element for the tort of defamation. It is submitted that the impugned article in the present case was not motivated by malice. It is urged that the appellant has not raised any issue of ill-will, grudge or differences between him and the respondent before or after the publication of the impugned article for an imputation of malice.
 41. It is the respondent's case that the defence of fair comment is available. It is submitted that judges are public figures. It is urged that the Judiciary being one of the arms of government, anything that happens in the Judiciary and to the judicial officers' falls under the ambit of public interest especially the conduct of Judges while in office. It is contended that the report was accurate on matters of public interest and did not pass any judgment on any judicial officer who was featured. The decision in *Nation Media Group Limited & another V. Alfred N. Mutua (2017)* eKLR is relied on for this assertion.



42. On the reliefs sought, it is urged that the learned trial magistrate erred in combining the general and exemplary damages both at a cumulative figure of Ksh.5,000,000 yet the two are separate and distinct.
43. It is submitted that the Court of Appeal has pronounced itself on the two categories of conduct that attracts punishment of exemplary damages and the case does not fall under those categories. The decision in *Baraza Limited & another v George Onyango Oloo (Supra)* is cited to buttress this assertion.
44. It is urged that trial magistrate misdirected herself in law and fact by awarding general damages and aggravated damages that are excessive, disproportionate and exorbitant in the circumstances. It is contended that the decision in *Eric Gor Sungu Vs. George Odinga Oraro (2014) eKLR* relied on by the appellant is not appropriate in the circumstance since they are not comparable for there is no allegation of murder involved in this case.
45. It is argued that the appellant's failure to establish all the necessary elements of defamation, which was critical to his case, and his inability to demonstrate any actual harm suffered, warrant the court to award only nominal damages of Ksh 500,000.
46. The decisions in *Jacob Kipngetich Katonon vs Nation Media Group Limited [2017] eKLR*; *Stephen Onyando vs Zachary Onsongo Mosei [2017] eKLR* and *DDO & Another vs East 25 Africa Magazine Limited & 2 Others [2020] eKLR* were relied on to reinforce this assertion.

Analysis and determination

47. This being a first appeal, this court is enjoined to re-evaluate and re-analyze the evidence tendered in the lower court so as to arrive at its own conclusions. I must however bear in mind, that I have neither seen nor heard the witnesses and should make due allowance in this respect. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time. [See *Peters vs. Sunday Post Limited [1958] EA 424*].
48. Guided by the foregoing, after perusal of the record of appeal and written submissions from the rival parties, and the authorities cited, the issues that emerges for determination are whether the appellant had established the tort of defamation to the required standard of proof, being on a balance of probabilities, and whether the trial court erred in awarding the reliefs sought. I shall examine these issues in turn.
49. Before I proceed to the first issue, I note that the respondent sought to have the trial court's judgment set aside on the basis that the appellant closed his case without producing the Certificate of Electronic evidence authenticating the photo he intended to rely on. It was argued that the appellant may have filed the Certificate of Electronic Evidence but failed to produce it.
50. From the record, it is evident that there is a certificate of electronic evidence dated 9th March 2023. The record also reveals that the appellant sought leave of the court to file the said electronic certificate of which application was allowed on the 28th day of February, 2023. The respondent did not object to the said request. It is therefore, my finding that electronic evidence was admissible as evidence and the trial magistrate did not misdirect herself by admitting the photograph as evidence.
51. Now to the first issue. It is the appellant's case that the respondent used his photograph, without his authorization and justification on a news segment, on persons that the President had declined to nominate as Judges because of integrity issues. His case is that he never applied for Judgeship and the position he held and holds now in the discharge and administration of justice requires a person of unquestionable integrity and moral standing. His case is that his standing also depends on the



perceptions of his professional colleagues, and members of the public at large who appear before him for the sole purpose of receiving justice. He argues that it was within the public knowledge that the declined aspirants being broadcast by the respondent were seen as corrupt and lacked the threshold to be judicial officers. As a consequence, he argues that the said publication was intended to lower or actually lowered his reputation and character in the eyes of the right-thinking members of the society.

52. This is disputed by the respondent who argue that the publication was not published with malicious intent or with the aim of ruining the reputation of all the named Judges but with the aim of providing information to the public.
53. Halsbury's Laws of England 4th Edition Vol. 28 paragraph 10 defines a defamatory statement as "A statement which tends to lower a person in the estimation of the right-thinking members of the society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt ridicule to convey any imputation on him disparaging or injuries to him in office, profession, calling, trade or business."
54. In addition, Gatley on Libel and Slander 6th Edn. states that: "A man commits the tort of defamation when he publishes to a third person words (or matter) containing an untrue imputation against the reputation of another".
55. The Court of Appeal lends guidance as to what the tort of defamation entails. In *Selina Patani & Another vs. Dhiranji V. Patani* [2019] eKLR, at paragraph 17, the court stated as follows: ".....In rehashing, we note the ingredients of defamation were summarized in the case of *John Ward -v- Standard Ltd*, HCCC 1062 of 2005 as follows: -
 - 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."

Further at paragraph 24:

"...In *Pullman -v- Walter Hill & Co* (1891) 1 QB 524, the English Court of Appeal explained what publication constitutes as follows:

"What is the meaning of 'publication'? The making known the defamatory matter after it has been written to some person other than the person of whom it is written. If the statement is sent straight to the person of whom it is written, there is no publication of it; for you cannot publish a libel of a man to himself."

56. Additionally, the High Court in *Alnashir Visram v Standard Limited* [2016] KEHC 2050 (KLR), stated:

"85. It is worth noting that the meaning behind the publication can be implied or express. It all depends on the context and circumstances of each case. Thus, defamation may arise from the direct meaning of words used when taken on the face value, through an innuendo from the statement itself, or from an innuendo based on known facts that are not included in the statement. It is also irrelevant whether the publisher or author intended to make a defamatory statement of and concerning the plaintiff when he or she published the defamatory words complained of. The applicable test is an objective test; whether or not



the statement is defamatory is judged against contemporary community standards from the stand point of a reasonable person.”

57. In *Ambe v Sajero* [2024] KECA 1687 (KLR), the Court of Appeal was categorical in paragraph 26 that “ It is to also be borne in mind that the elements of defamation are conjunctive. In other words, they must be ascertained all together and none is autonomous over the other.”

58. In the instant case, it is factual that the President had declined to appoint judges of the Court of Appeal and Environment and Lands Court despite their recommendation for appointment by the JSC. The respondent also admits that in its daily news broadcast, it aired the list of JSC nominees to the position of judge whom the President declined to appoint. It is not disputed that in the respondent’s news broadcast, the photograph of the appellant was embossed against the name of Hon. Evans Kiago Makori, a nominee of the JSC for judgeship. It is not disputed that the appellant had not applied for the position of judgeship and he was a judicial officer.

59. I note that Clerk & Lindsell on Tort 17th Ed. 1995 at page 1018 states:-

“Whether the statement is defamatory or not depends not, as has been pointed out already, upon the intention of the Defendant, but upon the probabilities of the case and upon natural tendency of the publication having regard to the surrounding circumstances. If the words published have a defamatory tendency it will suffice even though the imputation is not believed by the person to whom they are published.”

60. It is my finding, therefore, that the respondent’s article was communicating persons whom the president had declined for judgeship. The President had approved thirty-five nominees but declined to appoint the six who were being broadcast. By embossing the appellant’s photograph in the article, the implication was that according to the President, the appellant was unfit to hold the position of a judge.

61. The appellant relied on the broadcast and the photograph in their natural and ordinary meaning rather than any implied meaning. The direct meaning being that while thirty-five nominees were appointed, the individual in the photograph’s nomination was excluded, which cast doubt on his nomination. Considering the overall context of the matter and the manner of publication, it is evident that the content was defamatory. Such a portrayal would likely diminish the appellant’s reputation in the eyes of reasonable members of society.

62. At this stage, it is important to highlight that one of the respondent’s grounds of appeal is the assertion that the trial court erred in law by concluding that publication had occurred when, in the respondent’s view, there was no publication in law. However, considering the Court of Appeal’s decision regarding publication, it is evident that the respondent disseminated the list and photograph to third parties, reaching millions of viewers both within the continent and internationally. Therefore, based on this broad dissemination, it is my finding that a publication did indeed exist in law. The respondent was emphatic that it was fatal for the appellant not to call a character witness hence his claim for defamation must fail. On this, I am guided by the Court of Appeal in *Selina Patani & Another vs. Dhiranji V. Patani* [2019] eKLR where it noted at paragraphs 26 and 27:

“The other issue for our consideration is whether the Judge erred in finding it was imperative to call a third party to prove the appellants claim for defamation. In principle, defamation is actionable per se. This does not mean the ingredients of the tort must not be proved. It simply means you must prove the elements of the tort of defamation; what need not be



proved is the damage suffered. If no damage is proved, a claimant may be entitled to nominal damages.”

63. I do not consider that it was fatal on the appellant’s case not to call a character witness because the appellant proved all the ingredients of the tort of defamation on a balance of probabilities.

64. Now to the second issue, on whether the trial court erred in awarding the reliefs sought. The appellant seeks that the award of Kshs. 5,000,000 for both general and exemplary damages be enhanced to Kshs. 7,000,000 in general damages and Kshs. 4,000,000 in exemplary damages. The respondent submits that the trial magistrate erred in fact by combining general and exemplary damages both at a cumulative figure of Ksh.5,000,000 yet the two are separate and distinct. The respondent urges that should the court find that the appellant is entitled to nominal damages, Ksh.500,000 is sufficient.

65. The Court of Appeal in *Aziz Kassim Lakha v Standard Limited T/A East African Standard* [2009] KECA 426 (KLR) stated as follows with regards to quantum of damages:

“...Thus, in the case of *Broom v. Cassel & CO.* [1972] A.C. 1027 (HL) which were relied on by this Court in the locus classicus case of *Johnson Evan Gicheru V Andrew Morton & Anor* [2005]e KLR, the House of Lords held:-

“that in actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of restitution in integrum has necessarily an even more highly subjective element. Such actions involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover the estimated sum of any past and future losses, but, in case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness, of the charges.”

Again going by the checklist of compensable factors in libel actions we are of the view that the trial Judge did omit to consider a number of the factors and where she made an attempt to consider that she did not do so fully. In the case of *Jones v Pollard* [1997] E & KLR 233, 243 the factors were enumerated as:

1. The objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published, and any repetition.
 2. The subjective effect on the plaintiff feelings not only from the prominence itself but from the defendant’s conduct thereafter both up to and including the trial itself.
 3. Matters tending to mitigate damages, such as the publication of an apology.
 4. Matters tending to reduce damages.
 5. Vindication of the plaintiff’s reputation past and future.”
66. Additionally, In *Baraza Limited & another v George Onyango Oloo* [2018] KECA 36 (KLR) the Court of Appeal observed: “In *The Standard Ltd v. Alnashir Visram*, [*CA No. 89 of 2017*](#) this Court recently considered the purpose and the circumstances under which exemplary damages will be awarded. It expressed itself thus: “Be that as it may, and notwithstanding that the place of exemplary damages is highly contested elsewhere in common law jurisdictions, it is quite easy to distinguish it on the basis that, it is meant to punish only two categories of conduct; oppressive, arbitrary or unconstitutional action by servants of the government or where a tort is committed under guilty



knowledge with the motive of economic advantage outweighing any possible economic or physical penalty. Unlike compensatory damages which are concerned with how much a plaintiff should receive for his injury, punitive damages focus on how much the defendant ought to pay for his conduct...Another critical distinction is that exemplary damages, in cases where they are appropriate, are payable if, but only if the sum the court has in mind to award as compensation including on aggravated footing, is not adequate to punish for his outrageous conduct as to show disapproval and to deter repetition.”(emphasis mine)

67. Guided by the above, I note that the trial court considered decisions in Eric Gor Sungu Vs George Odinga Oraro (2014) eKLR and John Evans Gicheru Vs Andrew Morton & anor (2005) eKLR and found them comparable. It also considered the proposed award by the respondent to be on the lower side and awarded a composite sum of Kshs. 5,000,000 both in general and aggravated damages guided by the Court of Appeal decision in John Evans Gicheru Vs Andrew Morton & anor (2005) eKLR .

68. I am guided by the Court of Appeal in Johnson Evan Gicheru v Andrew Morton & another [2005] KECA 307 (KLR) where it stated: “It is trite that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in ROOK V. RAIIRIE [1941] 1 ALL E.R. 297. It was echoed with approval by this Court in BUTT V. KHAN [1981] KLR 349 when it held as per Law, J.A that:-

“ An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low”

69. In the instant case, I have considered that the respondent was irresponsible in the performance of its duties. It lacked the scribe’s integrity and responsibility in reporting and doing a thorough check on the appellant before it utilized his photograph in its repeated broadcasts. It was reckless and did not establish the veracity of the appellant’s photograph. It was irresponsible. Thus, in this case, respondent did not provide truthful reporting. In addition, there is no evidence in the record of publication of an apology. The trial court was therefore justified to award aggravated or exemplary to show disapproval and deter repetition. As such, I am unconvinced that the trial court proceeded on wrong principles, or misapprehended the evidence in some material respect, to arrive at a figure which was either inordinately high or low. In my considered view, I do not fault the trial court for making a finding on aggravated or exemplary damages or in awarding the composite sum of Kshs.5,000,000 for both general and exemplary damages.

70. The upshot is that the appellant’s appeal dated 6th October 2023 and respondent’s appeal dated 28th September 2023 are both unmerited and both are dismissed. Each party to bear their own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 19TH DAY OF JUNE, 2025

RHODA RUTTO

JUDGE



In the presence of;

.....Applicant

.....Respondent

Sam, Court Assistant

